2013

Remittance Transfers Under Dodd-Frank: The Final Rules and Their Far-Reaching Implications

Alvin C. Harrell, *Oklahoma City University School of Law*

Remittance Transfers under Dodd-Frank: the Final Rules and Their Far-Reaching Implications

By Alvin C. Harrell*

Alvin C. Harrell is a Professor of Law at Oklahoma City University School of Law, and President of Home Savings and Loan Association of Oklahoma City. He is coauthor of a dozen books, including THE LAW OF MODERN PAYMENT SYSTEMS AND NOTES (with Professor Fred H. Miller). Professor Harrell edited the *Annual Survey of Consumer Financial Services Law* in *The Business Lawyer,* 1989–2013, chaired the American Bar Association UCC Committee Task Force on State Certificate of Title Laws, and was Reporter for the NCCUSL Uniform Certificate of Title Act (UCOTA). He is Executive Director of the Conference on Consumer Finance Law and a member of its Governing Committee, a member of the American Law Institute (ALI), a member of the American College of Commercial Finance Lawyers and the American College of Consumer Financial Services Lawyers, and served as Chair of the Financial Institutions and Commercial Law Section of the Oklahoma Bar Association.

I. Introduction

Section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act)[1] amended the Electronic Fund Transfer Act (EFTA)[2] by adding a new section to the EFTA entitled "Remittance Transfers."[3]

This new provision of the EFTA, among other things:

- mandates disclosure of certain specified data related to each "remittance transfer,"[4] which in most cases must be provided to consumers prior to and at the time of the transfer;
- provides for consumer protections, including the right to cancel a transfer and the right to a refund in certain circumstances;
- sets forth a new error resolution scheme to which remittance transfer providers must adhere; and
- establishes standards of liability for remittance transfer providers and their agents.[5]

A comprehensive remittance transfer rule was first proposed by the Board of Governors of the Federal Reserve System (the Original Proposed Rule).[6] However, once the Bureau of Consumer Financial Protection (CFPB) officially came into existence on the designated transfer date of July 21, 2011, rulemaking authority for section 1073 of the Dodd-Frank Act transferred to the CFPB.[7]

The CFPB issued a final remittance transfer rule on January 20, 2012 (the initial CFPB Final Rule).[8] The initial CFPB Final Rule, which was published in the *Federal Register* on February 7, 2012 was scheduled to become effective February 7, 2013. However, as noted below at Part XII., this effective date was subsequently extended.

As noted below and at Part XIII, the revised CFPB Final rule (Revised Final Rule) was published in the *Federal Register* on May 22, 2013 and is effective as of October 28, 2013. In the aggregate, these rules are referred to as the Remittance Transfer Rule.

* Parts of this article are indebted to a series of papers authored primarily by Christina A. LaVera, used here with permission.

1. Pub. L. No. 111-203, § 1073, 124 Stat. 1376 (2010). *See Generally*: John L. Ropiequet, Christopher S. Naveja & Jason B. Hirsh, *The Dodd-Frank Act Changes the Consumer Finance Landscape*, 64 Consumer Fin. L.Q. Rep. 284 (2010); Richard P. Hackett & Frank H. Bishop, Jr., *Summary of the Consumer Financial Protection Act of 2010, id*., at 295.

2. Consumer Credit Protection Act, tit. IX, §§ 901 - 921 (codified as amended at 15 U.S.C. §§ 1693 - 1693r).

3. Dodd-Frank Act, *supra* note 1, § 1073, adding EFTA § 919 (codified at 15 U.S.C. § 1693o-1).

4. *See infra* Part II. for relevant definitions.

5. *See* EFTA § 919, *supra* note 3; and discussion *infra* at Parts IV. - VII.

6. Board of Governors of the Federal Reserve System, Notice of Proposed Rulemaking, 76 Fed. Reg. 29902 (May 23, 2011) [Original Proposed Rule].

7. *See* Designated transfer date, 75 Fed. Reg. 57252 (Sept. 20, 2010). Consequently, the CFPB reissued Regulation E, formerly 12 CFR pt. 205, at 12 CFR pt. 1005. *See* 76 Fed. Reg. 81020 (Dec. 27, 2011).

8. Bureau of Consumer Financial Protection, Electronic Fund Transfers (Regulation E), Final rule, 77 Fed. Reg. 6194 (Feb. 7, 2012) (to be codified at 12 CFR pt. 1005) [initial CFPB Final Rule].

Concurrent with its publication of the initial CFPB Final Rule, the CFPB also issued an additional request for comment regarding certain discrete areas covered in the initial CFPB Final Rule (the Second Proposed Rule).[9] Specifically, the announcement of the Second Proposed Rule sought comment on two primary issues:

- how to set the parameters of a safe harbor from coverage for those providers that are not engaged in providing remittance transfers "in the normal course of business;" and
- how to address a range of issues that relate to remittance transfers that are scheduled by a consumer in advance of the transfer date.[10]

The CFPB then issued a final rule corresponding to the Second Proposed Rule on August 7, 2012 (the Second Final Rule).[11] The Second Final Rule was scheduled to take effect on the same date as the first Final Rule, February 7, 2013. However, as noted below at Part XII., the CFPB subsequently delayed the effective date of the Final Rule and Second Final Rule, and announced that they would be amended.

This article describes:

- the requirements set forth in the first Final Rule;
- the contents of the Second Final Rule;
- practical implications of these new requirements;
- the implications of the extended effective date; and
- the Revised Final Rule that became effective October 28, 2013.

II. Importance of Remittance Transfers[12]

Remittance transfers from the United States to recipients in other countries total billions of dollars each year.[13] While remittance transfers are commonly conducted by recent immigrants transmitting funds to family members "back home," many such transfers also are made by U.S.-born citizens.[14] As noted below at Parts III. and IV., the Remittance Transfer Rule broadly defines its scope to include virtually all of these transfers, thereby affecting hundreds of billions of dollars in funds transfers.[15]

Most remittance transfers are conducted through non-bank money transmitters such as Western Union, or bank "wire" transfers governed by Uniform Commercial Code (UCC) Article 4A, although a variety of other channels is available, including, *e.g.*, stored-value cards, automated clearing house transactions, and debit and credit cards.[16] Traditionally these transfers have been governed primarily by state law,[17] but that changed significantly with enactment of the Dodd-Frank Act and involvement of the CFPB.[18] Section 1073 of the Dodd-Frank Act provides for establishment of "minimum protections for remittances sent by consumers in the United States to other countries."[19] The applicable Senate Report indicates a Congressional concern that consumers sending remittance transfers "face significant problems…, including being overcharged or not having the funds reach intended recipients."[20]

The terminology and scope of the Remittance Transfer Rule, discussed below, reflect this broad public policy shift.

III. Terminology

The Remittance Transfer Rule defines its scope in part by the expansive definition of terms relating to remittance transfers. A "remittance transfer" (*i.e.*, the transaction itself) is an electronic transfer of funds requested by a sender to a designated recipient that is sent by a remittance transfer provider.[21]

A "remittance transfer provider" (*i.e.*, the institution at which the consumer initiates the transfer) is any person that provides remittance transfers for a consumer in the normal course of its business, regardless of whether the consumer holds an account with such person.[22]

9. Bureau of Consumer Financial Protection, Electronic Fund Transfers (Regulation E), Proposed rule, 77 Fed. Reg. 6310 (Feb. 7, 2012) [Second Proposed Rule].

10. *Id.*

11. Bureau of Consumer Financial Protection, Electronic Fund Transfers (Regulation E), Final rule, 77 Fed. Reg. 50244 (Aug. 20, 2012) (to be codified at 12 CFR pt. 1005) [Second Final Rule]. The history of this rule-making process is summarized in the Supplementary Information published in conjunction with the Revised Final Rule. *See* CFPB, Electronic Fund Transfers (Regulation E), Final rule, official interpretation, 78 Fed. Reg. 30662, 30663 (May 22, 2013) [Revised Final Rule]. *See also* CFPB, Elecronic Fund Transfers (Regulation E); Correction, 78 Fed. Reg. 49365 (Aug. 14, 2013) [Correction].

12. This discussion is indebted to Christina A. LaVera & Stephen Krebs, *The New Regulatory Framework for Remittance Transfers under the Dodd-Frank Act*, 28 Rev. of Banking & Fin. Servs. No. 6, 61 at 62 (June 2012).

13. *See, e.g.*, Board of Governors of the Federal Reserve System, Report to the Congress on the Use of the Automated Clearinghouse System for Remittance Transfers to Foreign Countries (July 2011), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/ACH_report_201107.pdf [FRB Report].

14. *Id.*

15. *See infra* notes 21 - 24. The World Bank estimated that global remittance flows exceeded $440 billion in 2010. *See* FRB Report, *supra* note 13.

16. *See, e.g.*, Original Proposed Rule, *supra* note 6, 77 Fed. Reg. at 6195. *See generally* Robert T. Luttrell, III. & Alvin C. Harrell, *Update on Deposit Account, Negotiable Instrument, and Payment System Issues and Developments*, 65 Consumer Fin. L.Q. Rep. 76 (2011).

17. *See, e.g.*: Philip Keitel, *The Laws, Regulations, Guidelines, and Industry Practices that Protect Consumers Who Use Gift Cards*, 63 Consumer Fin. L.Q. Rep. 163 (2009); Stuart R. Hene, *Funds Transfers under UCC Article 4A: What is a Commercially Reasonable Security System,* 64 Consumer Fin. L.Q. Rep. 331 (2010).

18. *See generally* sources cited *supra* note 1.

19. Dodd-Frank Act, *supra* note 1, § 1073, adding EFTA § 919, *supra* note 3.

20. S. Rep. 111-176, at 179 (2010), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-111srpt176/pdf/CRPT-111srpt176.pdf.

21. Initial CFPB Final Rule, *supra* note 8 (to be codified at 12 CFR § 1005.30(e)(2)). Under the Dodd-Frank Act, *supra* note 1, § 1073, and the Remittance Transfer Rule, the vast majority of consumer-initiated electronic funds transfers sent to recipients in foreign countries will be designated as "remittance transfers." *See id.*, and *infra* this text at note 24. This definition did not change in the Revised Final Rule.

22. *See*: EFTA § 919, *supra* note 3, § 919(g)(3); Initial CFPB Final Rule, *supra* note 8 (to be codified at 12 CFR § 1005.30(f)). A focus of controversy has been the definition of "normal course of business." *See, e.g.*, Second Proposed Rule, *supra* note 9, 77 Fed. Reg. at 6314 - 15. The Second Final Rule adopted a safe

(Continued on next page)

The "sender" (*i.e.*, the consumer) means a consumer in a state who, primarily for personal, family, or household purposes, requests a remittance transfer provider to send a remittance transfer to a designated recipient.

The "designated recipient" (*i.e.*, the person to whom the funds are sent) is any person specified by the sender as the authorized recipient of a remittance transfer to be received at a location in a foreign country. This definition is not changed in the Revised Final Rule; however, the CFPB clarified in Comment 1005.30(c)-1 that the designated recipient is the person identified by the name of the person stated in the disclosure provided pursuant to 12 C.F.R. section 1005.31(b)(1)(iii).

IV. Scope

Prior to Dodd-Frank Act section 1073 and its implementing rules, the term "remittance transfer" was traditionally understood to include four elements, namely that the transfer would be: (1) a cross-border; (2) person-to-person payment; (3) of relatively low value; (4) for family or household purposes.[23]

However, section 1073 and the Remittance Transfer Rule define the term "remittance transfer" far more broadly to include the vast majority of electronic funds transfers (including wire and automated clearing house (ACH) transactions) sent by consumers in the United States to consumers and businesses in foreign countries, and the term is not limited by rule or the statute to remittance transfers as traditionally understood.[24]

In fact, the Remittance Transfer Rule broadly applies to, among other things:

- funds transfers whether or not they are electronic funds transfers within the meaning of the EFTA;
- all remittance transfer providers regardless of whether the sender maintains an account with the provider; and
- all remittance transfers initiated in the United States by consumers to be sent outside of the United States (regardless of whether the recipient is a business or natural person).

There is, however, a limited exclusion from the definition of remittance transfer. The Remittance Transfer Rule expressly excludes two types of transactions from the definition of a remittance transfer:

- small value transfers of $15 or less; and
- transfers made for the purpose of purchasing or selling securities or commodities.

The Remittance Transfer Rule imposes a range of compliance obligations on remittance transfer providers, a term which is defined to mean any person that provides remittance transfers for a consumer in the normal course of its business, regardless of whether the consumer holds an account with such person.[25]

V. Required Disclosures

A. Basic Requirements

The Remittance Transfer Rule requires remittance transfer providers to give senders detailed disclosures about the transfer both before and at the time of the transfer. These include:

- pre-payment disclosure: A provider must give a sender a written pre-payment disclosure when the sender requests the transfer, but prior to payment for the transfer;[26] and
- receipt disclosure: In general, the provider must also give the sender a written receipt when payment is made for the transfer;[27] or
- combined disclosure: As an alternative to the separate prepayment and receipt disclosures described above, a provider may give the sender (at the time the pre-payment disclosure is required) a single, combined disclosure containing the information that must be included on both the pre-payment disclosure and receipt disclosure.[28]

B. Pre-Payment Disclosure

The prepayment disclosure must contain, as applicable:

- the transfer amount (in the currency in which the transfer is funded);
- fees and taxes imposed by the provider;
- the total amount of the transaction (in the currency in which the transfer is funded);[29]
- the exchange rate;

22. *(Continued from previous page)*

harbor for persons providing 100 or fewer remittance transfers in the preceding calendar year, deeming this not to be in the ordinary course of business. *See* Second Final Rule, *supra* note 11, 77 Fed. Reg. at 50244 & 50247 - 49. This definition did not change in the Revised Final Rule.

23. *See, e.g.*, Original Proposed Rule, *supra* note 6, 76 Fed. Reg. 29902 ("traditional remittance transfers often consist of consumer-to-consumer payments of low monetary value."). *See also* FRB Report, *supra* note 13 (noting that the majority of sources compiling data on remittance transfers essentially apply this definition).

24. *See: supra* note 21 and accompanying text; Initial CFPB Final Rule, *supra* note 8 (to be codified at 12 CFR § 1005.30(e)(1) & (2)).

25. *See supra* notes 21 - 24 and accompanying text, and *infra* Parts V. - VII.

26. *See* Initial CFPB Rule, *supra* note 8 (to be codified at 12 CFR § 1005.31(e)(1)).

27. *Id*. (to be codified at 12 CFR § 1005.31(e)(2)).

28. *Id*. (to be codified at 12 CFR § 1005.31(b)(3)).

29. *Id*. (to be codified at 12 CFR § 1005.31(b)(1)).

- the transfer amount (in the currency in which the funds will be received by the designated recipient);
- other fees and taxes (*i.e.*, those imposed on the transfer by a person other than the provider); and
- the total amount that will be received by the designated recipient (in the currency in which the funds will be received).

The prepayment disclosure must be provided to the sender when the sender requests the remittance transfer, but prior to payment for the transfer.[30]

Section 1005.31 of the initial CFPB Final Rule required remittance transfer providers to disclose taxes and fees imposed by others. In response to concerns that this information might not be available, the Revised Final Rule (at 12 CFR sections 1005.30(h)(1) and 1005.31(b)(1)(vi)) eliminates this fee disclosure requirement for providers using "open networks," substituting instead a general disclaimer that the recipient may receive less due to fees charged by the recipient's bank. Transfers sent through "closed" systems must include the full disclosure of taxes and fees. To effectuate this distinction, there are new definitions of "covered third-party fees" and "non-covered third-party fees" at 12 C.F.R. section 1005.30(h)(1) and (2). Similary, subsections 1005.31(b)(1)(vi) and (vii) were revised to eliminate the requirement to disclose taxes imposed by a person other than the provider.

C. Receipt Disclosure

The written receipt must contain:

- the information that must be included in the prepayment disclosure;
- the date the funds will be available to the designated recipient;
- the name of (and, if provided, contact information for) the designated recipient;
- a statement about the sender's error resolution and cancellation rights;
- the name of and contact information for the remittance transfer provider; and
- a statement that the sender may contact the state agency that licenses or charters the remittance transfer provider and the CFPB, along with relevant contact information.[31]

In general, the receipt must be provided to the sender when payment is made for the remittance transfer, although different timing/delivery rules apply to transfers conducted entirely by phone, as well as transfers conducted entirely by phone where the sender has an account with the remittance transfer provider.[32]

D. Combined Disclosure

Generally speaking, the combined disclosure must contain information required to be included in both the pre-payment disclosure and receipt disclosure. The combined disclosure must be provided to the sender when the sender requests the remittance transfer, but prior to payment for the transfer.

E. Disclosure Challenges

Currently, many financial institutions use open networks to send transfers to unaffiliated institutions in foreign countries with which they have no contractual relationship. A provider that sends an "open network" transfer often has limited control over and information regarding the transaction (as the funds are transferred from the sending institution to a recipient institution through a network of intermediary institutions).

Notably, the Supplementary Information to the Initial CFPB Final Rule acknowledged that the disclosures required by the Initial CFPB Final Rule could pose a particular challenge for providers that send transfers through open networks. In fact, the CFPB stated in the Supplementary Information that it is aware that "a number of providers likely do not currently possess or have easy access to the information needed to satisfy the new disclosure requirements for every transaction" and "for these providers, as well as their operating partners, compliance may require modification of current systems, protocols, and contracts."[33]

The Initial CFPB Final Rule provided two limited exceptions that permitted certain providers to disclose estimates rather than exact amounts: a "temporary" exception for insured depository institutions; and a "permanent" exception for transfers to certain countries.[34]

F. Temporary Exception

The temporary exception permits a provider to disclose estimates of certain information if three conditions are satisfied:

- a provider cannot determine exact amounts for reasons beyond its control (such as when the exchange rate is set by a person with which the insured institution has no correspondent relationship after the insured institution sends the remittance transfer);

30. Note, however, that there are separate timing requirements for preauthorized remittance transfers. *See infra* Part X.

31. Initial CFPB Final Rule, *supra* note 8 (to be codified at 12 CFR § 1005.31(b)(2)).

32. *See supra* Part IV.

33. Initial CFPB Final Rule, *supra* note 8. *See also* Revised Final Rule, Supplementary Information, 78 Fed. Reg. at 30667-30678.

34. *See, e.g.*, Second Final Rule, *supra* note 11, Supplementary Information, 77 Fed. Reg. at 6203 & 6242-44 (also noting that the temporary exception expires on July 21, 2015). *But see infra* note 37. There is also a thrid exception, under 12 CFR § 1005.32(b)(2), for transfers scheduled five or more business days in advance. *See also infra* Part X.

- a provider is an insured institution;[35] and
- the remittance transfer is sent from the sender's account with the insured institution.[36]

Among the data that may be estimated under the temporary exemption: the exchange rate; the transfer amount; other fees and taxes; and the total to be received by the designated recipient. However, the Revised Final Rule provides that non-covered third party fees and taxes cannot be estimated under 12 C.F.R. section 1005.32(b)(3) and (4), as they are no longer required to be disclosed under section 1005.31(b)(1).

Although the temporary exception was designed to alleviate some of the compliance challenges this new disclosure regime poses, it is important to note that the exception expires on July 21, 2015.[37] Thus, once the exception expires, providers will be required to disclose exact amounts as opposed to estimates, unless they qualify for the "permanent exception." Notably, the CFPB has the authority to extend the temporary exception for five years.[38]

G. Permanent Exception

The permanent exception permits providers to disclose estimates (rather than exact amounts) of certain items when the provider cannot determine the exact amounts at the time the disclosure is required because either:

- the laws of the recipient country do not permit such a determination, or
- the method by which transactions are made in the recipient country does not permit such determination.[39]

The CFPB has interpreted the "method exception" to apply only to remittances sent via international ACH on terms negotiated by the United States government and the government of a recipient country where the exchange rate is set by the recipient country's central bank after the transfer is sent. The CFPB will publish a "safe harbor" list of countries that qualify for the permanent exception.

For both the temporary and permanent exceptions, a provider that qualifies for the exception must comply with certain specified approaches for calculating estimates.[40]

VI. Cancellation

The Remittance Transfer Rule generally provides consumers the right to cancel a transfer within thirty minutes of making payment for the transfer.[41] However, this time frame is different for transfers scheduled at least three days in advance. For such transactions, the cancellation period is three days.

If the following two conditions are satisfied, the remittance transfer provider is required to refund to the sender the total amount provided by the sender in connection with the remittance transfer. The two conditions are:

- the sender's oral or written request to cancel enables the remittance transfer provider to identify the sender and the particular transfer to be cancelled; and
- the transferred funds have not been picked up by or deposited into the account of the designated recipient.[42]

Remittance transfer providers must make this refund at no additional cost to the sender and must do so within three business days of receiving the request.[43]

VII. Error Resolution

A remittance transfer provider is required to investigate and remedy an error if it receives notice of the error no later than 180 days after the disclosed date of availability of the remittance transfer and if certain other conditions are met (such as the notice of error enables the remittance transfer provider to identify the sender, the designated recipient and the remittance transfer to which the notice of error applies).[44]

The Remittance Rule defines "error" to include:

- an incorrect amount paid by a sender in connection with a remittance transfer;
- a computational or bookkeeping error made by the provider relating to a transfer;
- the failure to make available to a designated recipient the amount of currency stated in the receipt or combined disclosures (unless: (1) the disclosure stated an estimate as permitted under 12 C.F.R. section 1005.32(b)(1) or (2), and the difference results from the application of the actual exchange rate, fees or taxes rather than estimated amounts;

35. "Insured institution" is defined as an insured depository institution (including uninsured U.S. branches and agencies of foreign depository institutions) as defined in section 3 of the Federal Deposit Insurance Corporation Act, and insured credit unions as defined in section 101 of the Federal Credit Union Act.

36. Initial CFPB Final Rule, *supra* note 8 (to be codified at 12 CFR § 1005.32(a)).

37. Dodd-Frank Act § 1073, *supra* notes 1 & 3, authorizes the CFPB to extend the temporary exception for an additional five years (through July 1, 2020), if needed to avoid a negative effect on the ability of insured institutions to send remittance transfers to foreign countries.

38. *Id.*

39. Initial CFPB Final Rule, *supra* note 8 (to be codified at 12 CFR § 1005.32(b)).

40. *Id.* (to be codified at 12 CFR § 1005.32(c)).

41. *Id.* (to be codified at 12 CFR § 1005.34(a)). However, this does not apply to remittance transfers scheduled at least three business days in advance. *See id.* (to be codified at 12 CFR § 1005.36(c)); and *see* discussion *infra* at Part X.

42. Initial CFPB Final Rule, *supra* note 8 (to be codified at 12 CFR § 1005.34(b)).

43. *Id.*

44. *Id.* (to be codified at 12 CFR § 1005.33(a) & (b)).

or (2) the failure resulted from extraordinary circumstances outside the provider's control that could not have been reasonably anticipated);

- a failure to make the funds available to a recipient by the date of availability (unless the failure resulted from: (1) extraordinary circumstances outside the provider's control that could not have been reasonably anticipated; (2) delays related to fraud, the Bank Secrecy Act (BSA), the Office of Foreign Assets Control (OFAC) or another similar screening; or (3) the transfer being made with fraudulent intent by the sender or any person acting in concert with the sender); or

- the sender's request for documentation (required by the disclosure provisions of the Remittance Transfer Rule) or for additional information or clarification concerning a transfer, including a request to determine whether an error exists.[45]

The remittance transfer provider must investigate and determine whether an error occurred within ninety days of receiving a notice of error and report the results to the sender, including notice of any remedies available, within three business days after completing its investigation.[46]

A remittance transfer provider is also required to correct the error as designated by the sender in accordance with the remedy provisions contained in the Remittance Transfer Rule. These remedies include:

- refunding to the sender the amount of funds provided by the sender in connection with a transfer that was not properly transmitted (or the amount appropriate to resolve the error); or

- making available to the designated recipient, without additional cost to the sender or designated recipient, the amount appropriate to resolve the error.[47] This means that in some circumstances a provider may be required to resend the transfer at no additional cost to the sender or the designated recipient.

There are additional provisions of the Remittance Transfer Rule applicable to situations in which a provider fails to make funds available to the designated recipient by the disclosed date of availability. Under these circumstances the remittance transfer provider must, as applicable, either:

- provide the sender with a refund; or

- make available to the designated recipient the amount appropriate to resolve the error without additional cost to the sender or to the designated recipient.[48]

If a sender requests additional information, documentation, or clarification regarding a remittance transfer, including a request to determine if there was an error, the remittance transfer provider must provide the requested information and refund any fees resulting from the error, unless the sender provided incorrect or insufficient information.[49]

If, however, the sender provided incorrect or insufficient information to the remittance transfer provider in connection with the transfer, the remittance transfer provider may impose third party fees for resending the transfer with the corrected or additional information (though the remittance transfer provider may not require the sender to provide the principal transfer amount again).

The Revised Final Rule added a new exception to the definition of error in 12 C.F.R. section 1005.33, at subsection 1005.33(a)(1)(iv), for cases where the sender gives the remittance transfer provider an incorrect account number in certain circumstances. There are also changes in the procedures for remedying errors that result from the sender supplying incorrect or insufficient information.

The Remittance Transfer Rule also makes providers liable for any violation of the Rule when the agent acts for the remittance transfer provider.[50]

VIII. Interplay Between the Remittance Transfer Rule and UCC Article 4A

Uniform Commercial Code (UCC) Article 4A contains a well-established legal framework that determines the respective rights and obligations of the parties to a wire transfer. However, Article 4A section 4A-108 provides that Article 4A does not apply "to a funds transfer, any part of which is governed by the Electronic Fund Transfer Act."

As noted above at Part I., section 1073 of the Dodd-Frank Act amended the EFTA to create the new remittance transfer regime.[51] Thus, because international wire transfers initiated by consumers will now be governed in part by the EFTA (as a result of section 1073),[52] UCC Article 4A will no longer apply to those transfers (and, accordingly, certain rights and obligations among parties to a wire transfer transaction that is also a "remittance transfer" will be undefined).[53]

45. *Id.* (to be codified at 12 CFR § 1005.33(a)(1)).

46. *Id.* (to be codified at 12 CFR § 1005.33(c)(1)).

47. *Id.* (to be codified at 12 CFR § 1005.33(c)(2)).

48. *Id.* (to be codified at 12 CFR § 1005.33(c)(2)(ii)).

49. *Id.* (to be codified at 12 CFR § 1005.33(c)(2)).

50. *Id.* (to be codified at 12 CFR § 1005.35).

51. *See supra* notes 1 - 3 and accompanying text.

52. *See* initial CFPB Final Rule, *supra* note 8, Supplementary Information, 77 Fed. Reg. at 6195.

53. *See* UCC Article 4A § 4-108 (Article 4A "does not apply to a funds transfer any part of which is governed by the [EFTA].").

The CFPB expressly stated that it believes that "the best mechanisms for resolving this uncertainty rests with the states, which can amend their respective versions of UCC Article 4A, with the purveyors of rules applicable to specific wire transfer systems, which can bind direct participants in the system, and with participants in wire transfers who can incorporate UCC Article 4A into their contracts."[54] Furthermore, the CFPB has taken the view that the delayed implementation period should provide time for the issue to be resolved. Efforts are underway in the states to accomplish this objective.

IX. Second Final Rule—Safe Harbor for Certain Providers

As noted above at Part II., the Remittance Transfer Rule defines "remittance transfer provider" to mean any person that provides remittance transfers for a consumer in the normal course of its business, regardless of whether the consumer holds an account with such person.[55] CFPB Comment 30(f)-2 provides for a facts and circumstances test in determining if an entity is engaged "in the normal course of business," which includes among other factors the total number and frequency of remittance transfers sent by the remittance transfers provider.

As proposed in the Second Proposed Rule, the CFPB revised Comment 30(f)-2 to adopt a bright line test to determine if someone is engaged in providing remittance transfers in the "normal course of business."[56] Then, in the Second Final Rule, the CFPB adopted a bright line test based on the number of transfers provided per year. Specifically, if a person provided 100 or fewer remittance transfers in the previous calendar year, and provides 100 or fewer remittance transfers in the current calendar year, then the person is deemed not to be providing remittance transfers for a consumer in the normal course of its business.[57] When a person crosses the 100-transfer threshold, the Second Final Rule permits a reasonable time period, not to exceed six months, to begin complying with the rule's requirements.

X. Second Final Rule—Transfers Scheduled in Advance

Preauthorized remittance transfers are defined in the Remittance Transfer Rule to mean a remittance transfer authorized in advance to recur at substantially regular intervals.[58] With respect to certain remittance transfers that a sender schedules in advance, the Remittance Transfer Rule sets forth tailored disclosure and cancellation requirements including with respect to preauthorized remittance transfers.[59]

In proposing the Second Proposed Rule, the CFPB sought additional input on how these tailored requirements might be revised to further ease compliance burdens associated with preauthorized remittance transfers.[60] The Second Final Rule amended a number of aspects of the Initial CFPB Final Rule relating to remittance transfers that are scheduled in advance, including preauthorized transfers.

One key provision of the Second Final Rule is a permanent exception that permits the use of estimates. Specifically, when a sender schedules a one-time transfer or the first in a series of preauthorized remittance transfers five or more business days before the date of transfer, the Second Final Rule permits a remittance transfer provider to estimate certain information in the pre-payment disclosure and receipt. However, if estimates are provided under this new permanent exception, the remittance transfer provider generally must give the sender an additional receipt with accurate figures after the transfer is made.[61]

For subsequent transfers, the Second Final Rule generally eliminated the requirement that a remittance transfer provider mail or deliver a pre-payment disclosure for each subsequent transfer, unless certain information has changed. However, the Second Final Rule generally requires a remittance transfer provider to provide accurate receipts after subsequent transfers are made.

In addition, the Second Final Rule created new requirements regarding the disclosure of the date of transfer. Specifically, the Second Final Rule requires disclosure of the date of transfer on the initial receipt and on any subsequent receipts provided with respect to a particular transfer. For subsequent preauthorized transfers, the Second Final Rule also requires that a remittance transfer provider disclose the future date or dates the remittance transfer provider will execute subsequent transfers in the series. In general, the Second Final Rule generally offers some flexibility in how these disclosures may be made, however, for any subsequent preauthorized transfer for which the date of transfer is four or fewer business days after the date payment is made for that transfer, this information must be provided on the receipt for the initial transfer in the series.

XI. Observations and Practical Considerations

Given the broad scope of the Remittance Transfer Rule beyond the realm of traditional remittance transfer transactions, the implications are far-reaching. Compliance by remittance transfer providers will require significant time and effort, and may warrant a range of measures, including:

- revision to existing policies, procedures and practices to ensure overall compliance with

54. *See* initial CFPB Final Rule, *supra* note 8, Supplementary Information, 77 Fed. Reg. at 6211-12.

55. *See supra* this text and note 22.

56. *See supra* note 9.

57. *See supra* note 11.

58. Initial CFPB Final Rule, *supra* note 8 (to be codified at 12 CFR § 1005.30(d)).

59. *See id*. For example, for the first in a series of preauthorized transfers, the provider must provide the prepayment disclosure and receipt pursuant to the general timing requirements for all remittance transfers. *See id*. (to be codified at 12 CFR § 1005.36(a)(1)). For subsequent transfers, the prepayment disclosure must be mailed or delivered within a reasonable time before the scheduled transfer date. *Id*. (to be codified at 12 CFR § 1005.36(a)(2)).

60. *See supra* note 9.

61. *See supra* Parts V.F. & G.

the Remittance Transfer Rule, including adequate supervisory oversight and resource allocation, employee training, ongoing compliance monitoring, updates to the compliance program as needed, and third party oversight (which may warrant changes to vendor management processes);

- review of current disclosures and disclosure practices, and incorporation of the new remittance transfer disclosures into that process;
- review of and revisions to processes for disclosing exchange rates and estimating foreign currency amounts to be transferred;
- establishment of new error resolution procedures, either within existing systems or anew, to comply with the Remittance Transfer Rule requirements; and
- evaluating, and where necessary re-negotiating, agreements with third parties to ensure a sufficient information flow to accomplish the disclosure obligations.

XII. The CFPB Delayed the Effective Date of the Initial CFPB Final Rule and Proposed to Revise the Rule

A. Delayed Effective Date

On November 27, 2012 the CFPB published CFPB Bulletin 2012-08 (the CFPB Bulletin), indicating that the CFPB intended to issue a proposal in December 2012 to amend the final remittance transfer rule and extend its effective date.[62] This proposal (the December Proposal) was published on December 31, 2012.[63] While the initial CFPB Final Rule was previously scheduled to become effective February 7, 2013,[64] the CFPB Bulletin stated that the CFPB would extend the effective date of the final rule by ninety days, and approximated that the new effective date would be "sometime during the spring of 2013."[65]

In addition to the delayed effective date, the CFPB Bulletin outlined three separate areas of the Remittance Transfer Rule that the December Proposal would address, as noted below.

B. Errors Resulting from Incorrect Account Numbers Provided by Senders of Remittance Transfers

The CFPB Bulletin indicated that the December Proposal would address situations in which a sender provides an incorrect account number to a remittance transfer provider, resulting in a remittance transfer being deposited into the wrong account. Specifically, the CFPB "intends to propose that where the provider can demonstrate that the consumer provided the incorrect information, the provider would be required to attempt to recover the funds but would not be liable for the funds if those efforts are unsuccessful."[66] As noted above at Part VII., the Revised Final Rule addresses this issue.

C. Disclosure of Certain Foreign Taxes and Third-Party Fees

The CFPB Bulletin stated that the December Proposal was expected to provide "additional flexibility" as to foreign tax and third-party fee disclosure requirements, including that the December Proposal would permit providers to base fee disclosures on published bank fee schedules and offer further guidance on foreign tax disclosures where certain variables may affect tax rates. As noted above at Part V.B., the Revised Final Rule addresses this issue.

D. Disclosure of Sub-National, Foreign Taxes

The CFPB Bulletin also referenced the CFPB's plans to limit the obligation for providers to disclose foreign taxes imposed on remittance transfer transactions to taxes imposed at the national level (as opposed to taxes that may be imposed by foreign, sub-national jurisdictions). As noted above at Part V.B., the Revised Final Rule addresses this issue.

XIII. CFPB Issues Revised Final Rule and Correction

As noted through-out this article, in May 2013 the CFPB issued a Revised Final Rule amending Regulation E as regards remittance transfers.[67] The Revised Final Rule builds on the foundation of the initial CFPB Final Rule[68] and the Second Final Rule,[69] with significant changes relating to the required disclosures of third-party fees and taxes,[70] error resolution,[71] estimates,[72] and remedies.[73] The effective date is October 28, 2013.

On August 14, 2013 the CFPB published a Correction to the Revised Final Rule, revising Regulation E, 12 C.F.R. section 1005.33(c)(2)(iii), to

(Continued on page 163)

62. CFPB Bulletin 2012-08, Remittance Rule Implementation (Subpart B of Regulation E), *available at* http://www.consumerfinance.gov/blog/proposed-changes-to-the-remittance-rule-and-an-extension-of-rules-effective-date/ [CFPB Bulletin].

63. *See* 77 Fed. Reg. 77188 (Dec. 31, 2012).

64. *See supra* Part I.

65. *See* CFPB Bulletin, *supra* note 62.

66. *Id.*

67. *See* Revised Final Rule, *supra* note 11.

68. *See supra* note 8.

69. *See* Second Final Rule, *supra* note 11.

70. *See*: *supra* Parts V.B. & C.; and Revised Final Rule, *supra* note 11, Supplementary Information, 78 Fed. Reg. at 30666 - 30680.

71. *See*: *supra* Part VII.; and Revised Final Rule, *supra* note 11, Supplementary Information, 78 Fed. Reg. at 30681 - 30693.

72. *See*: *supra* Part V.F.; and Revised Final Rule, *supra* note 11, Supplementary Information, 78 Fed. Reg. 30680 - 81.

73. See Revised Final Rule, supra note 11, Supplementary information, 78 Fed. Reg. at 30687 - 89.

Remittance Transfers under Dodd-Frank:…

(Continued from page 33)

clarify the remedies for errors that occur if a sender provides incorrect or insufficient information.[74] The Correction requires the provider to refund, or reapply to a new transfer, the amount paid by the sender, less fees and taxes for the first transfer. The Correction also inserts a new Comment 33(c)-5, inadvertently omitted in the Revised Final Rule, and renumbers old Comment 33(c)-5 as new Comment 33(c)-6.

74. *See* Correction, *supra* note 11.

Articles Solicited

The *Quarterly Report* is seeking submission of manuscripts, for possible publication, on the following subjects: consumer protection law and litigation; CFPB regulation; Truth in Lending and Regulation Z; access to consumer financial services (including fair housing, CRA, and equal credit opportunity); electronic commerce; credit and debit cards; credit insurance; mortgage lending; auto finance; UCC case law and revisions; banking law; debt collection; and bankruptcy. If you would like to contribute to an article or research project, please contact the Editor of the *Quarterly Report*.