

Alert

Consumer Financial Protection Bureau Issues Final Rule and Concurrent Notice of Proposed Rulemaking to Implement the Dodd-Frank Act Remittance Transfer Provisions

January 27, 2012

On Jan. 20, 2012, the Consumer Financial Protection Bureau (“Bureau”) issued a final rule amending Regulation E (12 C.F.R. Part 1005) (the “Final Rule”), which implements the Electronic Fund Transfer Act (15 U.S.C. §§ 1693, *et seq.*) (“EFTA”) and the Official Interpretations (Supplement I to Part 1005) to the regulation.¹ The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203, 124 Stat. 1376 (2010)) (the “Dodd-Frank Act”) added a new section to EFTA to require remittance transfer providers (“RTPs”), which include, e.g., traditional money transmitters, banking institutions and certain providers of prepaid cards that provide international remittance transfers in the normal course of their business to provide certain consumer protections. The Final Rule implements such protections by providing consumers with certain disclosures and error resolution rights when sending remittance transfers to consumers or businesses abroad. The Final Rule does not apply to business-to-consumer or business-to-business transactions. The Final Rule is effective one year from the date it is published in the Federal Register.

The Bureau also issued a concurrent notice of proposed rulemaking to seek public comment on whether to amend the Final Rule to provide: (1) a specific numeric threshold as a safe harbor for determining which companies do not provide remittance transfers “in the normal course of business”; and (2) a possible safe harbor and other refinements to disclosure and cancellation requirements for certain transfers scheduled in advance of the transfer date.

The Final Rule substantially adopts the requirements set forth in the Board’s May 2011 proposed rule (the “Proposed Rule”), with some notable changes and clarifications briefly summarized below and followed by a more comprehensive discussion.

- *Disclosure of Third Party Fees & Taxes Required:* Although the Bureau recognizes the challenges faced by RTPs in determining fees and taxes imposed by third parties, the Bureau believes it is bound by the Dodd-Frank Act to require RTPs to determine and disclose third party costs “specifically related to the remittance transfer” (unless estimates exception applies).
- *Combined Disclosure:* RTPs may give senders a single written notice prior to payment containing all of the information required on the receipt, so long as the RTP provides proof of payment on the combined disclosure, such as a stamp, or on separate piece of paper.

¹ In light of the transfer of the rulemaking authority for EFTA (other than Section 920 of EFTA) from the Federal Reserve Board (the “Board”) to the Bureau, the provisions in the Board’s Regulation E at 12 C.F.R. Part 205 were republished as the Bureau’s Regulation E at 12 C.F.R. Part 1005.

- *Pre-Payment Disclosures for Mobile Application or Text Message Transactions:* Pre-payment disclosures for mobile application or text message transactions do not need to be “retainable in form” and may be disclosed orally or via mobile application or text message if certain conditions are met.
- *FX Estimate Bases Clarified:* If an RTP uses the most recent wholesale exchange rate as a basis for an estimate of an exchange rate, the exchange rate must also reflect any spread, and further provides that if the exchange rate is published or provided multiple times throughout the day due to rate fluctuations, an RTP may use any exchange rate available on that day for purposes of determining the “most recent” exchange rate.
- *Safe Harbor Country List for Permanent Exception:* Prior to the effective date of the Final Rule, the Bureau expects to issue a safe harbor list of countries to which the permanent exception will apply, and the Bureau refused to broaden the applicability of the permanent exception to international wire transfers or international ACH transfers using a method negotiated between the United States and a private entity.
- *Foreign Language Requirements for Written Receipts for Transactions Conducted Entirely by Telephone:* An RTP is not obligated to provide the written receipt in the foreign language used to conduct the telephone transaction unless the foreign language was principally used to advertise, solicit or market remittance transfers during the call.
- *Definition of “Error” Clarified:* Among other clarifications, an error does not include a change in the amount or type of currency received by the designated recipient from the amount or type disclosed to the sender if the RTP relied on information provided by the sender in making such disclosure, so long as the change is made solely because the designated recipient requested the change (and not because the payout agent does not have sufficient amounts of local currency).
- *Error Exception for Extraordinary Circumstances Outside of the RTP’s Control:* The Bureau refused to expand the exception to generally exclude errors caused by acts of a third party beyond an RTP’s control, but expanded the exception to cover circumstances where a foreign government imposes an emergency tax that was not in effect nor could have been reasonably anticipated by the RTP at the time disclosures were given.
- *Error Exception for BSA/OFAC Screening:* Delays in making funds available to a designated recipient that are related to an RTP’s fraud screening procedures in accordance with the BSA, OFAC requirements, or similar laws or requirements would not constitute an error.
- *Error Exception for “Friendly Fraud”:* RTPs are subject to liability for fraudulent pick-ups under the error resolution provisions, but “friendly fraud” would not result in an error.
- *Minimum Cancellation Period Reduced:* The minimum cancellation period for remittance transfers is reduced from one business day to 30 minutes to allow for RTPs to mitigate some of the risk of losing fees or taxes charged by only sending transfers after the 30-minute cancellation period ends.
- *Strict Liability for Acts of Agents:* The Final Rule adopts Alternative A, which provides that an RTP would be strictly liable for violations of the Final Rule when such agent acts for the RTP.
- *Storefront & Online Disclosures Not Required:* The posting of model remittance transfer notices at a storefront or on the Internet is not required.

Disclosure Requirements²

The Final Rule adopts the requirements set forth in the Proposed Rule, with minor modifications, for the two types of disclosures established by the Dodd-Frank Act: (1) pre-payment disclosures; and (2) receipts. As discussed below, the Final Rule also adopts the requirements set forth in the Proposed Rule for providing a single disclosure that accurately discloses all of the information required on both the pre-payment disclosure and the receipt (a “Combined Disclosure”). The Final Rule also implements the specific formatting requirements for the disclosures set forth in the Proposed Rule, including grouping, proximity, segregation, prominence and size requirements.

² 12 C.F.R. § 1005.31.

- **Pre-Payment Disclosure Requirement:**³ Written pre-payment disclosures must be provided to the sender containing certain information specific to the sender's transfer. Specifically, the pre-payment disclosure must contain the contents below to the extent such information is applicable to the sender's transfer:
 - **Transfer Amount, Fees and Taxes:** RTPs must disclose the amount that will be transferred to the designated recipient in the currency in which the funds will be transferred. For example, if the funds will be transferred from U.S. dollars to Mexican pesos, the transfer amount must be disclosed in U.S. dollars. The Final Rule also requires the itemized disclosure of all charges that would affect the cost of the remittance transfer to the sender, including all fees and applicable taxes. In addition, the disclosure must contain the total amount to be paid out-of-pocket for the transaction by the sender (i.e., transfer amount plus applicable fees and taxes).
 - **Exchange Rate:** The Final Rule requires the disclosure of any exchange rate used by the RTP for the remittance transfer, rounded consistently for each currency to no fewer than two decimal places and no more than four decimal places. RTPs are not required to provide the exchange rate disclosure for dollar-to-dollar transactions. If an RTP uses the most recent wholesale exchange rate as a basis for an estimate of an exchange rate, the exchange rate estimate must also reflect any spread that is typically applied to such a rate for remittance transfers for a particular currency. If the exchange rate for a currency is published or provided multiple times throughout the day because the exchange rate fluctuates throughout the day, an RTP may use any exchange rate available on that day for the purposes of determining the "most recent" exchange rate.⁴ An RTP cannot disclose terms such as "unknown," "floating," "variable" or "to be determined" instead of a specified exchange rate.⁵
 - **Amount to be Received by the Designated Recipient:** Subject to two statutory exceptions discussed below, the Final Rule adopts the Proposed Rule's requirement that the RTP must disclose the transfer amount in the currency in which the funds will be received by the designated recipient, net of all fees and taxes (if any) "specifically related to the remittance transfer" that would affect the amount received by the designated recipient. Such fees and taxes could include lifting fees charged in connection with an international wire transfer, a fee charged by a recipient institution or agent, or a tax imposed by a government in the designated recipient's country, but would not include fees that banks charge one another for handling a remittance transfer or an interchange fee that is charged to an RTP when a sender uses a credit or debit card to pay for a remittance transfer. RTPs must also disclose these fees and taxes in the currency in which the funds will be received by the designated recipient, and the Final Rule addresses how to make such disclosures where the fee or tax may be imposed in one currency, but the funds may be received by the designated recipient in another currency.

Oral pre-payment disclosures are permitted if the transaction is conducted orally and entirely by telephone, and the RTP complies with the foreign language disclosure requirements and informs the sender of cancellation rights.⁶ Similarly, pre-payment disclosures for transactions conducted entirely by telephone via mobile application or text message may be provided orally or via mobile application or text message if the RTP complies with the foreign language disclosure requirements and informs the sender of cancellation rights.⁷ For point-of-sale transactions, RTPs are not permitted to provide pre-payment disclosures orally or by showing consumers a computer screen at the point-of-sale prior to payment.

- **Statutory Exceptions for Requirement to Disclose the Actual Amount of Currency to be Received:** The Final Rule contains two statutory exceptions that permit RTPs to disclose an estimate of the amount of currency to be received, rather than the actual amount.

³ 12 C.F.R. § 1005.31(b)(1).

⁴ Comment 32(c)(1)-4.

⁵ Comment 31(b)(1)(iv)-1.

⁶ 12 C.F.R. § 1005.31(a)(3).

⁷ 12 C.F.R. § 1005.31(a)(5).

- *Temporary Exception:* Until July 21, 2015, insured depository institutions and insured credit unions that cannot determine certain disclosed amounts for reasons beyond their control, which primarily occurs with international wire transfers, may provide an estimate of the amount of currency to be received.⁸
- *Permanent Exception:* Under the Final Rule, the permanent exception applies: (1) when the government of a recipient country sets the exchange rate after a transfer has been sent; (2) where the exchange rate, by law, is not set until the recipient picks up the funds; or (3) to certain international ACH transactions, where the central bank of the foreign country sets the exchange rate after the transfer has been sent.⁹ The permanent exception does not apply to international wire transfers or international ACH transfers using a method negotiated between the U.S. government and a private entity. An RTP may rely on a safe harbor list of countries, to be published by the Bureau, to determine whether estimates may be provided under the permanent exception, unless the RTP has information that a country on the Bureau's list legally permits the RTP to determine exact disclosure amounts.
- *Written Receipt Requirement:*¹⁰ RTPs must provide a written receipt containing all the information provided on the pre-payment disclosure, plus the information listed below to the extent it is applicable to the sender's transfer.
 - *Promised Date of Delivery:* The Final Rule requires RTPs to disclose the date the currency will be available to the designated recipient in the foreign country. In cases where it is difficult to determine the exact date on which funds will be available, RTPs must disclose the latest date that the funds will be available and can indicate that the funds may be available sooner.
 - *Contact Information for Designated Recipient:* The Final Rule requires RTPs to disclose the name of the designated recipient, and if provided by the sender, the telephone number and/or address of the designated recipient.
 - *Information Regarding Sender's Error Resolution and Cancellation Rights:* The Final Rule requires that RTPs include an abbreviated statement about the sender's error resolution and cancellation rights and provides a model disclosure that may be used.
 - *Contact Information for the RTP and Applicable Regulatory Agencies:* The Final Rule requires the disclosure of the name, telephone number and website of the RTP and a telephone number and website for the applicable state regulatory agency and the Bureau. The Final Rule clarified that the RTP must provide appropriate contact information for the State agency that regulates the RTP, and cannot satisfy this requirement by providing contact information for an alternative source that maintains a list of State agencies (e.g., the RTP's website). If an RTP is licensed in multiple states, a provider may not disclose contact information for agencies in other states, but should make the determination as to the State in which the sender is located based on information that is provided by the sender and on any records associated with the sender.

For a transaction that is conducted entirely by telephone (either orally or via mobile application or text message), RTPs must mail or deliver a written receipt to the sender no later than one business day after the date on which payment is made for the transfer. If the telephone transaction involves the transfer of funds from the sender's account held by the RTP, the written receipt may be provided on or with the next regularly scheduled periodic statement for that account or within 30 days after payment is made for the remittance transfer if a periodic statement is not provided.¹¹

- *Combined Disclosure:*¹² As an alternative to providing the two disclosures discussed above, the Final Rule permits RTPs to provide the pre-payment disclosure and receipt disclosure in a single disclosure

⁸ 12 C.F.R. § 1005.32(a).

⁹ 12 C.F.R. § 1005.32(b); see also Comment 32(b).

¹⁰ 12 C.F.R. § 1005.31(b)(2).

¹¹ 12 C.F.R. § 1005.31(e)(2).

¹² 12 C.F.R. § 1005.31(b)(3).

prior to payment. RTPs using the Combined Disclosure must provide the sender with proof of payment, which must be clear and conspicuous, in writing or electronically, and in retainable form. The proof of payment for the transaction may be provided on the same piece of paper as the Combined Disclosure, such as a stamp, or on a separate piece of paper, which may be a more practical option for RTPs concerned with the occurrence of fraudulent proof of payment on the Combined Disclosure. For point-of-sale transactions, the Combined Disclosure may not be provided orally or be shown to a consumer on a computer screen at the point-of-sale prior to payment to satisfy the Final Rule disclosure requirements.

- **Providing Pre-Payment Disclosures and Receipts Electronically:**¹³ If the sender electronically requests the RTP to send the remittance transfer, pre-payment disclosures and receipts may be provided electronically. Pre-payment disclosures may be provided electronically without regard to the consumer consent and other applicable provisions of the E-Sign Act; however, receipts and combined disclosures must comply with such provisions of the E-Sign Act. Electronic disclosures generally must be provided in a retainable form. For electronic disclosures, an RTP may satisfy this requirement if it provides an online disclosure in a format that is capable of being printed. However, electronic disclosures may not be provided through a hyperlink or in another manner by which the sender can bypass the disclosure.¹⁴ However, the Final Rule excludes pre-payment disclosures for transactions conducted entirely by telephone via mobile application or text message from the retainable in form requirement. In addition, RTPs are not required to confirm that the sender has read the electronic disclosures.
- **Foreign Language Disclosure Requirements:**¹⁵ Subject to an exception for oral disclosures, pre-payment disclosures and receipts must be made in English and, if applicable, either in: (1) each of the foreign languages “principally used” by the RTP to advertise, solicit or market remittance transfer services, either orally, in writing or electronically, at that office; or (2) the foreign language primarily used by the sender with the RTP to conduct the transaction (or, for error resolution disclosures, in the foreign language primarily used by the sender with the RTP to assert the error), provided that such foreign language is “principally used” by the RTP to advertise, solicit or market remittance transfer services, either orally, in writing or electronically, at that office. The Final Rule does not strictly limit the number of languages that may be contained in a single disclosure. The Final Rule modifies the Proposed Rule regarding written receipts for telephone transactions, so that an RTP would not be obligated to provide the written receipt in a foreign language, even if such foreign language was used to conduct the telephone transaction, unless the foreign language was principally used to advertise, solicit, or market remittance transfers during the telephone call.
 - **Fact-and-Circumstances Approach to “Principally Used”:** The Final Rule adopts the Proposed Rule’s facts-and-circumstances approach to determining whether a foreign language is principally used by the RTP. The following factors can contribute to whether a foreign language is principally used: (1) the frequency with which the RTP advertises, solicits or markets remittance transfers in a foreign language at a particular office; (2) the prominence of such advertising, soliciting or marketing in that language at that office; and (3) the specific foreign language terms used to advertise, solicit or market remittance transfer services at that office.
 - **Definition of “Office” and “at the Office”:** As stated in the Proposed Rule, the Final Rule states that an “office” includes any telephone number or website through which a consumer can complete a transaction or assert an error. The Final Rule also clarifies that an advertisement, solicitation, or marketing that is considered to be made “at the office” does not include general advertisements, solicitations, or marketing that are not intended to be made at a particular office. For example, if an advertisement for remittance transfers in Chinese appears in a Chinese newspaper that is being distributed at a grocery store in which an agent location is located, such advertisement would not be considered to be made at that office.

¹³ 12 C.F.R. § 1005.31(a)(2).

¹⁴ Comment 31(a)(2)-3.

¹⁵ 12 C.F.R. § 1005.31(g).

- *Exemption for Oral Disclosures:* As indicated above, the Final Rule requires oral disclosures to be made in the language primarily used by the sender to conduct the transaction (or for error resolution purposes the language primarily used by the sender to assert the error).¹⁶

Error Resolution Standards¹⁷

- *Error Resolution Procedure:* The Final Rule requires a sender to provide notice of an error to the RTP within 180 days of the stated date of availability of a remittance transfer. The notice triggers an RTP's duty to investigate the claim and correct any error within 90 days of receiving the notice of the error. As noted above, the Final Rule adopts the Proposed Rule's comment that a notice of error from a sender received by an RTP's agent is deemed to be received by the RTP for purposes of the 180-day time frame for reporting errors. The Final Rule allows an RTP to select a default remedy that the RTP will use if the sender does not designate a remedy within a reasonable time (10 days) after the RTP sends the report.¹⁸ The Final Rule revises the commentary in the Proposed Rule to provide that a financial institution that is also the RTP may have error obligations under both Regulation E Section 1005.11 and the Final Rule, and provides examples to illustrate when certain error resolution procedures apply to an RTP that is also the account-holding institution from which the transfer is funded.
- *Definition of "Error" and Certain Exceptions:*¹⁹ The Final Rule substantially adopts the definition of "error" in the Proposed Rule and generally includes the following:
 - *Incorrect Amount Paid By Sender:* An incorrect amount paid by a sender in connection with a remittance transfer;
 - *Computational or Bookkeeping Error:* A computational or bookkeeping error made by the RTP relating to a remittance transfer;
 - *Incorrect Amount Received by the Designated Recipient:* The failure to make available to a designated recipient the amount of the currency stated in the disclosure provided to the sender, unless the disclosure stated an estimate as permitted by the Final Rule, or if the failure resulted in extraordinary circumstances outside the RTP's control that could not have been reasonably anticipated, such as an emergency tax imposed on a transfer that was not in effect nor could have been reasonably anticipated by the RTP at the time disclosures were given;
 - *Failure to Make Funds Available by Date of Availability:* The failure to make funds in connection with a remittance transfer available to a designated recipient by the date of availability stated in the disclosure provided to the sender, unless the failure to make the funds available resulted from: (1) extraordinary circumstances outside the RTP's control that could not have been reasonably anticipated, such as force majeure, civil unrest, or a natural disaster; (2) delays related to the RTP's fraud screening procedures in accordance with BSA, OFAC requirements, or similar laws or requirements; or (3) the remittance transfer being made with fraudulent intent by the sender or any person acting in concert with the sender; and
 - *Sender's Request for Documentation:* A sender's request for documentation provided in connection with the remittance transfer or additional information or clarification concerning a remittance transfer, including a sender's request for information to determine whether an error exists.

The Final Rule adopts the Proposed Rule's exclusion from the term "error" as an inquiry about the status of a remittance transfer (except where the funds from the transfer were not made available to a designated recipient by the disclosed date of availability), or a request for information for tax or other recordkeeping purpose, but does not include the exclusion for "an inquiry involving a transfer of \$15 or less." In addition, the

¹⁶ 12 C.F.R. § 1005.31(g)(2).

¹⁷ 12 C.F.R. § 1005.33.

¹⁸ Comment 33(c)-4.

¹⁹ 12 C.F.R. § 1005.33(a).

Final Rule adds a new section to provide that an error does not include a change in the amount or type of currency received by the designated recipient from the amount or type of currency stated in the disclosure provided to the sender if the RTP relied on information provided by the sender in making such disclosure.²⁰ This exception is available only if the change is made solely because the designated recipient requested the change, but not if the payout agent does not have sufficient amounts of local currency on hand.

Cancellation and Refund Rights²¹

Under the Final Rule, RTPs must comply with a sender's oral or written request to cancel a remittance transfer that is received no later than thirty minutes (not one business day as originally proposed) from when the sender makes payment for the transfer provided that: (1) the request enables the RTP to identify the sender's name and address or telephone number and the particular transfer to be cancelled; and (2) the transferred funds have not been picked up by the designated recipient or deposited into an account held by the designated recipient. RTPs must refund, at no additional cost to the sender, the total amount of funds tendered by the sender for the transfer, including any fees, within three business days of receiving the sender's cancellation request. Although the Bureau recognizes that a provider may not be able to recover some fees or taxes charged for a transfer, the Bureau believes that changing the cancellation period from the proposed one business day to thirty minutes helps address these concerns. In the Final Rule, the Bureau states that a provider can mitigate some of the risk of losing fees or taxes charged for a transfer by sending a transfer after the thirty minute cancellation period ends.

Vicarious Liability for Agents²²

The Final Rule adopts proposed Alternative A. Under Alternative A, an RTP would be strictly liable for violations of the Final Rule when such agent acts for the provider. The Bureau rejected Alternative B, under which an RTP would not be liable for violations by an agent acting for the RTP where the RTP establishes and maintains policies and procedures for agent compliance. The Final Rule explains that RTPs remain fully responsible for complying with these requirements even if an RTP performs its functions through an agent, and regardless of whether the provider has an agreement with a third party that transfers or otherwise makes funds available to a designated recipient. However, the Bureau notes that enforcement agencies may consider, in any action or other proceeding against an RTP, the extent to which the provider had established and maintained policies or procedures for compliance. Thus, enforcement agencies are permitted to tailor any remedies in light of single agent non-compliance or isolated violations. Nothing in the Final Rule shields agents from liability, nor does it prevent providers from requiring specific agent conduct in their contracts or negotiating other contractual liability or indemnification clauses.

Miscellaneous Issues

- *International Bill Payments:* Under the Final Rule, some transactions that have not traditionally been considered remittance transfers, such as a consumer's online bill payment through his or her financial institution to a recipient abroad, will fall within the scope of the rule.
- *Applicability of Article 4A of the Uniform Commercial Code to Consumer International Wire Transfers:* Article 4A of the Uniform Commercial Code ("Article 4A") does not apply to a funds transfer any part of which is governed by EFTA. In the rulemaking to the Final Rule, the Bureau states that it believes that Article 4A will no longer apply to international consumer wire transfers and recommends that Congress adopt legislation to help resolve the legal uncertainty, so parties engaged in remittance transfers will be able to continue to rely on Article 4A, notwithstanding the implementation of the Final Rule.
- *Multiple RTPs and Prepaid Card Programs:* The Final Rule clarifies that if a remittance transfer involves more than one RTP, only one set of disclosures, must be given, and the RTPs must agree among themselves which provider must take the actions necessary to comply with the Final Rule. This clarification was included to address, for example, prepaid card programs that may involve: (1) a program sponsor that establishes the program relationships, identifies and procures the necessary parties and sets contractual T/Cs; (2) a program manager which functions as a day-to-day operations

²⁰ 12 C.F.R. § 1005.33(a)(2)(iv).

²¹ 12 C.F.R. § 1005.34.

²² 12 C.F.R. § 1005.35.

“control center” for the program; and (3) an issuing bank whose contractual involvement is required to invoke the payment network and which also may serve as the holder of the funds that have been prepaid and are awaiting instructions to be disbursed. The Bureau notes that any and all of these entities may be an RTP.

- *Applicability to Prepaid Cards:* When a participant in a prepaid card program, such as a prepaid card issuer or a prepaid card program manager, issues prepaid cards, the participant in the prepaid card program must look to where it or another participant in the prepaid card program sends the prepaid cards, to determine whether the prepaid card funds will be received in a foreign country.²³ Unlike the Proposed Rule, if a consumer in the United States purchases a prepaid card and the provider sends a second prepaid card to specified recipient in a foreign country, the purchase of the prepaid card is covered by the Final Rule (even if the sender located in the United States retains the ability to access funds on the prepaid card).

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²³ Where the funds that can be accessed by a prepaid card are held does not determine whether a prepaid card is being issued to a designated recipient in a foreign country.