June 8, 2012

Mr. David Silberman
Acting Associate Director
Research, Markets, and Regulations
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20006

Re: Clarification of Certain Aspects of the Remittance Transfer Rules Issued Pursuant to Section 1073 of the Dodd-Frank Act

Dear Mr. Silberman:

The Clearing House Association L.L.C.[1] respectfully submits to the Bureau of Consumer Financial Protection ("the Bureau") this request for clarification regarding certain aspects of the final rule ("Final Rule")[2] the Bureau issued to implement Section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which amended the Electronic Funds Transfer Act ("EFTA") to create a range of new consumer protection requirements applicable to consumer-initiated cross-border electronic transfers.

As discussed in further detail below, this letter identifies a number of points of ambiguity in the Final Rule, and requests that the Bureau clarify these points. The Bureau's guidance on aspects of the Final Rule that are unclear is critical to the efforts of financial institutions to comply with the Final Rule's requirements. Accordingly, we are hopeful that the Bureau will provide clarity on these subjects through formal guidance, revisions to the official commentary, and/or revisions to the Final Rule itself.

I. Executive Summary

We ask that the Bureau provide clarification and guidance on the issues listed below.

- The definition of a "remittance transfer," including with respect to:
  - checks issued from bill payment services that use omnibus processing accounts;
  - transfers from business and trust accounts; and

[1] Established in 1853, The Clearing House is the nation's oldest payments company and banking association. The Clearing House is owned by 21 of the largest commercial banks in America, which employ 1.4 million people domestically and hold more than half of all U.S. deposits. The Payments Company within The Clearing House clears and settles approximately $2 trillion daily, representing nearly half of the U.S. volume of ACH, wire and check image transactions. The Clearing House Association is a nonpartisan advocacy organization within The Clearing House that represents, through regulatory comment letters, amicus briefs and white papers, the interests of its owner banks on a variety of systemically important bank policy issues.
[2] Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194 (Feb 7, 2012).

- the scope of the exception for securities and commodities transactions.

➢ The definition of "remittance transfer provider," including with respect to:
  - the distinction between situations involving "agents" of a provider and those involving "multiple remittance transfer providers."

➢ Certain aspects of the content and timing requirements for disclosures, including with respect to:
  - provisions regarding electronic disclosures;
  - timing requirements for receipts provided for transfers made from prepaid card accounts;
  - the disclosure of fees that are not deducted from the principal amount of the transfer; and
  - the date of availability of funds accessed by electronic devices that are mailed to the designated recipient.

➢ Certain aspects of the error resolution provisions, including with respect to:
  - the scope of the exception to the definition of "error" for delays relating to OFAC/BSA/Fraud screening;
  - providing specific contact information that senders must use when providing notice of an error;
  - the operation of the remedy provisions under certain circumstances;
  - the application of UCC 4A to unauthorized wire transfers; and
  - fraudulent pickup of funds by a person other than the designated recipient.

II. Specific Issues

A. Definition of Remittance Transfer

1. Bill Payment Services

The Final Rule excludes certain bill payment services that are accessible via computer or other electronic means from the scope of the Final Rule. Specifically, Comment 30(e)-1 states that a transfer made under a bill payment service available to a consumer via computer or other electronic means is not a remittance transfer if "the terms of the bill-payment service explicitly state that all payments, or all payments to a particular payee or payees, will be solely by check, draft, or similar paper instrument *drawn on the consumer's account* to be mailed abroad, and the payee or payees that will be paid in this manner are identified to the consumer."[3] However, if the terms of an online bill-payment service do not explicitly state that all payments to a particular payee or payees will be made by check or other similar instrument, such payments will be considered an electronic transfer of funds, and thus may qualify as a remittance transfer, for purposes of the Final Rule.

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[3] (Emphasis added.)

We interpret Comment 30(e)-1 to exclude from the scope of the Final Rule all bill payment service transfers that involve a check, draft, or similar paper instrument drawn on *any account in which the consumer has an interest or any processing account that debits an account in which the consumer has an interest.* Specifically, we read the term "consumer's account" to encompass (i) any account in which the consumer may hold an interest, including an account the consumer owns as an individual or an account the consumer owns jointly, and (ii) any processing account that debits an account in which the consumer has an interest, including an omnibus or aggregated account that contains other consumer funds. We note that it is a standard industry practice to draw checks issued under bill-payment services on omnibus processing accounts that debit the consumer's account rather than to draw such checks directly on the consumer's account.

Accordingly, we ask the Bureau to confirm our understanding that Comment 30(e)-1 would exclude from the definition of "remittance transfer" those transfers made under bill-payment services that involve a check, draft, or similar paper instrument drawn on any account in which the consumer has an interest or any processing account that debits an account in which the consumer has an interest.

2. Transfers from Business and Trust Accounts

Under the Final Rule, "sender" is defined to mean 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."[4] Thus, a transfer that is not made for personal, family, or household purposes does not meet the definition of a "remittance transfer." For this reason, financial institutions expect that all transfers made from business accounts are not made for personal, family or household purposes and do not qualify as remittance transfers under the Final Rule.[5] This also appears to be the position taken by the Bureau, which stated in the preamble to the Final Rule that "a transfer requested by a sole proprietor on behalf of his or her company would not be covered by the rule."[6] Furthermore, financial institutions expect to treat transfers from accounts owned by all business forms, whether corporation, LLC, sole proprietorship, partnership, association, or other business purpose entities as being transfers that are not made for personal, family, or household purposes.

Similarly, transfers from trust accounts also should not qualify as remittance transfers for a variety of reasons, including that these are not the type of transfers that Section 1073 was intended to cover[7] and that such accounts are owned by trusts rather than consumers (even

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[4] 12 C.F.R. § 1005.30(g).

[5] 12 C.F.R. § 1005.2(b)(1) defines "account" to mean "a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes." The term "account" does not include an account held by a financial institution under a bona fide trust agreement. *Id*. § 1005.2(b)(3).

[6] 77 Fed. Reg. 6194, 6214.

[7] The purpose of the remittance transfer provisions contained in Section 1073 of the Dodd-Frank Act is to protect senders of remittance transfers, who are "not currently provided with adequate protections under federal or state law." S. Rep. 111-176, at 179 (2010). The Senate Report on The Restoring American

though a consumer may be the beneficiary of the trust). In addition, we note that Regulation E generally defines "account" to mean "a demand deposit (checking), savings, or other consumer asset account … held directly or indirectly by a financial institution *and established primarily for personal, family, or household purposes*" and that accounts held under bona fide trust agreements are excluded from this definition.[8] Based on the fact that trusts are not consumers and that trust accounts are excluded from Regulation E's definition of account, we believe it is reasonable to conclude that transfers from trust accounts are not made primarily for personal, family or household purposes and, accordingly, are not remittance transfers.

Accordingly, we ask that the Bureau confirm that transfers made from business accounts, and transfers that involve funds held in trust or other fiduciary accounts, are not "remittance transfers" under the Final Rule.

3. Exclusion of Securities/Commodities Transactions (and other issues related to broker-dealers)

The Clearing House appreciates that the Final Rule provides broker-dealers with some relief as it excludes certain securities and commodities transactions from the definition of a "remittance transfer."[9] However, this exclusion will apply to some but not all of the transfers a customer may initiate through a broker-dealer. In addition to transactions that directly relate to the purchase or sale of U.S. regulated securities, broker-dealers also typically provide their customers with the ability to engage in a broad range of transactions that do not involve the purchase and sale of U.S. regulated securities. For example, many broker-dealers hold accounts for clients to meet their cash management needs and many of these accounts provide clients with the ability to write checks, pay bills, send and receive electronic funds transfers and send and receive domestic and international wires. The transfers that are made from these brokerage accounts might be made for the purpose of purchasing securities in another account or for the purpose of transferring the proceeds of a sale of securities to another account. However, transfers from these brokerage accounts could also be made for a variety of other reasons, including all of the reasons that a client might make a transfer from a bank account.

Thus, we ask the Bureau to expand the relief that the Final Rule affords broker-dealers in two ways.

a) Expansion of the Temporary Exception

The Final Rule contains a "temporary exception" that permits a provider to disclose estimates (rather than exact figures) if:

Financial Stability Act of 2010, the Senate bill that became the Dodd-Frank Act, discusses these protections in the context of immigrants who "send substantial portions of their earnings to family members abroad."

[8] *See* 15 USC § 1693a(2) and 12 C.F.R. § 1005.2(b) (emphasis added).

[9] 12 C.F.R. § 1005.30(e)(2).

- A provider cannot determine the exact amounts required to be disclosed for reasons beyond its control;
- The provider is an insured institution; and
- The transfer is sent from the sender's account with the institution.

The "temporary exception" to the disclosure requirements for insured institutions does not apply to broker-dealers as they do not meet the definition of an "insured institution."[10] However, broker-dealers that use open networks to make international transfers will face the same difficulty in disclosing exact figures as insured depository institutions. We appreciate the Bureau's express exclusion of transfers for the purchase or sale of certain securities and commodities from the requirements of the Final Rule (by excluding such transactions from the definition of "remittance transfer"). Notably though, not all of the transfers that broker-dealers make will fall under this exclusion.

Thus, The Clearing House requests that the Bureau extend the temporary exception to cover broker-dealers to prevent the disruption of services to broker-dealer customers that could otherwise result. We believe that the Bureau has the authority under sections 904(a) and 904(c) of the EFTA to extend the temporary exception to broker-dealers.

b) Clarification of the Types of Securities and Commodities Transactions Excluded from the Final Rule

The Final Rule excludes from the definition of "remittance transfer" those securities and commodities transfers that are excluded from the definition of "electronic fund transfer" under 12 C.F.R. § 1005.3(c)(4). This exclusion applies to any transfer of funds the primary purpose of which is the purchase or sale of a security or commodity, if the security or commodity is:

> "(i) Regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission;
> (ii) Purchased or sold through a broker-dealer regulated by the Securities and Exchange Commission or through a futures commission merchant regulated by the Commodity Futures Trading Commission; or
> (iii) Held in book-entry form by a Federal Reserve Bank or federal agency."

The commentary to Regulation E provides that this exemption applies to securities and commodities that "*may be sold by* a registered broker-dealer or futures commission merchant, even when the security or commodity itself is not regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission." Broker-dealers and future commission merchants are not prohibited *under U.S. law* from buying or selling foreign securities, although foreign law may impose requirements regarding such transactions (including that the transaction be performed through a foreign regulated broker-dealer). It is our

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[10] 12 C.F.R. § 1005.32(a)(1). An "insured institution" means "insured depository institutions (which includes uninsured U.S. branches and agencies of foreign depository institutions) as defined in Section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813), and insured credit unions as defined in Section 101 of the Federal Credit Union Act (12 U.S.C. 1752)." *Id*. § 1005.32(a)(3).

view, under the commentary to Regulation E, that if a broker-dealer regulated by the Securities and Exchange Commission or through a futures commission merchant regulated by the Commodity Futures Trading Commission is not restricted *under U.S. law* from purchasing or selling a security or commodity, then the security or commodity transaction satisfies the exemption.

Thus, we ask that the Bureau confirm that where U.S. law does not restrict the ability of a broker-dealer or futures commission merchant to purchase or sell a security or commodity, the purchase or sale of such a security or commodity through a broker-dealer or futures commission merchant satisfies the exemption for securities and commodities transactions under the Final Rule.

B. Multiple Remittance Transfer Providers

1. Prepaid Card Programs; Intermediary Banks in Open Network Transfer Transactions

The Bureau states in the preamble to the Final Rule that in some situations more than one remittance transfer provider may be involved in providing a remittance transfer. The preamble explains "[f]or example, prepaid card programs may involve, among others: (i) a program sponsor that establishes the program relationships, identifies and procures the necessary parties and sets contractual terms and conditions; (ii) a program manager which functions as a day-to-day operations 'control center' for the program; and (iii) an issuing bank whose contractual involvement is required to invoke the payment network and which also may serve as the holder of funds that have been prepaid and are awaiting instructions to be disbursed. Any and all of these entities may be a 'remittance transfer provider' if they meet the definition as set forth in § 1005.30(f)."[11]

It is unclear, however, whether and precisely how the concept of "multiple remittance transfer providers" will apply to remittance transfer transactions in general, as well as to remittance transfer transactions conducted on open networks. The fact that the concept of "multiple remittance transfer providers" was not included in the proposed rule[12] and was not sufficiently explained in the Final Rule adds to this lack of clarity. As referenced above, the Final Rule contains only a brief discussion of this concept and a single example from the preamble that relates to prepaid card programs. Apart from this example (and, in fact, even when considering this example), it is difficult to envision a scenario where there could be multiple remittance transfer providers. Specifically, Comment 30(e)-2 expressly states that in order to satisfy the term "remittance transfer," there must be a remittance transfer provider that is "directly engaged" with the sender. It is our understanding that most (if not all) jointly offered programs designate only one financial institution to take instruction from the consumer – and thus, it is only that one designated financial institution in a jointly offered program that would be "directly engaged" with the sender.

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[11] 77 Fed. Reg. 6194, 6214.

[12] Electronic Fund Transfers, 76 Fed. Reg. 29902 (May 23, 2011).

With respect to open network transactions in particular, we believe that only the entity that is directly engaged with the sender would be the remittance transfer provider – and not any correspondent or intermediary institutions through which the transfer may *subsequently* flow since those institutions are not directly engaged with the sender. In other words, based on the language from the preamble and commentary cited above, as well as the nature of the open network cross-border transfer process (which may involve a series of payment orders processed by multiple, unrelated financial institutions), we believe that intermediary institutions in open network transfer transactions would not be considered to be multiple remittance transfer providers so long as their roles are limited to acting as intermediaries.

In addition, it is unclear how the concept of "multiple remittance transfer providers" relates to the definition of an "agent" and the Final Rule provides no guidance with respect to this distinction. The Bureau declined to provide clarity on the definition of "agent" in the Final Rule, including with respect to financial institutions' relationships with correspondent and intermediary institutions.[13] In any event, it is our view that intermediary institutions involved in open network transfers are not agents of a provider when their role in an open network transfer transaction is limited to participating as intermediaries in the funds transfer process because, under such circumstances, they are not acting for or under the control of the remittance transfer provider. Thus, we do not believe that intermediary institutions involved in open network transfers would qualify as remittance transfer providers, because these institutions are not directly engaged with the sender. Moreover, we do not believe that intermediary institutions involved in open network transfers would qualify as agents because, with respect to their limited role in the open network transfer process, they are not acting on behalf of or under the control of the provider.

Accordingly, we ask that the Bureau confirm (i) that situations that could involve "multiple remittance transfer providers" under the Final Rule are limited to prepaid card products that are administered by multiple parties, and only then when the parties considered to be remittance transfer providers are directly engaged with the sender; and (ii) that intermediary institutions involved in open network transfers are neither remittance transfer providers in their own right nor are they agents of the provider.

2. Correspondent Banking Relationships

Depository institutions often establish "correspondent banking relationships" with other banks ("a correspondent bank"), in which the correspondent bank may receive deposits from, or make payments or other disbursements on behalf of the depository institution, or handle other financial transactions related to the depository institution and its customers (as requested by the depository institution). Under such circumstances, the correspondent bank may indirectly perform wire transfers for a customer of the depository institution. However, the correspondent bank will not have a direct relationship or interaction with the customer of the depository

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[13] 77 Fed. Reg. 6194, 6205. The Bureau stated in the preamble to the Final Rule that it "believes that because the concept of agency has historically been defined by common law, it is appropriate for the definition to defer to applicable law regarding agents, including with respect to what creates or constitutes an agency relationship."

institution and, in most cases, the correspondent bank will have no way of knowing whether the transactions requested by the other institution were initiated from a consumer or business account. Thus, it is our view that only the depository institution, and not the correspondent bank, would be acting as a remittance transfer provider for transactions requested by the depository institution's customer in which the correspondent bank acts on behalf of the depository institution to send the transfer to a designated recipient.

We note that when a sender initiates the transfer with his or her depository institution, only that institution, and not the correspondent bank, has a direct relationship with the sender. Therefore, consistent with Comment 30(e)(2)(i), the correspondent bank would not be acting as a provider because the definition of "remittance transfer" requires that a transfer be "sent by a remittance transfer provider" and this means that there must be an intermediary that is *directly engaged* with the sender to send an electronic transfer of funds on behalf of the sender to a designated recipient. In the correspondent banking scenarios set forth above, the correspondent bank would not be directly engaged with the sender.

Separately, the lack of clarity with respect to definition of an "agent" under the Final Rule complicates the efforts of depository institutions as they work to institute compliance programs to meet the requirements of the Final Rule. The concept of agency, under which a person or entity is authorized to act on behalf of another, has never been applied in the context of correspondent banking relationships and we believe it is inappropriate for correspondent banks that provide services to financial institutions to be deemed "agents" of remittance transfer providers under the Final Rule. Thus, we ask that the Bureau confirm that unless the agreement governing the relationship between a depository institution and a correspondent bank explicitly provides that an agency relationship exists between the two entities, the correspondent bank is not an "agent" for purposes of the Final Rule.

Accordingly, we ask the Bureau to confirm (i) that correspondent banks that perform the types of accommodation (or "back office") services described above are not remittance transfer providers when they are not directly engaged with the senders of remittance transfers and (ii) that correspondent banks are not "agents" of a depository institution for purposes of the Final Rule absent an agreement between the depository institution and the correspondent bank stating that an agency relationship exists.

C. Disclosures

1. Written and Electronic Disclosures

Pursuant to Section 919(a)(5)(D) of the EFTA, which permits the Bureau to waive the requirements of the E-Sign Act with regard to prepayment disclosures, the Final Rule provides that if a sender electronically requests the remittance transfer provider to send a remittance transfer, the prepayment disclosure may be provided to the sender in electronic form without regard to the consumer consent and other applicable provisions of the Electronic Signatures in

Global and National Commerce Act (the "E-Sign Act").[14] However, in explaining this provision of the Final Rule, comment 31(a)(2)-1 states that "*if a sender electronically requests the provider to send a remittance transfer*, the receipt may be provided to the sender in electronic form, subject to compliance with the consumer consent and other applicable provisions of the E-Sign Act."[15]

We believe that, consistent with the E-Sign Act, this comment should be revised to state that providers may give receipts electronically subject to compliance with the E-Sign Act, *regardless of how the sender requests the transfer*. The Final Rule generally requires that disclosures be provided to the sender in writing. The E-Sign Act provides that when a disclosure is required to be made available to a consumer in writing, the information can be delivered electronically as long as the disclosure is given in compliance with the E-Sign Act's consumer consent requirements.[16] Thus, by stating only that the receipt may be provided electronically subject to compliance with the E-Sign Act "if a sender electronically requests the provider to send a remittance transfer," the language of comment 31(a)(2)-1 is inconsistent with the E-Sign Act. Specifically, if the provider complies with the applicable provisions of the E-Sign Act, then the E-Sign Act permits the receipt disclosure to be given to the sender electronically *regardless of how the sender requests the remittance transfer*. Although comment 31(a)(2)-1 does not address the issue, we also note that it is our understanding that the prepayment disclosure may be provided to the sender electronically, subject to compliance with the E-Sign Act, regardless of how the sender requests the transfer.

Furthermore, if the sender and the remittance transfer provider have already established a relationship, and in doing so the provider has previously obtained an E-Sign consent from the sender, it is our understanding that the provider would not need to obtain a second E-Sign consent in order to give the sender a receipt disclosure electronically because the pre-existing relationship between the provider and sender is already governed by an E-Sign consent. Requiring remittance transfer providers to obtain a second E-Sign consent specific to the remittance transfer transaction would not result in providing the consumer with additional consumer protections (and instead, would merely be duplicative), would be unnecessarily burdensome to the transfer process, and could have a negative impact on the consumer experience.

Accordingly, we ask that the Bureau (i) revise Comment 31(a)(2)-1 to clarify that the receipt may be provided electronically, subject to compliance with the E-Sign Act, regardless of how the sender requests the transfer; (ii) confirm our understanding that the prepayment

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[14] Specifically, Section 919(a)(5)(D) of the EFTA states that the Board may, by rule, permit a remittance transfer provider to satisfy the prepayment disclosure requirement "without compliance with section 101(c) of the Electronic Signatures in Global Commerce Act, if a sender initiates the transaction electronically and the information is displayed electronically in a manner that the sender can keep."

[15] (Emphasis added.)

[16] The statute states that "if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing" if certain requirements are met, including that the consumer has affirmatively consented to the use of an electronic record. 15 USC § 7001(c).

disclosure may be provided electronically, subject to compliance with the E-Sign Act, regardless of how the sender requests the transfer; and (iii) confirm that a provider may give disclosures electronically pursuant to an E-Sign consent previously obtained from the sender in connection with an established customer relationship.

2. Receipt Timing Requirements

The Final Rule provides that if a transaction is conducted entirely by telephone and involves the transfer of funds from the sender's account held by the remittance transfer provider, the required receipt may be given 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 given.[17] Because this provision includes the term "account," it is unclear whether this disclosure option is available in the context of transfers of consumer funds from prepaid card accounts that do not meet the definition of "account" under 12 C.F.R. § 1005.2(b).

Notably, Treasury Department regulations require issuers of prepaid cards to meet certain requirements in order for those prepaid cards to be eligible to receive federal payments, including that the issuer of the prepaid card provide the cardholder with all of the consumer protections that apply to a payroll card under Regulation E, *even though the prepaid card does not meet the definition of "account" under 12 C.F.R. § 1005.2(b)*.[18] Thus, some general purpose prepaid card programs are structured to incorporate Regulation E's payroll card protections, even though these prepaid card accounts are not "accounts" under Regulation E. We believe that permitting financial institutions that provide prepaid cardholders with the consumer protections of Regulation E to use the disclosure option available under 12 C.F.R. § 1005.31(e)(2) (even though the prepaid card account is not an "account" as defined in 12 C.F.R. § 1005.2(b)) is consistent with the purposes of the EFTA and would facilitate compliance with the Final Rule.

Accordingly, we ask that the Bureau use its interpretative authority under sections 904(a) and 904(c) of the EFTA to permit, in the context of transactions conducted entirely by telephone, a provider to give the receipt on or with the next regularly scheduled periodic statement or within 30 days after payment is made for the remittance transfer if a periodic statement is not given, for transfers of consumer funds from a prepaid card account to which the provider extends all of the protections that apply to payroll card accounts under Regulation E, even if the prepaid card account is not an "account" as defined in 12 C.F.R. § 1005.2(b).

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[17] 12 C.F.R. § 1005.31(e)(2). Section 919(a)(5)(B) provides that the Bureau has authority to issue regulations permitting a provider to satisfy the receipt disclosure requirement for transactions conducted entirely by telephone by "including [the receipt] in the next periodic statement, if the telephone transaction is conducted through a demand deposit, savings deposit, or other asset account that the sender holds with the remittance transfer provider."

[18] 31 C.F.R. § 210.5(b)(5)(i)(D); *see also* Federal Government Participation in the Automated Clearinghouse, 75 Fed. Reg. 80335 (Dec. 22, 2010).

3. <u>Fees Imposed by a Person Other than the Provider</u>

The Final Rule requires that the prepayment disclosure and receipt include any fees and taxes imposed on the remittance transfer by a person other than the provider.[19] Comment 31(b)(1)-ii explains the "fees and taxes imposed on the remittance transfer include only those fees and taxes that are charged to the sender or designated recipient *and are specifically related to the remittance transfer*."[20] Furthermore, in discussing this requirement, the Bureau states that providers are required "to determine the costs specifically related to the remittance transfer *that may reduce the amount received by the designated recipient*."[21] We interpret this provision to require the disclosure of third party fees only if they will reduce the principal amount of the transfer. Moreover, our understanding is that a remittance transfer provider is not required to disclose fees that a recipient institution may charge its own customer (i.e., the designated recipient) if those fees are not required to be deducted from the principal amount of the transfer.[22]

Accordingly, we ask that the Bureau confirm that a provider is not required to disclose fees a recipient institution may charge its own customer if those fees are not required to be deducted from the principal amount of the transfer.

4. <u>Date of Availability of Funds Accessed by Electronic Devices Mailed to the Designated Recipient</u>

The Final Rule requires remittance transfer providers to disclose on the receipt the date in the foreign country on which funds will be available to the designated recipient. [23] With respect to electronic devices that may be mailed to designated recipients in foreign countries, such as prepaid cards, this provision appears to require that a provider disclose the date that the prepaid card will be received in the mail (as opposed to the date that funds are loaded onto the card). The length of time it may take for a prepaid card to travel through the mail system and arrive in a foreign country is completely outside the control of the remittance transfer provider. Accordingly, while Comment 31(b)(2)-1 provides that "[i]f a provider does not know the exact date on which funds will be available, the provider may disclose the latest date on which the funds will be available," we note that as a practical matter it will be very difficult for providers to give accurate disclosures regarding the date that prepaid cards or other prepaid devices will be received by recipients in foreign countries.

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[19] 12 C.F.R. §§ 1005.31(b)(1)(vi), (b)(2)(i).
[20] (Emphasis added.)
[21] 77 Fed. Reg. 6194, 6224 (emphasis added).
[22] In further support of this conclusion, we note that a significant purpose of the Final Rule is to provide consumers with the ability to comparison shop among available remittance transfer providers. The disclosure of "other fees" imposed by the recipient institution does nothing to further this purpose because these fees will be the same regardless of which provider sends the transfer. In addition, it may not be possible for a remittance transfer provider to disclose certain fees that a recipient institution charges its own customer. For example, foreign institutions may be prohibited from sharing their fee schedules with other financial institutions under applicable privacy laws.
[23] 12 C.F.R. § 1005.31(b)(2)(ii).

Accordingly, we request that for electronic devices (such as prepaid cards) that will be mailed to designated recipients in foreign countries, the Bureau permit remittance transfer providers to estimate the date of funds availability and provide a sender with a statement to the effect that the provider cannot control the date the device will be received by the recipient in the foreign country and, therefore, can only provide a good faith estimate of such date. Furthermore, we request that the Bureau confirm that no error has occurred if the designated recipient receives the device after the estimated date of availability or, alternatively, that if late delivery of the device does constitute an error, the remittance transfer provider is not required to provide any remedy for the error, including any refund of fees and/or taxes related to the remittance transfer.

D. Error Resolution

1. OFAC/BSA/Fraud Screening

The Final Rule states that delays in making funds available to a designated recipient that are related to the remittance transfer provider's fraud screening procedures or in accordance with the BSA, OFAC requirements, or similar laws or requirements would not constitute an error.[24] As drafted, this provision appears to apply to delays that result from screening that is performed by the remittance transfer provider itself, and not to similar screenings conducted by intermediary banks. Notably, as with all cross-border transfers that may involve more than one financial institution, there are likely to be other institutions (such as correspondents and intermediaries in open network transfers) that perform screenings that delay the date the funds become available to the designated recipient. Like the screenings that are performed by the remittance transfer provider itself, the screenings performed by the foreign financial institutions would be conducted for fraud, anti-money laundering, trade sanctions or other similar purposes under the relevant country's laws.

Notably, remittance transfer providers do not have control over screenings performed by foreign financial institutions, which also could delay the availability of funds to the designated recipient. Thus, as with the screenings that they perform directly, remittance transfer providers should not be held liable for delays that may be caused by screenings performed by correspondent, intermediary or beneficiary banks.

Accordingly, we ask that the Bureau confirm that a delay resulting from screenings conducted by correspondent and intermediary banks would not constitute an error under the Final Rule. This would be consistent with the Bureau's statement from the preamble to the Final Rule that the "Bureau believes it is appropriate to exclude these situations [delays resulting from the providers fraud screening procedures or in accordance with BSA, OFAC or other similar requirements] from the definition of "error" in order to encourage remittance transfer providers to continue to engage in activities that benefit the safety of the transfer system as a whole."[25]

[24] 12 C.F.R. § 1005.33)(a)(1)(iv)(B).
[25] 77 Fed. Reg. 6194, 6252.

2. Notice of Error from Sender

The Final Rule requires providers to comply with certain error resolution requirements with respect to any oral or written notice of error from a sender that meets certain requirements (e.g., it must be received by the provider no later than 180 days after the disclosed date of availability, enable the provider to identify the transaction, and indicate why the sender believes an error exists).[26] Comment 33(b)-5 states that a notice of error provided by a sender to an agent of the provider is deemed to be received by the provider when received by the agent. However, in the context of a remittance transfer transaction that does not involve an agent, financial institutions should be permitted to require senders of remittance transfers to give notice only at the contact information disclosed by the provider (including a phone number, email address and mailing address), so long as the provider maintains reasonable procedures to refer the sender to the specific phone number or address if the sender attempts to give notice to the provider in a different manner.

Designating a phone number, email address and mailing address that a sender must use to report an error would be consistent with the provisions of Regulation E pertaining to notices of error relating to electronic fund transfers.[27] This would also be in the sender's interest as it would streamline the process for reporting errors by ensuring that they are reported through the proper channel so that the appropriate persons are notified and resources are allocated to investigate and remedy the error. We also note that providing a sender with contact information to report a remittance transfer error would be consistent with customer expectations and standard industry practice for error resolution as financial institutions typically provide their customers with contact information that they may use to contact the institution regarding issues with a product or service.

We also request that the Bureau revise Comment 31(c)(4)-2 to state that such contact information is "directly related" to the disclosures required by the Final Rule for purposes of the segregation requirements of 12 C.F.R. § 1005.31(c)(4).[28]

Accordingly, we request that (i) the Bureau permit providers, in the context of a remittance transfer transaction that does not involve an agent[29], to require senders of remittance transfers to give notice only at the telephone number or address disclosed by the provider, and (ii) the Bureau revise Comment 31(c)(4)-2 to state that such contact information is "directly related" to the disclosures required by the Final Rule.

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[26] 12 C.F.R. § 1005.33(b)(1).

[27] Comment 11(b)1-6 to Regulation E states that "[a] financial institution may require the consumer to give notice only at the telephone number or address disclosed by the institution, provided the institution maintains reasonable procedures to refer the consumer to the specified telephone number or address if the consumer attempts to give notice to the institution in a different manner."

[28] 12 C.F.R. § 1005.31(c)(4) states that "[e]xcept for disclosures provided via mobile application or text message, to the extent permitted by paragraph (a)(5) of this section, disclosures required by this subpart that are provided in writing or electronically must be segregated from everything else and must contain only information that is directly related to the disclosures required under this subpart."

[29] As discussed in Section B, we do not believe that intermediary banks or correspondent banks are agents of depository institutions for purposes of the Final Rule or otherwise.

3. Remedies

a) Returns and Rejections

Under the Final Rule, if a remittance transfer provider's failure to make funds available to a designated recipient by the disclosed date of availability occurs because the sender provided incorrect or insufficient information in connection with the transfer, the sender may choose to have the provider resend the transfer and third party fees may be imposed for the re-transmission.[30] We interpret this remedy to apply to an error that results from the failure of a remittance transfer to be received by a designated recipient because the designated recipient's bank does not offer accounts in the currency in which the funds are received and the transfer is not accompanied by instructions to convert the received funds to a currency that matches one of the recipient bank's account offerings. For example, a sender may ask his or her bank to send a remittance transfer in U.S. dollars to a designated recipient's account at a foreign bank without requesting that the transferred funds be converted into a currency that matches one of the foreign bank's account offerings. Under certain circumstances, the foreign bank will reject and send back the remittance transfer if it does not offer U.S. dollar-denominated accounts. We believe that situations in which there is a problem with the receipt currency that causes the transfer to be returned to the sending institution qualify as instances in which the sender has provided incorrect or insufficient information to the provider (and, accordingly, that third party fees may be imposed for resending the transfer).

Moreover, when a provider has acted in accordance with a sender's instructions, the provider should not be responsible for the various return processing fees that may be imposed on funds that are not accepted by the recipient's institution. The Final Rule and commentary do not discuss the treatment of fees that may be imposed on funds that are returned by the recipient's institution. However, if the funds are rejected by the recipient's institution and returned to the provider, a provider that has acted in accordance with the sender's instruction should bear no responsibility for any return processing fees that are deducted from the transfer amount during the course of the return and, similarly, should not be liable for failing to disclose any such fees to the sender on the prepayment disclosure or receipt.

In addition, a funds transfer may be rejected by the recipient's institution and returned to the provider when the designated recipient's account has been closed or the intended recipient is deceased. We believe that when the funds are returned for either of these reasons, no error has occurred.

Accordingly, we ask that the Bureau confirm (i) that situations in which a problem with the receipt currency causes the transfer to be returned to the sending institution qualify as instances in which the sender has provided incorrect or insufficient information to the provider and, accordingly, that third party fees may be imposed for resending the transfer); (ii) when a provider has acted in accordance with a sender's instructions, the provider will not be

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[30] 12 C.F.R. § 1005.33(c)(2)(ii)(A)(2).

responsible for any return processing fees that may be deducted from the returned funds or for failing to disclose such returns fees on the prepayment disclosure or receipt; and (iii) that no error has occurred when the funds are returned to the provider because the designated recipient's account has been closed or the intended recipient is deceased.

b) Risk of Repeated Non-Delivery of Funds

The Final Rule obligates remittance transfer providers to give senders certain remedies if the remittance transfer provider determines that an error occurred.[31] As noted above, one possible remedy for situations where a remittance transfer is not made available by the date of availability is that the provider make available to the designated recipient, without additional cost to the sender or to the designated recipient, the amount appropriate to resolve the error.[32] We note that this provision places financial institutions at risk for loss of the entire principal amount of a remittance transfer, including for errors that are wholly outside of the provider's control and that could not be detected by the provider regardless of the amount of due diligence the provider may undertake. Specifically, if non-delivery of the original remittance transfer occurred because the sender provided incorrect or insufficient information, the sender may choose to have the transfer resent and the provider may re-charge third party fees actually incurred (but may not have the sender provide the principal amount again).[33] Thus, the Final Rule holds remittance transfer providers liable for the principal amount of a transfer that is not received by the designated recipient when the provider has acted in accordance with a sender's precise instructions.

Given the extraordinary risk of financial loss associated with this aspect of the Final Rule, we believe that a provider should be permitted to prevent further principal losses. Specifically, if a provider determines that there is a sufficient risk that the resend of the transfer will again result in non-delivery of the funds for any reason, the provider should be permitted to, at its option and regardless of the remedy designated by the sender, provide the sender with a refund or make the amount necessary to resolve the error available to the designated recipient by check rather than by resending the transfer electronically. We note that under the Final Rule providers are permitted to send refund checks to senders that provided cash as payment for the transfer.[34]

Accordingly, we ask the Bureau to confirm that if a provider determines that there is a sufficient risk that the resend of the transfer will again result in non-delivery of the funds for any reason, the provider, at its option and regardless of the remedy designated by the sender, may

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[31] 12 C.F.R. § 1005.33(c)(2).
[32] *Id*. § 1005.33(c)(2)(ii)(A)(2).
[33] Notably, Comment 33(c)-2 states that "a request to resend is a request for a remittance transfer. Therefore, a provider must provide the disclosures required by § 1005.31 for a resend of a remittance transfer, and the provider must use the exchange rate it is using for such transfers on the date of the resend if funds were not already exchanged in the first unsuccessful remittance transfer attempt."
[34] Comment 33(c)(6) states that "if a sender initially provided cash for the remittance transfer, a provider may issue a refund by check. For example, if the sender originally provided cash as payment for the transfer, the provider may mail a check to the sender in the amount of the payment."

provide the sender with a refund or make the amount necessary to resolve the error available to the designated recipient by check rather than by resending the transfer electronically.

c) Resend Requests

If a remittance transfer provider's failure to make funds available to a designated recipient by the disclosed date of availability occurs because the sender provided incorrect or insufficient information in connection with the transfer, the sender may choose to have the provider make funds available to the designated recipient. If the sender elects this remedy, the provider may impose third party fees for resending the transfer.[35] Comment 33(c)-2 states that "a request to resend is a request for a remittance transfer. Therefore, a provider must give the disclosures required by § 1005.31 for a resend of a remittance transfer, and the provider must use the exchange rate it is using for such transfers on the date of the resend if funds were not already exchanged in the first unsuccessful remittance transfer attempt." This comment raises a number of questions.

For example, it is unclear when the sender will have *requested* the transfer for purposes of giving the prepayment disclosure if the sender designates the preferred remedy at the time sender provides the notice of error, which is permitted pursuant to Comment 33(c)-3. Specifically, if the sender is deemed to have requested the transfer when he or she provides the notice of error designating the resend, a provider would be required to provide the prepayment disclosure at that time and before the provider has investigated to determine whether the alleged error occurred and the resend of the transfer is required.[36] In addition, it is unclear whether a sender has a right of cancellation in this situation and, if so, when the 30 minute cancellation window would begin. It is also unclear whether new disclosures are required (i) when the provider retransmits the entire original amount of the transfer; (ii) when the provider retransmits the portion of the original amount that is necessary to make the intended full amount available to the recipient (so as to resolve the error); or (iii) under both circumstances.

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[35] 12 C.F.R. § 1005.33(c)(2)(ii)(A)(2).

[36] We note that, in the context of a customer's request for a resend, there are a number of logistical issues relating to compliance with the Final Rule's timing and format requirements for disclosures. For example, if a sender originally requests a transfer orally and entirely by telephone, but later notifies the provider of an error relating to that transfer in writing, it is our understanding that the provider would not be permitted to make the new prepayment disclosure to the sender orally under § 1005.31(a)(3) (because the request for a resend was made in writing and, accordingly, the transaction has not been conducted orally and entirely by telephone). Moreover, the provider would not be permitted to provide the prepayment disclosure electronically because the transfer was not requested electronically. Thus, the only option available to the provider would be to deliver the prepayment disclosure by mail; however, it is unclear whether doing so would be consistent with the requirement that the prepayment disclosure be provided when the sender requests the transfer. Similar issues arise under these circumstances with respect to the receipt requirement. The provider would not be permitted to mail the receipt pursuant to § 1005.31(e)(2) because the transaction has not been conducted entirely by telephone. Accordingly, if the provider does not have an E-Sign consent from the sender (therefore permitting it to provide the receipt electronically), the provider would have no way of making the receipt available to the sender in accordance with the requirements of the Final Rule.

Accordingly, we ask that the Bureau provide guidance on the application of the Final Rule to a sender's request for a resend, including with respect to disclosure and cancellation timing requirements. In addition, we ask that the Bureau clarify whether new disclosures are required (i) when the provider retransmits the entire original amount of the transfer; (ii) when the provider retransmits the portion of the original amount that is necessary to make the intended full amount available to the recipient (so as to resolve the error); or (iii) under both circumstances.

4. Unauthorized Wire Transfers (UCC 4A)

The Final Rule contains a provision stating that certain unauthorized transfers are not governed by the Final Rule, but are instead subject to other regulations. Specifically, 12 C.F.R. § 1005.33(f)(3) states that "[i]f an alleged error involves an unauthorized electronic fund transfer for payment in connection with a remittance transfer, §§ 1005.6 and 1005.11 apply with respect to the account-holding institution. If an alleged error involves an unauthorized use of a credit account for payment in connection with a remittance transfer, the provisions of Regulation Z, 12 CFR 1026.12(b), if applicable, and § 1026.13, apply with respect to the creditor."[37]

In the preamble to the Final Rule, the Bureau stated that "[s]ome industry commenters suggested that the reasoning the Board used in applying Regulation E §§ 1005.6 and 1005.11 in the case of an unauthorized EFT and Regulation Z §§ 1026.12(b) and 1026.13 in the case of an unauthorized use of a credit card, should be used in applying UCC Article 4A provisions to an unauthorized wire transfer." However, the Bureau declined to implement the commenters' suggestion with respect to unauthorized wire transfers. In situations where an unauthorized wire transfer occurs (i.e., there is no sender and, thus, no "remittance transfer") it is unclear why the Final Rule would govern the transfer, in effect displacing UCC Article 4A, which does not apply "to a funds transfer, any part of which is governed by the Electronic Fund Transfer Act."[38] This is especially problematic because the definition of "error" contained in the Final Rule does not include an unauthorized transfer.[39] The Bureau's position appears to be that an unauthorized international wire transfer is not governed by UCC Article 4A and at the same time is not an error under the Final Rule, which would leave the rights and obligations of the sender and the remittance transfer provider undefined.

Accordingly, we request that the Bureau confirm that UCC Article 4A, which contains well established principles regarding the rights and obligations of parties to a wire transfer, including with respect to unauthorized transfers, applies when a wire transfer that would otherwise be a remittance transfer was not authorized by the sender.

5. Fraudulent Pickup

Comment 33(a)-5 states that the failure to make funds available by the disclosed date of availability, which constitutes an error under the Final Rule, includes the fraudulent pick-up of a

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[37] 12 C.F.R. § 1005.33(f)(3).
[38] UCC 4A – 108.
[39] 12 C.F.R. § 1005.33(a)(1).

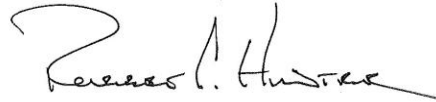
remittance transfer in a foreign country by a person other than the designated recipient. The Bureau indicated in the preamble to the Final Rule that "it is appropriate to treat these circumstances as errors because the remittance transfer provider, rather than the sender, is in the best position to ensure that a remittance transfer is picked up only by the person designated by the sender."[40] However, under most circumstances a remittance transfer provider is not in a position, nor does it have the ability, to determine that the designated recipient is the individual who actually receives the funds when another institution, often with no connection to the provider, disburses the funds.

Thus, we request that the Bureau clarify that for deposits into an account held by the designated recipient at another depository institution, the provider is deemed to have made the funds available to the designated recipient once the funds are deposited into that account, and that the provider is not responsible for any fraudulent conduct that may occur after that point.

III. Conclusion

Thank you for your consideration and review of these requests for clarification. If you have any questions or wish to discuss this letter, please do not hesitate to contact me using the contact information provided below.

Yours very truly,



Robert C. Hunter
Deputy General Counsel
(336) 769-5314
Rob.Hunter@theclearinghouse.org

[40] 77 Fed. Reg. 6194, 6250.