

From: Linda J. Rush
Proposal: 1419 (RIN 7100-AD76) - Reg E - Electronic Fund Transfer
Subject: Reg E - EFT

Comments:

June 30, 2011

Re: Docket No. R-1419 and RIN 7100-AD76,

Proposed Rule on Remittance Transfers, 76 Fed. Reg. 29902 (May 23, 2011)
From: Linda J. Rusch, Professor of Law, Co-director Commercial Law Center,
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These comments are submitted in response to the proposed rules regarding remittance transfers as set forth in 76 Fed. Reg. 29901 (May 23, 2011) and are submitted in my individual capacity and not on behalf of any other organization with which I am affiliated.

1. Concern regarding use of definitions in proposed rules regarding remittance transfers.

The proposed rule designates § 205.1 through § 205.3 in a new subpart A, and creates a new subpart B starting with proposed § 205.30. Proposed § 205.30 contains several definitions for use in the new subpart B concerning remittance transfers. However, many of the critical terms used in proposed § 205.30 are not defined in that section, such as "person", "consumer", "account" and "state". Rather these terms are defined in § 205.1. The definitions in § 205.1, however, may apply only to the rules in subpart A as that section starts with the phrase "For purposes of this part. . ." This may create an ambiguity regarding the meaning of the terms in proposed § 205.30. To avoid that ambiguity, proposed § 205.30 should make clear which definitions in § 205.1 apply to subpart B.

2. Concern about proposed definition of agent in § 205.30(a).

The definition of "agent" includes not only agents as defined under other applicable law, it also includes "authorized delegates" and a person "affiliated with" a remittance transfer provider. Each of those three terms is cabined by the clause "acts for that remittance transfer provider." Thus there are two parts to being an agent as defined. First, the person must fall within one of three categories (agent, authorized delegate, or affiliate) and second, that person must "act for" the remittance transfer provider. This second requirement may result in unintended consequences, particularly, what does it mean to "act for" the remittance transfer provider? If the person exceeds the authority that they have been granted in regard to a particular transaction, are they still "acting for" the provider? In a different context, courts have found that employees who exceed their authority by engaging in fraud are not acting for their employer, and thus the employer is not subject to liability for the employee's wrongful acts. See *Siemens Building Technologies, Inc. v. PNC Financial Services Group Inc.*, 226 Fed. Appx. 192 (3d Cir. 2007). Is this the intended result?

This phrase, "acts for", is found in both alternatives of proposed § 205.35 and

presents the same opportunity for unintended consequences there as well.

3. Concern about relationship to U.C.C. Article 4A as enacted by state legislatures.

As the proposing release notes, the amendment of the Electronic Fund Transfer Act (EFTA) to include remittance transfers presents a challenging interface with U.C.C. Article 4A, because U.C.C. § 4A-108 provides that it does not apply to a "funds transfer" any part of which is governed by the EFTA "as amended from time to time."

There may be a significant number of cases in which a remittance transfer would fall within the definition of a funds transfer under U.C.C. Article 4A but for the fact that the Congress inserted the remittance transfer provision into the EFTA. A funds transfer under U.C.C. Article 4A is generally a transfer in which a person instructs the originating bank to transfer funds to the beneficiary at the beneficiary's bank, known as a credit funds transfer. U.C.C. § 4A-104. U.C.C. Article 4A does not cover debit funds transfers.

U.C.C. Article 4A (absent the remittance transfer provision) currently covers at least the following consumer transactions, because of the way "fund transfer" is defined in the EFTA and Regulation E (Reg. E, § 205.3, § 205.1 (definitions of "consumer" and "account")):

- a fund transfer by a consumer from an asset account that is not established primarily for family, personal or household purposes.
- a fund transfer by a consumer from an asset account that is established for family, personal or household purposes as long as that fund transfer is not initiated by electronic means.
- a fund transfer by a consumer from an asset account that is established for family, personal or household purposes in which the transmission of the fund transfer process is over a commercial network, such as CHIPS or Fedwire.
- a pre-authorized fund transfer from a consumer from an asset account that is established for family, personal or household purposes in which the account holding financial institution has \$100 million or less in assets.

The remittance transfer rules proposed will remove these fund transfers from the protection of the U.C.C. Article 4A rules.

What are the consequences to a consumer sender that would have a remittance transfer fall within U.C.C. Article 4A but is now proposed to be an excluded transaction? Perhaps the most important rule in U.C.C. Article 4A that protects a consumer in these transactions is the money back guarantee in the event the funds transfer is not completed, U.C.C. § 4A-402. Other U.C.C. Article 4A rules protect senders in the event of errors in execution, U.C.C. § 4A-305, and bank non-compliance with the security procedures, U.C.C. § 4A-204.

Thus the proposal as drafted reduces protection for a significant class of consumers sending remittance transfers because it removes them from having the benefit of the rules in U.C.C. Article 4A. These consumers seem to be relegated to in between state. Their transactions would not be fund transfers for purposes of the protections of the EFTA and they would not be fund

transfers for the purpose of the rights in U.C.C. Article 4A. Rather, except for the minimal protections found in the new remittance transfer provisions, these consumers would be subject to whatever rights the financial institution decided to grant them.

In order to prevent that result, I would urge that revised Regulation E state that to the extent that a remittance transfer is not an electronic fund transfer as defined in Regulation E, § 205.3, and is a funds transfer as defined in U.C.C. Article 4A, U.C.C. § 4A-104, the provisions of U.C.C. Article 4A continue to apply, notwithstanding U.C.C. § 4A-108.

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