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July 22, 2011

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
regs.comments@federalreserve.gov

Re: Docket No. R–1419/RIN 7100–AD76—Regulation E Proposed Rule on "Remittance Transfers"

Dear Ms. Johnson:

The Credit Union National Association (CUNA) appreciates the opportunity to submit comments to the Federal Reserve Board (Board) in response to the proposed regulation to implement the "remittance transfers" provisions of Electronic Fund Transfer Act (EFTA) section 919, as added by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Specifically, these rules would place new regulatory requirements on consumer-initiated cross border electronic funds transfer other than credit or debit card transactions. By way of background, CUNA is the largest credit union advocacy organization in this country, representing approximately 90% of our nation's 7,400 state and federal credit unions, which serve 93 million members.

In addition to the comments below, CUNA also has filed an additional, joint comment letter with several other bank and credit union trade associations that contains further concerns about the proposal in greater detail.

Summary of CUNA's Views

- CUNA appreciates the agency's effort in this rule to protect immigrants who send workers' remittances internationally, typically through the use of "closed-loop networks" operated by money transfer organizations (MTOs) such as Western Union, Vigo, MoneyGram, and others.

- CUNA, however, opposes the proposed rule's application to "open networks" such as the Society for Worldwide Interbank Financial Telecommunication (SWIFT), Fedwire, and international ACH systems because these "open networks" operate through the use of unrelated correspondent institutions and clearing houses that operate beyond the control of a credit union that originates these transactions. Finalization of

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this regulation as proposed with respect to open networks will have the unintended consequence of forcing many, if not most, credit unions to cease offering international wire and international ACH products to their members because of the proposal's high compliance costs and excessive legal liabilities.

- The agency should use its authorities under Section 904(c) of the Electronic Funds Transfer Act and Section 1022(b) of the Dodd-Frank Act to exempt international wires and ACH transactions from this regulation as proposed in order to maintain consumer access to these services and prevent significant increases in the fees that consumers are charged for these services. The agency should instead issue an additional proposal setting forth a separate disclosure and error regime that is tailored to the operational realities of open networks. Credit unions should be able to base their estimates on the best information reasonably available to them and couple this estimate with a disclosure that:
    - The remittance transfer is being sent via an open network,
    - The remittance transfer is subject to fees and rates the financial institution does not control, and
    - The exact amount that the recipient will receive and the exact date on which funds will be available cannot be guaranteed.
- If the agency does not exempt the international wire and ACH systems from the proposed requirements and set forth a separate set of disclosure and error resolution rule tailored to open networks, it is imperative that the permanent exemption for disclosing the "exact amount" of money to be received be expanded to international wire transfers and ACH transfers beyond the Fedglobal ACH product.
- The agency should interpret the statutory provision regarding providing remittances "in the ordinary course of business" to:
    1) Exempt international wire and ACH transfers that are <u>not</u> traditionally understood to be "remittance" products as defined by the World Bank, the Bank for International Settlements, and industry custom; or
    2) Exempt credit unions that do relatively few international wire or ACH transfers per year, such as fewer than 2400 (or an average of

200 per month) international transfers per method of transfer (e.g., 2400 wires plus 2400 ACH) in the prior calendar year, if the agency believes that it must set a maximum number of transactions. Most CUNA-member credit unions that responded to our information requests made fewer than 2,400 international transfers per method per year. While we believe that a qualitative approach—rather than a numerical one—is more appropriate for interpreting "in the ordinary course of business," the high compliance costs of this regulation would not likely allow relatively small volume credit union international payments programs to remain economically sustainable.

- CUNA strongly supports the proposed official staff commentary that would define "remittance transfer" to exclude transfers from a consumer's U.S.-based account to an account in another country that the consumer has access to (such as if the foreign account is also in the name of the sender).

- The average value of workers' remittance transfers outbound from the United States is less than $500 and data from the World Council of Credit Unions's *IR*net program, which averages close to $500 million in worker's remittances annually, indicates that approximately 90 percent of all MTO-originated remittances (worker's remittance transfers) are less than $1,000. Establishing that transfers made via wire or ACH that are more than $1000 are excluded from these rules would help allow credit unions to continue to provide these services while also ensuring that the vast majority of worker's remittance transfers remain covered.

Background Information on "Remittances"

As background, we note that credit union consumer wire and ACH transfers are not typically "workers' remittances" as the term is commonly understood. In 2007, the World Bank and the Bank for International Settlements issued a joint report called *General Principles for Remittance Transfer Services* that defined the term "remittances" as follows:

> For the purposes of the report, remittance transfers are defined as cross-border person-to-person payments of relatively low value. In practice, the transfers are typically recurrent payments by migrant workers.[1]

[1] World Bank & Bank for International Settlements, *General Principles for Remittance Transfer Services* ¶ 7 (2007), *available at*

The Consumer Financial Protection Bureau's recent *Report on Remittance Transfers* (2011) similarly found that:

> Historically, most personal transfers have been sent by money transmitter companies that are not depository institutions . . . These money transmitters have usually focused on cash-to-cash transfers. In other words, they permit U.S. consumers to submit cash in the United States, often to a retail agent of the money transmitter. Money transmitters then distribute transferred funds to recipients in cash, usually through a disbursing agent in the destination country.

Id. at 6.

Credit union consumer wire and ACH transfers are account-to-account transfers—not cash-to-cash transfers—often for paying a child's tuition at a foreign university, making purchases, or transferring funds from a consumer's U.S.-based account to a foreign account. These transfers are not traditionally considered "remittances" notwithstanding the overly-broad definition of "remittance transfer" included in the Dodd-Frank Act and this proposed rule.

We also note that wire systems and ACH systems are operated by governmental or international entities over which credit unions have little or no control. The Fedwire and Fedglobal ACH are operated by the Federal Reserve System; and the SWIFT wire system is an international cooperative headquartered in Brussels, Belgium. Typically, a U.S. credit union will initiate an international wire transaction via Fedwire with a U.S. based correspondent bank, which then would generally transfer funds to an international correspondent bank via SWIFT, with potentially several additional correspondent institutions being needed to complete the transfer of funds to the recipient account. The originating credit union has no legal or technological means to control the routing of the transaction once the transaction has been initiated and sent to its U.S.-based correspondent, and has no way of knowing how many additional correspondent institutions will be involved in the transfer, the names or locations of those institutions, the "lifting fees" those institutions charge, the taxes charged by other countries, or know any currency conversion that will occur or a what rates.

MTOs and the World Council of Credit Unions's IRnet

In addition to the thousands of U.S. credit unions that offer international wire and ACH services to their members, approximately 50 U.S. credit unions participate in the World Council of Credit Unions's *IR*net remittance transfer service, with a volume of about $500 million in international remittance transfers per year.

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http://siteresources.worldbank.org/INTPAYMENTREMMITTANCE/Resources/New_Remittance_Report.pdf

These credit unions engage in specific outreach to immigrant communities to attract remittances business and offer these underserved communities access to the full range of financial services offered by credit unions to their members (including lending products, savings and checking products, debit cards, and so forth). *IR*net uses "closed-loop" (or "stand alone") networks like Vigo to send cash or account-based immigrant workers remittances abroad, and the *IR*net system falls within what is traditionally thought of in financial services as a "remittance transfer" provider.

In contrast to "open" networks like wires and ACH, *IR*net uses MTOs (e.g., Vigo) that control the international flow of both information and funds and contract with agents in both the U.S. and the receiving country. In a typical MTO transfer, the flow of information and funds is bifurcated, with the electronic funds transfer order being transmitted via the MTO's computer network in as little as five minutes (after which the funds are typically available to the recipient, even though the transaction's monetary settlement occurs later).

CUNA believes that most closed-loop networks, unlike "open networks" as discussed below, can comply with the proposed rule's requirements because, generally only one to two entities control and are responsible for the entire funds transfer. However, some aspects of the proposal as applied to MTO systems—such as reducing the permissible cancellation period to 30 minutes or less, revising the liability for fraudulent pick-up identity theft as discussed below, and not requiring disclosure of all applicable foreign taxes at the point of sale—should be addressed in order to maintain immigrant access to low-cost remittance transfer services, provide faster transfers for consumers, and limit credit union legal liability, as further discussed herein.

Detailed Comments

CUNA opposes the proposed rule's application to "open networks" such as the SWIFT, Fedwire, and international ACH systems because these "open networks" operate through the use of unrelated correspondent institutions and clearing houses that operate beyond the control of the credit union that originates these transactions. There is wide variation in terms of the volume of credit union international wire and ACH transactions from institution to institution. Among CUNA-member credit unions, the volume of international wire and ACH transactions range from fewer than 10 a month at some credit unions, to over 10,000 a month at other credit unions, depending on the credit union's field of membership.

Additional Outreach to Credit Unions

We urge the CFPB to engage in outreach to credit unions and other community financial institutions prior to finalizing this regulation to understand better the impact of these requirements on smaller financial institutions and the

communities they serve. We urge the agency to employ the Small Business Regulatory Enforcement Fairness Act (SBREFA) panel process for additional credit union outreach, or engage in equivalent outreach to credit unions and community banks prior to finalizing this rule in order to reduce compliance burden on these institutions and preserve consumer access to international funds transfer services.

The Agency Should Propose an Alternative Approach for Wires/ACH Under EFTA and/or Dodd-Frank

The agency should use its authorities under Section 904(c) of the Electronic Funds Transfer Act and Section 1022(b) of the Dodd-Frank Act to exempt international wires and ACH transactions from this regulation as proposed in order to maintain consumer access to these services and prevent significant increases in the fees that consumers are charged for these services.

The agency should instead issue an additional proposal setting forth a separate disclosure and error regime that is tailored to the operational realities of open networks if the agency believes that additional open network disclosure and error requirements are necessary and would be beneficial to consumers. Providers should simply base their estimates on the best information reasonably available to them and couple this estimate with a disclosure that:

- The remittance transfer is being sent via an open network,
- The remittance transfer is subject to fees and rates the financial institution does not control, and
- The exact amount that the recipient will receive and the exact date on which funds will be available cannot be guaranteed.

This alternate approach to disclosure would provide senders with useful but realistic information about their wire or ACH remittance transfer and would help enable financial institutions to continue to offer these services to consumers.

The Board has Applied the "Permanent" Exception for Transfers to Certain Nations too Narrowly

If the agency does not exempt the international wire and ACH systems from the proposed requirements and set forth a separate set of disclosure and error resolution rules tailored to open networks, it is imperative that the permanent exemption for disclosing the "exact amount" of money to be received be expanded to international wire transfers and ACH transfers beyond the Fedglobal ACH product (which the agency has proposed as the only system to enjoy a permanent exemption, notwithstanding that all open systems face the same or similar problems as Fedglobal ACH).

Under Dodd-Frank section 1073(c), the agency may grant an exception from the "exact amount" disclosures when the method by which remittances are made in a recipient country does not allow the remittance transfer provider to know the amount of currency that will be received by the designated recipient. Transfers sent as ACH or wires utilize open networks which involve the use of a network or independent, intermediary institutions in foreign countries to move funds. Such foreign institutions are not subject to U.S. law. Using an open network to send remittances is a method that does not allow a sending institution to know the precise amount of currency that will be received by the designated recipient in a foreign country and logically should fall under the "method" exception.

The proposed rule provides that only certain international ACH services offered by the Federal Reserve Banks (i.e. Fedglobal ACH) constitute a method that prevents a provider from knowing the exact amount that will be received by the recipient. However, all open network transfers are subject to the same operational realities that make upfront disclosure of the exact amount to be received (as well as the exact date of funds availability) impossible for a remittance transfer provider to know.

Transfers by a Consumer to His or Her own Account

CUNA strongly supports the proposed official staff commentary that would define "remittance transfer" to exclude transfers from a consumer's U.S.-based account to an account in another country that the consumer has access to (such as if the foreign account is also in the name of the sender). Such transfers are not generally considered "remittances" and this approach will better allow credit unions to continue to provide international wire and ACH services even if the agency does not set forth a separate approach for international wire and ACH systems.

Account-to-Account Transfers

CUNA urges the agency to treat the account number in an account-to-account transfer as the identity of the recipient. This is the general rule under current law for wire and ACH transfers, and credit unions have limited, or no, ability to determine if the account number provided is indeed in the name of the designated recipient. We are concerned that significant fraud may occur if the final rule does not reflect the reality that the account number is, for the purpose of an account-to-account transfer, the relevant recipient identity.

Prepayment Disclosure

CUNA urges that the agency exempt open network wire and ACH transfers from the final remittance transfer rule by proposing an alternative set of criteria tailored to open networks (as suggested above), or revise the rule to incorporate a good

faith element into the final rule so that if a provider discloses the fees to the best of its ability and to the extent that it is able to provide that information, it will have met the appropriate compliance standard. Information such as correspondent institutions' "lifting fees," other external fees, or taxes imposed by the nearly 200 countries to which a transaction could be directed are often unknowable for a U.S. credit union.

Additionally, CUNA requests that the Board clarify the statement that "a provider must disclose the transfer amount in the currency in which the funds will be transferred to show the calculation of the total amount of the transaction."

Specifically, it is unclear what is meant by "the currency in which funds will be transferred" and whether this requirement applies based on the currency denomination of the consumer's account or whether it applies only where the remittance transfer provider, itself, performs the currency conversion. In keeping with what we believe to be the Board's intent, we urge the agency to clarify that this means that the provider disclose the transfer amount "using the currency submitted by the sender for the transfer."

U.S. credit unions are generally not permitted by National Credit Union Administration (NCUA) rules to perform foreign currency conversions themselves; rather, they must use correspondent institutions or clearing houses to perform the currency conversion if the credit union's member wishes to send an international wire or ACH transaction in a foreign currency.[2] Many international transactions are also sent in U.S. dollars but will be converted to another currency if the receiving account is not denominated in U.S. dollars. As noted above, credit unions have no way of knowing which currency the receiving account is denominated in—especially because some accounts are not denominated in local currency or in U.S. dollars (e.g., a Euro denominated account located in Kenya) or what rate the foreign exchange transaction will receive from the institution holding the account.

In addition, requiring the ACH/wire system to provide a guaranteed exchange rate at the point of sale (fixed rate) will almost certainly result in a less-competitive exchange rate as credit unions or their intermediary banks will necessarily have to include a margin to minimize losses from rate volatility.

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[2] Federal credit unions are limited by NCUA rules from providing currency exchange services (other than those involving physical currency), and state-chartered credit unions typically face similar limitations under state law. The relevant provision for federal credit unions reads as follows:
"*Monetary instrument services.* Monetary instrument services are services that enable your members to purchase, sell, or exchange various currencies. These services may include the sale and exchange of foreign currency and U.S. commemorative coins. You may also use accounts you have in foreign financial institutions to facilitate your members' transfer and negotiation of checks denominated in foreign currency or engage in monetary transfer services for your members." 12 C.F.R. § 721.3(i).

Today, the ACH and wire systems establish the rate during the transfer itself (floating rate) which allows for credit unions to set the rate closer to the market rate.

Today, this is a key differentiator between ACH and international wire transfers, which generally use a floating rate, and MTO transfers, which generally use a fixed rate. The proposed rule would have the unintended consequence of increasing ACH and international wire costs in exchange for greater pricing certainty.

Not "in the ordinary course of business" exemption

CUNA strongly urges the agency, as outlined above, to exempt open networks such as wire and ACH systems from the scope of this rule and set forth an alternative set of disclosures and error resolution procedures tailored to the realities of open networks. If the agency, however, does not take this approach for international wire and ACH transfers, it should interpret the statutory provision regarding providing remittances "in the ordinary course of business" to:

1) Exempt international wire and ACH transfers that are <u>not</u> traditionally understood to be "remittance" products as defined by the World Bank, the Bank for International Settlements, and industry custom; or
2) Exempt credit unions that do relatively few international wire or ACH transfers per year, such as fewer than 2400 (or an average of 200 per month) international transfers per method of transfer (e.g., 2400 wires plus 2400 ACH) in the prior calendar year, if the agency believes that it must set a maximum number of transactions. Most CUNA-member credit unions that responded to our information requests made fewer than 2,400 international transfers per method per year. While we believe that a qualitative approach—rather than a numerical one—is more appropriate for interpreting "in the ordinary course of business," the high compliance costs of this regulation would not likely allow relatively small volume credit union international payments programs to remain economically sustainable.

Dollar Threshold Exemption

If the agency does not set forth a separate approach international wire and ACH systems in order to maintain consumer access to these services, the agency should establish an upper dollar limit for the rule's application in order to permit continued consumer access to these systems for higher dollar amounts.

The average value of workers remittance transfers outbound from the United States is less than $500. Excluding transfers made via wire or ACH that are more than $1000 from these rules would help credit unions continue to provide these services to consumers for amounts in excess of $1000 because this dollar threshold limitation would significantly reduce the legal liabilities and compliance burdens of the regulation.

Error Resolution

The proposed rule's error resolution provisions do not reflect the operational realities of remittance transfers sent through an open network ACH or wire transfer system. CUNA believes that a credit union should not be liable in circumstances in which funds are delivered late or deposited into the wrong account that result from the fault of another institution involved in the transaction.

We note that many credit unions offer remittance transfer services simply as an accommodation to their members and that requiring credit unions, and in particular smaller institutions, to absorb all costs associated with resending a transfer is likely to lead many to discontinue offering remittance transfer services.

CUNA recognizes that Section 1073 contains statutory language requiring a provider to make certain remedies available to a sender at no additional cost—notwithstanding that a credit union investigating a wire system "exception" typically must pay a foreign bank between $50 and $150 to investigate the possible error—but the proposal would inexplicably extend this concept to apply to an exception where a originating credit union had not committed an error.

This would result in significant expenses to credit unions, and accordingly would result in higher risk-based pricing for all covered transactions. We recommend that the final rule state that a remittances transfer provider may rely on the information provided by a sender (including the recipient's name and account number), and that there would be no error if funds are delivered to the account designated by the sender.

In addition, credit unions are very concerned about the operation of the statute's 90 day period for resolving an "error," which can include if an international wire or ACH transaction does not arrive by the "promised delivery time." Credit unions typically tell members that their international wire transaction will be completed within a few business days. Non-timely delivery can occur, however, if an international correspondent bank fails to complete the transfer for any reason. This happens most often with international transfers to countries about which bank regulators have money laundering or security concerns.

Often the credit union does not know the identity of the correspondent institution holding up the transferred funds because that institution would have been

engaged to complete the transaction by the credit union's U.S. correspondent bank or another correspondent institution further along the "chain" of institutions facilitating the transfer. As noted above, an investigation requiring a $50-$150 fee is often required to determine which institution is holding the funds, and resolving these errors can sometimes take months.

One CUNA-member credit union with significant international wire and ACH activities—which it provides to serve its members—reported that its rate of international wire "exceptions" (including non-timely delivery) averaged less than 1 percent. Of those exceptions, however, more than 15 percent took longer than 90 days to resolve, meaning that the credit union could be required to reimburse over $2 million dollars a year for "errors" notwithstanding that a foreign correspondent bank, not the credit union, would be in possession of the funds sent by the consumer. It is rare that funds are returned to the credit union as the resolution of an investigation. These new liabilities could require the credit union to as much as double the fees it charges for international wires, which now range between $20 to $35 per transaction, in order for the program to remain economically sustainable.

Consumers would not be benefitted by such a high increase in costs, and many credit unions would likely choose to cease offering international wire and ACH services as an accommodation to their members because the compliance costs and potential legal liabilities of the proposed error rules could not be economically justified. We therefore strongly urge the agency to set forth a separate disclosure and error regime that is tailored to the operational realities of open networks, as discussed above.

Fraudulent Pick-Ups Outside the U.S.

The Board proposes that a consumer should be entitled to refund from the originating credit union if the recipient is the victim of a fraudulent pick-up—i.e. a type of identify fraud—occurring in a foreign country, such as in the context of cash transfers that are processed by MTOs as pick-up upon proper identification transactions (as opposed to transfers to a deposit account). Crimes such as fraudulent pick-up identity fraud that occur entirely outside this country are legally within the jurisdiction of the country where the funds are received and not within the United States' jurisdiction absent special circumstances (such as a wire or ACH transaction outbound from a U.S. institution that was not authorized by the account holder). We ask the agency to either take an approach to foreign crime that is more consistent with international law or, alternatively, clarify that this provision does not apply in the context of account-to-account transfers unless the account holder at the sending institution did not authorize the transfer.

Cancellation

The agency has proposed that consumer sending international transactions should have up to one business day to cancel an international "remittance transfer." Because credit unions have no control over an international wire or ACH transaction after it is transmitted to a correspondent institution, the only way to effectively comply with this one day cancellation requirement would be to not initiate the transfer until the cancellation right expires (i.e. after one business day).

Consumers generally want funds to be transferred quickly (in some cases not leaving the credit union branch until the transaction is sent off) and will not benefit if all international transactions are delayed for one business day. We ask the agency to revise this requirement to provide no more than a 30 minute cancellation period, and to provide for consumers to have the right to opt-out of this cancellation provision in a manner consistent with the EFTA's statutory requirements.

Article 4A of the Uniform Commercial Code ("UCC")

UCC Article 4A contains well established rules allocating risk among parties to a wire transfer. In order to send funds transfers using open wire networks, financial institutions must be able to rely on these well-established principles. These rules have significantly influenced credit union and banking industry standards and practices relating to wire transfers and other funds transfers that are not governed by the EFTA. Without these rules in place, financial institutions that send wire transfers will face significant legal uncertainty as to their rights and responsibilities in relation to other parties involved in a wire transfer.

The Board noted that "Congress amended the EFTA's preemption provision to specifically include a reference to state gift card laws when it enacted new EFTA protections for gift cards as part of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act)" and that, in contrast, "Congress did not amend the EFTA's preemption provision with respect to state laws relating to remittance transfers, including those that are not electronic fund transfers, when it enacted the Dodd-Frank Act."

However, Congress did address the issue of preemption of state laws in the context of the application of Title X of the Act (which includes section 1073). Specifically, Section 1041of the Dodd-Frank Act provides that Title X of the Act is not to be construed to preempt or otherwise displace existing state laws. In other words, the pre-emption provision of the EFTA may be construed as modified, limited, or superseded by Section 1041 and/or Section 1073 of the Dodd-Frank Act. We urge the agency to revise the rule's treatment of UCC Article 4A so that international wire transfers remain subject to the UCC.

Compliance Burden Estimate

The Board's Paperwork Reduction Act analysis concludes that the rule will impose approximately a one-time burden of 200 hours (5 business weeks) and 130 hours annually, and providers that are small entities will incur implementation costs to comply with the rule. We believe that these estimates significantly underestimate the true regulatory burden of these rules.

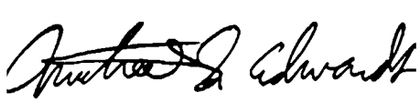
CUNA-member credit unions have indicated that compliance with this rule may take as much as 1000 employee-hours or more with respect to the one-time burden compliance burden alone. Credit unions also believe that the estimate of 1.5 hours a month to address reported "errors" underestimates the true regulatory burden of these requirements, at least in the context of wire and ACH transactions, by at least a factor of 10.

In addition, CUNA does not agree with the Board's Regulatory Flexibility Act analysis that "the Board does not believe that small financial institutions are likely to be significantly impacted by the rule" because, even though the Board admits that "some financial institutions may decide to stop offering international wire transfers to consumer customers" as a result of the rule, it claims that "unless these international wire transfers constitute a high volume of a financial institution's remittance transfer business, or business in general, such a decision is unlikely to have a significant economic impact on the institution."[3]

Credit union members expect their credit union, as a full-service financial institution, to offer services such as international wire transfers. The Board's conclusion that this proposal is not burdensome on smaller institutions because it believes that smaller institutions will be forced to cease offering these services is illogical and inconsistent with the Regulatory Flexibility Act's congressional intent. We ask the agency to conduct a new, more thorough analysis of the proposal's impact on smaller institutions, including proposing less burdensome alternatives.

Thank you for the opportunity to comment on the Board's proposed regulation to implement the EFTA's "remittance transfer" requirements that were added by the Dodd-Frank Act. If you have questions about our comments, please feel free to contact CUNA SVP and Deputy General Counsel Mary Dunn, CUNA Regulatory Counsel Dennis Tsang at (202) 508-6733, or me at (202) 508-6705.

Sincerely,



Michael S. Edwards
CUNA Senior Assistant General Counsel

[3] Electronic Fund Transfers, 76 Fed. Reg. 29905, 29937 (proposed May 23, 2011).