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MID-SIZE BANK COALITION OF AMERICA

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: *Electronic Fund Transfers*
76 Federal Register 29902 (May 23, 2011)

Dear Ms. Johnson:

On behalf of the Midsize Bank Coalition of America ("MBCA"), I am writing to comment on the above-referenced proposal by the Board of Governors of the Federal Reserve System ("Board") to amend Regulation E and its official staff commentary relating to remittance transfers.[1]

The MBCA is a non-partisan financial and economic policy organization of 24 mid-size banks doing business in the United States. Founded in 2010, the MBCA was formed for the purpose of providing the perspectives of mid-size banks on financial regulatory reform. As a group, the MBCA banks do business through more than 3,350 branches in 41 states, Washington D.C. and three U.S. territories. The MBCA's members' combined assets exceed $343 billion (ranging in size from $7 to $25 billion). Together, our members employ approximately 60,000 people. Member institutions hold nearly $258 billion in deposits and total loans of more than $205 billion.

MBCA has also joined in a comment letter on the proposed new rules submitted by the Clearing House Association, LLC, and other associations ("Clearing House Letter"). That comment letter contains an excellent description of the proposal and the difficulties that our members would face if it were adopted. We write separately in order to emphasize our overarching

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[1] While the rules are proposed by the Board, authority to adopt final rules will transfer to the Consumer Financial Protection Bureau ("CFPB") on July 21, 2011.

concerns with the proposed rules and to provide background as to how it would affect the services we provide to our customers.

The proposal, which reflects careful thought and hard work by the staff, stems from amendments to the Electronic Fund Transfer Act ("EFTA") by Section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("DFA").[2] In brief, it would establish new rules for "remittance transfers." Under the proposed rules, a remittance transfer would be any electronic transfer of funds from a "consumer" (*i.e.*, a natural person) in the United States to persons or entities in other countries, including payments for business purposes.

The proposed new rules would apply to any person providing remittance transfer services, including banks as well as money transmitters. They would apply to all forms of electronic transfers, including transfers by electronic book entry, consumer wire transfers, online bill payments to foreign merchants, international ACH transactions, and the addition of funds to prepaid cards that are or have been sent to a recipient where the sender does not retain the ability to withdraw such funds.[3] For these transactions, the proposal would establish new disclosure requirements and procedures for resolution of claimed errors. It would also impose liability on transfer providers for acts or omissions of third parties.

Scope of the Proposed New Rules.

At the outset, however, we note that remittance transfer providers generally perform their services in two very different ways, but that the proposed rules seem to contemplate that there is only one. In "closed loop" or "closed network" models, a single firm receives, transmits and disburses funds. Thus, a chain store, or a firm that specializes in remittance transfers, may offer individuals a way to transfer money through its own branch network. The proposed rules seem to be premised on this business model.

The members of MBCA, however, do not have local branches or affiliates in other countries. Thus, in order to provide remittance transfers to our customers, our members must rely on "open loop" or "open network" systems. In these systems, when our customers request a remittance transfer, we employ the services of a third party, such as a large international bank. That large international bank, in turn, may employ a third institution with which the international bank has a relationship. Depending on the destination of the funds,

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[2] *See* DFA § 1073 (amending EFTA §919).

[3] However, the new rules would not apply to transfers of $15 or less, purchases from a merchant in another country with a credit or debit card, the deposit of funds into a depositor's checking or savings account that can also be withdrawn by an authorized user in a foreign country, or online bill payments made through the website of a foreign merchant located in a foreign country.

it may even be necessary to employ other entities in the chain. Funds are then transferred by ACH or by wire. However, it is important to note that the MBCA bank only has a relationship with the large international bank in our example.

As discussed in the Clearing House Letter, Section 1073 of the Dodd-Frank Act was meant to protect individuals such as immigrants who send substantial portions of their income to family overseas. Such persons most commonly use closed network service providers. The proposed rules appear to be drafted for customer protection in this context. However, the proposal goes too far in that it would apply the same rules to open network service providers. Mid-size banks operating in open networks will not be able to comply with the proposed new disclosure, vicarious liability and other standards, and therefore may have to cease providing remittance services to their customers.

We submit that the proposed standards should be tailored to apply to transactions that are not effected via open network wire and ACH transfers. This could be accomplished by adopting guidance in the form of an interpretation of the definition of a "Remittance Transfer Provider." In addition, the rules should be tailored to apply to the types of transfers with which Congress was concerned: smaller remittances from one natural person to another. This could be accomplished by providing that the new rules would apply to transfers of $1,000 or less where the recipient of the funds is also a natural person.[4]

This overall approach would have two benefits. First, it would allow small and medium-sized banks to continue to provide remittances on an uninterrupted basis for their regular customers. Second, it would allow small and medium-sized banks to continue to rely on established practices under Uniform Commercial Code Article 4A or other applicable state laws, which set rules governing the allocation of risk between senders and bank providers of fund transfers, except with respect to those transactions where Congress intended new measures to be adopted.[5]

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[4] As noted further below, the proposed rules would cause many open network providers to limit or cease providing remittance services. If the final rules applied to transfers to business entities, their adoption would therefore result in a disruption of payments to businesses around the world.

[5] *See* Comments of Professor Linda Rush, Gonzaga University School of Law (Jun. 30, 2011) (*available at* http://www.federalreserve.gov/SECRS/2011/July/20110701/R-1419/R-1419_063011_81650_563758451868_1.pdf); Letter from Robert Hunter, Deputy General Counsel, the Clearing House Association, LLC to Ky Tran-Trong, Counsel, Board (Apr. 8, 2011) (*available at* http://www.theclearinghouse.org/index.html?f=071993).

Disclosures.

Under the proposed rules, before payment, a remittance transfer provider would have to provide the sender with a disclosure that describes (i) the amount to be transferred to the designated recipient in the currency to be transferred; (ii) any fees and taxes imposed by the provider of the remittance service in the currency to be transferred; (iii) the total amount of the transaction (the sum of (i) and (ii)); (iv) the exchange rate rounded to the nearest $1/100^{th}$ of a decimal point; (v) fees and taxes imposed by anyone other than the remittance service provider in the currency in which the funds will be received; (vi) if such fees or taxes are imposed by persons other than the provider of the remittance service, the amount of the transfer in the currency to be received and (vii) the amount that will be received by the recipient in the currency to be received.

The remittance transfer provider would also have to provide the sender with a receipt showing the information above, plus (i) the date the funds will be available to the recipient, (ii) the name, and if provided, the telephone number or address of the intended recipient, (iii) a statement about the sender's error resolution and cancellation rights, (iv) the name, telephone number and website of the remittance transfer provider, and (v) contact information for the transfer provider's primary state regulator and the CFPB, as well as a toll-free number and website for the CFPB.

These disclosures must be in writing, but may be electronic if the request was conveyed electronically. Pre-transaction disclosures may also be oral if the transaction is conducted entirely by telephone. The pre-transaction disclosures and receipt may be combined into one document if they are given before payment. Disclosures must be in English and (i) each other language that is used principally at the applicable office of the transfer provider, or (ii) in the language that the sender used with the transfer provider.

Until July 20, 2015, a depository institution will be allowed to provide a "reasonably accurate estimate of the foreign currency to be received," if it cannot determine the exact amount for reasons beyond its control, and the transfer is conducted through an account that the sender holds with the institution. In addition, estimates would be permitted if a remittance transfer provider cannot determine exact amounts because, as determined by the Board, local law or transaction methods in the receiving country do not permit.

Unfortunately, we do not believe that MBCA members, operating in open networks, will be able to meet the disclosure standards. In these systems, the bank that receives a customer request to transfer funds does not have information about fees that may be charged by entities other than the one with whom it has an immediate relationship. Nor do they have information as to the calculation of taxes that may be imposed in recipient countries, and which may change without notice. Even in cases where the sending bank has a relationship with the disbursing bank, it is not always possible to know what fees the disbursing bank charges to a recipient that is also its customer. Finally, exchange rates can change multiple times per day, and may change in the time between a sender's instruction and the receipt of funds by the receiving agent. Therefore, our members would not be able to provide accurate statements as to the amount to be received by the recipient.[6] Accordingly, it is critical that final rules be limited in their scope, as described above.[7]

Resolving Disputes and Claims of Errors.

Under the proposal, senders generally would have to notify remittance transfer providers of any errors within 180 days of the promised delivery date. A notice will require a transfer provider to conduct an investigation within 90 days and report the results to the sender with a written explanation within three days of completion. If the provider determines that an error occurred, it would have to offer a refund of the amount not properly transmitted "or the amount appropriate to resolve the error," or to make available to the designated recipient the amount appropriate to resolve the error. If the provider determines that no error occurred, it would have to notify the sender that the sender has the right to request the documents upon which the provider relied.

We believe that these procedures are generally clear and workable. However, we believe that a 180 day period for a consumer to notify a provider is not appropriate. In the half-year that elapses after a transfer, memories fade, records accumulate, and staff come and go. A more appropriate test would be 30 days, which is more than enough time for a consumer to deduce whether funds were received or not.

Moreover, the proposed rules and commentary do not define or provide guidance as to what would constitute an "amount appropriate to resolve the error." We believe that regulatory guidance should be provided so that financial institutions may anticipate potential liabilities and design appropriate safeguards

[6] Similarly, our members will not always be able to provide accurate dates when funds would be made available in the recipient's country. They would probably revert to the latest date possible. In contrast, providers of closed system services should be able to provide this disclosure (as well as others), due to their unitary structure. Thus, the proposed rules create an advantage for closed network providers, who would be able to take business from open network providers that elect to avoid providing remittance services due to compliance costs and uncertainty.

[7] Final rules could also provide that good faith, reasonable estimates, as suggested by the Clearing House Letter, would be deemed to meet applicable compliance standards via interpretation. The proposed rules would only allow estimates on a temporary basis, and permanently in cases where local law or methods in the receiving country make determination of exact amounts impossible. The Board's proposed interpretation of the permanent exception for "local methods" as only applying to a specific type of ACH transfers is not realistic and simply not reflected in the statute.

in such cases. For example, we do not believe the term should be read to include any types of consequential damages. Nor should a provider be held liable for any intervening changes in exchange rates. Such measures would be unpredictable from customer to customer and from transaction to transaction. Rather, amounts appropriate to resolve errors should be deemed to be the specific amounts of transferred funds that should have been received, or the amounts of fees and expenses that would have been due if the remittance had been effected without error.

Finally, we agree with the comments expressed in the Clearing House Letter that "errors" should not be attributed to a providing depository institution when it correctly executed a transfer based on the sender's instructions. The final rules should make clear that a financial institution should not be held liable for the acts or omissions of independent third party providers in an open network setting.

Liability for Conduct of Third Parties.

The EFTA provides for liability to private plaintiffs and criminal sanctions for violations.[8] As amended by Section 1073 of DFA, Section 919 of the EFTA requires the Board to adopt standards or conditions of liability for remittance transfer providers for the acts of their agents or authorized delegates. In this regard, the Board has proposed two alternative standards. The first would make transfer providers liable for any violation of the proposed rules by an agent when the agent acts for the provider. The second would make the provider liable for any violation of the proposed rules by an agent unless the provider established and maintained written policies and procedures designed to assure compliance by its agents (including appropriate oversight practices) and it appropriately corrected violations, including by following the above error resolution procedures.

Our members do not have local branches or affiliates in other countries. Thus, our members rely on independent, third-party service providers to disburse funds to intended recipients in foreign countries. We do not even have contractual relationships with these entities. Especially in the developing world, the reliability of local communications networks, infrastructure and payment practices are highly varied. For these reasons, we request that the final rules make clear that intermediary and correspondent institutions are not agents or authorized delegates of depository institutions operating in open network remittance systems. Otherwise, we believe that our members would not be able to justify the costs of continuing to provide remittance services for their customers, and some may choose not to do so.

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[8] EFTA §§ 916, 917.

As to other relationships, we believe the Board should adopt the second alternative standard for third party liability. Under that standard, remittance transfer providers would adopt and implement written policies and procedures designed to assure compliance by its agents. We believe that this is a workable approach with which banks are familiar.

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As noted above, the concerns expressed in this letter are in addition to those conveyed in the Clearing House Letter. We believe that the "one-size fits all" approach taken by the proposed rules unduly advantages closed network remittance service providers, and disadvantages small and mid-size banks that offer remittance services through open networks. As proposed, the new regulations would cause our members to restrict or cease these services, leaving consumers with fewer options.

We appreciate this opportunity to provide you with our comments and look forward to discussing these matters with you in the future.

Yours Truly,

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Chairman, Midsize Bank Coalition of America
Chairman and CEO, City National Bank

cc: Professor Elizabeth Warren
Special Advisor to the Secretary of the Treasury, CFPB
Ms. Dana Miller, Senior Attorney
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Mr. Jack Barnes, CEO, People's United Bank
Mr. William Cooper, CEO, TCF Financial Corp.
Mr. Raymond Davis, CEO, Umpqua Bank
Mr. Dick Evans, CEO, Frost National Bank
Mr. Philip Flynn, CEO, Associated Bank
Mr. Paul Greig, CEO, FirstMerit Corp.
Mr. Richard Hickson, CEO, Trustmark Corp.

Mr. Peter Ho, CEO, Bank of Hawaii
Mr. John Hope, CEO, Whitney Holding Corp.
Mr. Don Horner, CEO, First Hawaii Bank
Mr. Robert Jones, CEO, Old National
Mr. Bryan Jordan, CEO, First Horizon National Corp.
Mr. David Kemper, CEO, Commerce Bancshares, Inc.
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Mr. Gerald Lipkin, CEO, Valley National Bank
Mr. Dominic Ng, CEO, East West Bank
Mr. Joseph Otting, CEO, One West Bank
Mr. Steven Raney, CEO, Raymond James Bank
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