Comments
to the
Consumer Financial Protection Bureau
12 CFR Part 1005
Docket No. CFPB-2019-0058
RIN 3170-AA96

Proposed Rules on Remittance Transfers Under the Electronic Fund Transfer Act (Regulation E)[1]

by the
National Consumer Law Center
on behalf of its low-income clients
Public Citizen
UnidosUS

January 21, 2020

I. Introduction.

The **National Consumer Law Center** ("NCLC"),[2] on behalf of its low-income clients, **Public Citizen, Inc.**,[3] and **UnidosUS**[4] submit the following comments regarding the Consumer Financial

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[1] 84 Fed. Reg. 67,132, (Dec. 6, 2019). https://www.govinfo.gov/content/pkg/FR-2019-12-06/pdf/2019-25944.pdf.

[2] The **National Consumer Law Center** (www.nclc.org) is a nonprofit legal services organization that uses its expertise in consumer law and policy affecting low-income individuals to advocate before Congress, before federal and state agencies, and in the courts. NCLC publishes twenty practice treatises, updated annually, which describe the law currently applicable to all types of consumer transactions. NCLC has long been advocating before Congress and the CFPB regarding the importance of strong protections for international remittances.

[3] **Public Citizen, Inc.**, is a consumer-advocacy organization founded in 1971, with members in all 50 states. Public Citizen advocates before Congress, administrative agencies, and the courts for the enactment and enforcement of laws protecting consumers, workers, and the general public. Of particular relevance here, Public Citizen advocates for strong consumer-protection laws to bring fairness to consumer finance and accountability to the financial sector. Public Citizen actively supported establishment of the CFPB to serve as the first federal agency devoted to protecting the financial interests of consumers.

[4] Since 1968, **UnidosUS** has been committed to building a stronger America by creating opportunities for Latinos. In this rich 50-year history, UnidosUS has remained a trusted, nonpartisan voice for Latinos, serving the community through research, policy analysis, and state and national advocacy. We also work closely with a network of nearly 300 community-based organizations in 37 states, the District of Columbia, and Puerto Rico, to serve our community in a variety of areas including housing, workforce development, health care, immigration, and education. Many of our community partners provide direct services to immigrant and nonimmigrant groups in the United States, serving over nine million people annually. The terms "Hispanic" and "Latino" are used interchangeably by the U.S. Census Bureau and throughout this document to refer to persons of Mexican, Puerto Rican, Cuban, Central and South American, Dominican, Spanish, and other Hispanic descent; they may be of any race.

Protection Bureau's (CFPB) recent proposed changes to the regulations governing international remittances from the United States to foreign countries (Remittance Rule).[5]

We appreciate the opportunity to comment on the proposed changes. However, we strongly urge the CFPB *not* to proceed with them. Not one of the proposed changes to the Remittance Rule will assist consumers; instead they all undermine the integrity of the statutory protections intended by Congress to protect senders of remittances.

In this rulemaking, without legal authority or justification, the CFPB proposes to gut the statutory protections in potentially disastrous ways:

- One, by entirely exempting providers that make fewer than 500 remittance transfers a year from the statute.[6]

- Two, by permitting financial institutions that make fewer than 1,000 remittance transfers a year to a particular country to estimate the exchange rate, and thus the exact amount to be received by the recipient, in certain circumstances.[7]

- Three, by permitting financial institutions that make fewer than 500 remittance transfers a year to a particular recipient *institution* in a foreign country to estimate covered third party fees, in certain circumstances.[8]

These proposals lack factual foundation, are outside the scope of exemptions and exceptions that the CFPB has authority to make, and would cause significant harm to consumers who send international remittances, including both those who use financial institutions and those who use other providers.

The Remittance Rule implements 2010 amendments to the Electronic Fund Transfer Act (EFTA) that provide important protections for individuals who send money abroad. Many remittance senders are immigrants sending money to family members or others in their countries of origin. It is well known that immigrants and members of communities of color are more likely to be taken advantage of and less likely to feel empowered to assert their legal rights than other members of our society.[9] As a result, many immigrants are more vulnerable to both the inaccuracies and the deliberate malfeasance of those with whom they do business. Congress passed the statute[10] requiring

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[5] Reg. E, 12 C.F.R. § 1005.30-36.

[6] Proposed 12 C.F.R. § 1005.30(f)(2).

[7] Proposed 12 C.F.R. § 1005.32(b)(4)(c).

[8] Proposed 12 C.F.R. § 1005.32(b)(5)(c).

[9] *See generally,* Ruben J. Garcia*, Marginal Workers: How Legal Fault Lines Divide Workers and Leave Them Without Protection*, NYU Press, Sept. 13, 2013; UnidosUs, *7 Ways Immigrants Enrich Our Economy and Society,* http://www.nclr.org/issues/immigration/resources/facts?gclid=CO3l4OHyg9QCFV6Bswod3KQOoQ.

[10] 15 U.S.C. § 1693*o*-1; Pub. L. 111–203, title X, §§ 1073(a)(4), 1084(1), July 21, 2010, 124 Stat. 2060, 2081 (July 21, 2010).

consumer protections for remittances in a deliberate attempt to provide more protections to all remittance senders, specifically including immigrants.

Yet, over the objections of advocates representing these immigrants and other remittance senders, the CFPB has already improperly allowed a significant exception to the mandates in the statute by allowing all remittance providers to ignore what are called "non-covered third-party fees."[11] Because a primary purpose of the statute is to provide consumers with a promised amount that would be received from the remittance, and to require the providers to know the charges imposed upon recipients in order to do this, this exception has significantly undermined the protections of the law.

Now, the CFPB's current proposals, as discussed below, would water down the statutory protections even further.

II. The Remittance Requirements and Their Importance

A. Background

The most critical components of any protections related to remittances regard the prices charged and whether the promises made regarding those prices and the dates of delivery are actually kept. The EFTA remittance provisions require price disclosures and deliberately make those disclosures into enforceable promises. The CFPB's Rule undermines the power of these promises whenever it allows the remittance provider to provide an estimate rather than a promise.

There is a lot at stake in this Rule. As the CFPB knows, tens of billions of U.S. dollars are sent every year by millions of Americans to relatives or others abroad, and those figures may be increasing.[12] In a recently released study, Financial Health Network estimated that U.S. consumers spent $3.7 billion on sending remittances in 2018 and predicted that both volume and total spending on remittances would continue increasing, despite some price declines.[13]

Many remittances are sent by Latino and other immigrants in the United States to Latin America and other regions.[14] Data from the World Bank, whose definition of "remittance" focuses on nonresident migrants sending money home, shows that remittances to low- and middle-income countries reached a record high in 2018; remittance flows into Latin America and the Caribbean

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[11] Reg. E, 12 C.F.R. § 1005.31(b)(1)(vii).

[12] *See* CFPB, *Remittance Rule Assessment Report* 31, 59, 61-64 (as revised April 2019), https://www.consumerfinance.gov/data-research/research-reports/remittance-rule-assessment-report/ ("Assessment Report").

[13] *See* Financial Health Network, *Financially Underserved Market Size Study* 9, 18 (2019), https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2019/12/20160608/Market-Size-Report.pdf. The estimates draw on World Bank and FDIC data that the CFPB has early concluded are appropriate to approximate the U.S. remittances market, even though the definitions of "remittance" may vary, source to source. *See* Assessment Report at 31 & n.66, 64, 87.

[14] *See, e.g.*, Nurith Aizenman, *Mexicans in the U.S. Are Sending Home More Money Than Ever,* February 10, 2017, http://www.npr.org/sections/goatsandsoda/2017/02/10/514172676/mexicans-in-the-u-s-are-sending-home-more-money-than-ever; Assessment Report at 33, 60.

alone grew 10%, for a total of $88 billion in 2018.[15] Mexico continued to receive the most remittances in the region, posting about $36 billion in 2018, up 11% over the previous year.[16] Remittances to Guatemala went up 13%.[17] Remittances to the Dominican Republic and Honduras both went up 10%, respectively.[18] Many of these flows of funds reflect significant outbound remittances from the United States, which can indicate a strong economy and an industrious Latino workforce. In that same year, the top remittance recipients were India ($79 billion), followed by China ($67 billion), Mexico ($36 billion), the Philippines ($34 billion), and Egypt ($29 billion).[19]

Remittance senders include others as well.[20] For example, Latino communities demonstrate that the proposed changes to remittance regulations would impact U.S. citizens, as well as immigrants. As of 2018, the total population of Latinos over the age of 18 exceeded 41 million, of whom more than half were born in the U.S. (54.4%).[21] An additional 18.2% of adult Latinos in the U.S. are naturalized, meaning 72.5% of Latino adults are U.S. citizens.[22] This does not include the roughly 300,000 Latinos who pursue naturalization in the U.S. per year, on average.[23] Even though most Latinos in the U.S. are citizens, many carry important ties to loved ones overseas. In fact, remittance-sending is common among Latinos in the U.S., including those who have recently arrived, those who have been in the U.S. for years, and those who are U.S.-born.[24] Failure to protect consumers who send remittances directly harms Latinos—a group that collectively earns more than $1 trillion per year and holds over $780 billion in spending power—and in turn, may harm the U.S. economy.[25]

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15 World Bank, *Record High Remittances Sent Globally in 2018* (Apr. 8, 2019), https://www.worldbank.org/en/news/press-release/2019/04/08/record-high-remittances-sent-globally-in-2018; *see generally* World Bank, *Migration and Remittances Factbook 2016, Third Edition* xi-xii (2016), https://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1199807908806/4549025-1450455807487/Factbookpart1.pdf.

16 World Bank, *Record High Remittances Sent Globally in 2018*.

17 *Id.*

18 *Id.*

19 *Id.*

20 *See* Assessment Report at 32-33.

21 UnidosUS calculations using U.S. Census Bureau, "2018 American Community Survey 1-Year Estimates, Table B05003I" American Community Survey, data.census.gov (accessed October 21, 2019).

22 *Id.*

23 Office of Immigration Statistics, "Yearbook of Immigration Statistics 2017, Table 21," U.S. Department of Homeland Security, September 12, 2019, https://www.dhs.gov/immigration-statistics/yearbook/2017 (accessed December 4, 2019).

24 Gerver Torres, Brett Pelham and Steve Crabtree. 2009. "Half of New Latino Immigrants to U.S. Send Money Abroad." Gallup, https://news.gallup.com/poll/123140/half-new-latino-immigrants-send-money-abroad.aspx.

25 New American Economy and UnidosUS, "The Power of the Purse: How Hispanics Contribute to the U.S. Economy," (New York, NY: forthcoming), https://research.newamericaneconomy.org/report/hispanic-americans-2019/ (accessed January 8, 2019).

Before the passage of the EFTA remittance provisions, the price of a remittance was not always clear. Prices for remittance transfers include fees, government taxes, and exchange rates. Fees can include fees paid to the provider that collects the money from the sender, as well as fees paid to the agent that disburses the money to the recipient.[26] Exchange rates, as well as the total prices of transfers, can vary among providers.[27] In the past there have been disputes because companies did not disclose that they apply unfavorable exchange rates.[28]

Disputes may also arise when remittance payment instruments are lost or stolen, or the information is relayed incorrectly so that the transfer is in the wrong amount, not made at all, made to the wrong person, or delayed.[29] Delay may result in the payee losing interest or the check amount losing value if the foreign currency depreciates.[30] In addition, consumers may have difficulty obtaining refunds.[31]

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26 *See generally* 77 Fed. Reg. 6194, 6196 (Feb. 7, 2012).

27 *See* 77 Fed. Reg. at 6196, 6199 (Feb. 7, 2012). A few examples of price variances are listed below. These are drawn from the World Bank's fourth-quarter 2019 remittance price-tracking data. *See* World Bank, *Remittances Prices Worldwide*, https://remittanceprices.worldbank.org/en.

- U.S. to Ghana, $200 transfer: Exchange rate margin ranges from 0 to 10.04; total price ranges from 0.16 to 12.54% of the principal.

- U.S. to Guatemala, $200 transfer: Exchange rate margin ranges from 0.37 to 4.24; total price ranges from 3.25 to 7.74% of the principal.

- U.S. to Mexico, $200 transfer: Exchange rate margin ranges from below 0 to 3.62; total price ranges from below 0 to 7.07 % of the principal.

- U.S. to Philippines, $200 transfer: Exchange rate margin ranges from below 0 to 6.68; total price ranges from below 0 to 9.18 of the principal.

28 *See* Appleseed Foundation., *Creating A Fair Playing Field For Consumers: The Need For Transparency in the U.S.-Mexico Remittance Market* (2005), https://www.texasappleseed.org/sites/default/files/115-FinancialServices-US-MexicoRemittanceMarketStudySummary.pdf (study found a lack of marketplace transparency, a lack of consistent access to correct pricing information, and a lack of consistent regulation or standardized pricing disclosure practices); U.S. Gov't Accountability Office, No. GAO-06-204, *International Remittances, Information on Products, Costs, & Consumer Disclosures* (Nov. 2005).

29 *See, e.g.*, McDermott v. W. Union Tel. Co., 746 F. Supp. 1016 (E.D. Cal. 1990) (consumer purchases money order in United States; payee in Philippines is able to cash it only for pesos, not dollars; money order to pay funeral expenses delayed over three weeks). *See also* Consumers Int'l, *India: Migrants Lose Billions to Unfair Remittance Money Transfer System* (Mar. 2012), https://cuts-international.org/india-migrants-lose-billions-to-unfair-remittance-money-transfer-system/; Manuel Orozco, Pew Hispanic Ctr., *The Remittance Marketplace: Prices, Policy and Financial Institutions* (June 7, 2004), https://www.pewresearch.org/hispanic/2004/06/07/the-remittance-marketplace-prices-policy-and-financial-institutions/; The California legislature made a legislative finding that funds are "frequently misappropriated or never transmitted." Former Cal. Fin. Code § 1800(b) (West 1999).

30 Donald I. Baker and Roland E. Brandel, *The Law of Electronic Fund Transfer Systems* ¶ 30.02[2] (2005).

31 *McDermott v. W. Union Tel. Co.,* 746 F. Supp. 1016 (E.D. Cal. 1990) (when overseas payee was unable to cash delayed money order for dollars, he sent money order back to purchaser in United States for refund; Western Union agreed to refund based on exchange rate in effect when money order was received overseas, resulting in refund of only 60–70% of face amount of money order).

B. EFTA and Regulation E require enforceable disclosures and substantive protections for remittances.

1. Required disclosures allow price-shopping by remittance senders.

In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), Congress amended the EFTA to create an entirely new regulatory regime for international remittance transfers originating in the United States.[32] Remittances sent by entities deemed "remittance transfer providers" were subject to new disclosures, error resolution procedures, and—of particular importance—protections against loss through error or theft.

Until this law went into effect, remittances sent through non-bank providers were generally governed solely by federal anti-money laundering and similar laws and restrictions, as well as by state money transmitter licensing statutes.[33]

The new section of the EFTA applicable to remittances requires disclosures at two separate points in the process of sending an international remittance. Disclosures are first required when the sender is "requesting a remittance transfer"—in other words, *before* the sender has turned over money to be remitted.[34] The second disclosure is required in the form of a receipt after payment has been made.[35]

Under the statute, remittance transfer providers are permitted to use estimates for the amount to be received by the recipient under only two circumstances:

1. A "temporary exception" permits insured depository institutions to estimate certain remittance price information until July 21, 2020.[36] After that date, these institutions (*i.e.,* banks and credit unions), like other remitters, are required to provide accurate information.[37]

2. Additionally, estimates can permanently be provided for remittance transfers to certain countries when the countries' laws or transaction methods do not permit providers to indicate non-estimated amounts.[38] The CFPB publishes a list of the countries to which this exception applies.[39]

However, through regulation, the CFPB also permits estimates in two additional situations, although there is no express authority in the statute for either of these:

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[32] 15 U.S.C. § 1693*o*-1.

[33] 77 Fed. Reg. at 6195 (Feb. 7, 2012).

[34] 15 U.S.C. § 1693*o*-1(a)(2)(A).

[35] 15 U.S.C. § 1693*o*-1(a)(2)(B).

[36] 15 U.S.C. § 1693*o*-1(a)(4); Reg. E, 12 C.F.R. § 1005.32(a).

[37] 15 U.S.C. § 1693*o*-1(a)(4)(B); Reg. E, 12 C.F.R. § 1005.32(a).

[38] 15 U.S.C. § 1693*o*-1(c); Reg. E, 12 C.F.R. § 1005.32(b).

[39] Reg. E, 12 C.F.R. § 1005.32(b)(2).

3. Estimates can be provided for certain fees and taxes imposed by a third-party. It is optional for the provider to decide whether even to provide estimates of "non-covered third-party fees,"[40] which are defined as certain "fees imposed by the designated recipient's institution for receiving a remittance transfer into an account."[41]

4. Estimates can be provided for certain transfers scheduled in advance.[42]

There are extensive rules by which such estimates must be determined, and these are set out in the regulation.[43] If estimates are used in disclosures, they must be identified as such.[44]

Unfortunately, the CFPB's previous expansion of the situations in which estimates are permitted beyond those expressly permitted in the statute—particularly # 3 in the above list—already seriously undermines the reliability of the disclosures required by the statute. As explained in section III.B below, the CFPB now proposes to expand the use of estimates by financial institutions to an extent that will further undermine the integrity of the statutory disclosure requirements.[45] Worse, the CFPB's proposal to altogether exempt a significant new swath of remittance providers from the EFTA remittances requirements (discussed in Section III.A below) significantly reduces the reach of *all* of the statute's intended protections.

2. Critical error-resolution procedures hinge on the required disclosures.

The statute and regulation not only require the disclosures described in the preceding section, but also give senders a critical substantive protection: the right to invoke error resolution procedures. These procedures are invaluable to senders whose funds are lost or not paid in full to the recipient. The types of error that are subject to the error resolution procedure include:

a) An incorrect amount paid by sender;[46]

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40 Reg. E, 12 C.F.R. § 1005.32(b)(3).

41 Reg. E, 12 C.F.R. § 1005.30(h)(2). Section 1005.32(b)(3) permits the provider to disclose estimated amounts of such taxes and fees, provided any estimates are based on reasonable source of information. *See* 12 C.F.R. § 1005.32(b)(3). It further provides that, when the provider chooses, at its option, to disclose the amounts of the relevant recipient institution fee or and tax as part of the information disclosed pursuant to section 1005.31(b)(1)(viii), the provider must not include that fee or tax in the amounts disclosed pursuant to section 1005.31(b)(1)(vi) or (b)(1)(vii). *See id.* § 1005.31(b)(vi)-(viii).

42 Reg. E, 12 C.F.R. § 1005.32(b)(2).

43 Reg. E, 12 C.F.R. § 1005.32(c).

44 Reg. E, 12 C.F.R. § 1005.31(d).

45 Reg. E, 12 C.F.R. § 1005.31(f). In a further undermining of the statutory intent to require reliable disclosures to senders, current comment § 1005.31(f)-1 says that while a remittance transfer provider is not required to guarantee the terms of the remittance transfer in the disclosures required or permitted by section 1005.31(b) for any specific period of time, if any of the disclosures required or permitted by section 1005.31(b) are not accurate when a sender makes payment for the remittance transfer, a provider must give new disclosures before accepting payment.

46 Reg. E, 12 C.F.R. § 1005.33(a)(1)(i).

b) A computational error;[47]
c) The failure to make available to the designated recipient the amount of currency stated in the disclosure provided to the sender unless (1) the disclosures were an estimate and the difference was the result of the actual exchange rate used in accordance with the required procedures for estimates, or (2) the failure resulted from extraordinary circumstances outside the control of the remittance transfer provider that could not have been reasonably anticipated;[48]
d) The failure to make the funds available by the date specified, unless the failure was due to extraordinary circumstances outside the control of the remittance transfer provider that could not have been reasonably anticipated, or delays related to fraud screening;[49] or
e) The sender's request for documentation or additional information about a remittance, including a request to determine whether an error exists.[50]

The error-resolution procedure does *not* apply when the error is related to:

- The estimate of the amount to be received, when the difference between the estimate and the actual amount results from the application of the actual exchange rate, fees, and taxes.[51]

The error-resolution requirements are triggered by oral or written notice from the sender, within 180 days of the "promised date of delivery," that an error occurred.[52] The provider is required to investigate promptly and determine, within 90 days after receiving notice of the error, whether an error occurred and to report all results to the sender.[53] If an error is found to have occurred, the provider is required, within one business day of receiving the sender's instructions regarding the appropriate remedy, to correct the error as instructed.[54]

Thus, in practice, when the amount of money received is different from what is stated in the disclosure, the right to error resolution provides an important protection. When estimates are permitted, they can reduce the value of the error resolution procedure. However, even when the amount received is different from the amount promised to be received because an estimate was used, the right to error resolution will be helpful if the remittance is not delivered to the recipient in a timely manner, as promised in the initial disclosure.[55]

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47 Reg. E, 12 C.F.R. § 1005.33(a)(1)(ii).

48 Reg. E, 12 C.F.R. § 1005.33(a)(1)(iii).

49 Reg. E, 12 C.F.R. § 1005.33(a)(1)(iv).

50 Reg. E, 12 C.F.R. § 1005.33(a)(1)(v).

51 Reg. E, 12 C.F.R. § 1005.33(a)(1)(iii).

52 15 U.S.C. § 1693*o*-1(d)(1)(A), *as added by* Pub. L. No. 111-203, tit. X, § 1073(a)(4), 124 Stat. 2060 (2010); Reg. E, 12 C.F.R. § 1005.33(b).

53 Reg. E, 12 C.F.R. § 1005.33(c).

54 Reg. E, 12 C.F.R. § 1005.33(c)(2).

55 Reg E, 12 C.F.R. § 1005.33(a)(1)(iv).

C. With consumer protections in place, the market is competitive, and prices are falling.

Five years after the Remittance Rule's disclosure, error resolution, and other protections took effect, the market is better for consumers, in multiple respects. CFPB market-wide analyses showed that as entities have complied with the Rule, consumer access to and use of remittances have increased and prices have dropped. Moreover, companies are developing innovations for sending money abroad and the market has continued to be competitive.[56]

III. The Proposed Exemption and Exceptions Are Unjustified and Unsubstantiated

The CFPB proposes to –

A. Exempt the vast majority of depository institutions from coverage under the Rule, by defining "remittance transfer provider" to exclude entities providing 500 or fewer remittances a year rather than 100. The proposal would accomplish this by expanding an existing safe harbor for entities that are not remittance transfer providers because they are not providing transfers in the normal course of their business.[57]

B. For the minority of financial institutions that would still be covered by the Rule, create permanent exceptions to replace the time-limited exception permitted in the statute for critical remittance-price disclosures, further undermining the reliability of these disclosures.[58] Specifically, the proposal would allow a financial institution to estimate, in certain cases, 1) the exchange rate for remittances to a certain country *when that institution has not made 1,000 or more remittances to that country the previous year*;[59] and 2) the third party fees to be charged on a remittance *when that institution has not made 500 or more remittances to that recipient <u>institution</u> in the previous year*.[60]

The CFPB's proposal, at bottom, is an industry-protection measure rather than a consumer protection one. The Supplementary Information to the proposed regulation indicates that the CFPB is principally concerned with providers' bottom lines, seeking measures that will reduce the instances in which entities have to comply with the Remittance Rule as a way to eliminate the costs that banks and others might have to pay to protect consumers sending money abroad.[61] Though the proposal refers to consumer access and the price of remittance transfers, the available data does not support the CFPB's suggestions that the proposed measures are necessary or appropriate to preserve access or to keep prices reasonable. To the contrary, it is quite evident that the proposed changes will harm consumers by excluding tens or hundreds of thousands of remittance transfers from the consumer

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[56] *See* Assessment Report at 3-4, 67-68, 72-73, 87-106, 143-45.

[57] Proposed 12 C.F.R. § 1005.30(f)(2).

[58] Proposed 12 C.F.R. §§ 1005.30(b)(4) and (b)(5).

[59] Proposed 12 C.F.R. § 1005.30(b)(4).

[60] Proposed 12 C.F.R. § 1005.30(b)(5).

[61] *See, e.g.,* 84 Fed. Reg. at 67,132, 67,153 (Dec. 6, 2019) (describing the proposal as a measure that will "reduc[e] compliance costs for entities that make a limited number of remittance transfers annually," and "mitigate the effects of the expiration of" the temporary exception").

protections Congress provided. These changes will diminish transparency and impede comparison shopping.

Importantly, there is no reason that the CFPB needs to rush now to reconsider the existing safe harbor in the definition of "remittance transfer provider"—let alone expand the safe harbor to weaken the Rule's reach. As noted above, after a comprehensive review of the remittance market and the implementation of the Remittance Rule, the CFPB found extensive evidence of a competitive and thriving market. Moreover, the CFPB considered a variety of hypotheses about potential negative effects of the Rule and concluded that its data *did not show* that the Rule, on balance, was keeping entities out of the market or otherwise harming competition.[62] The July 2020 expiration of the statutorily-created temporary exception allowing for estimated rather than exact disclosures also does not provide a justification for the CFPB to reconsider the number of institutions that can avoid the Rule altogether. The temporary exception has nothing to do with the definition of "remittance transfer provider."

The expiration of the temporary exception likewise is not cause for the CFPB to create new, permanent exceptions to the requirement that providers disclose the exact prices of their transfers, especially when the available data does not support the proposal. Congress created the temporary exception to permit depository institutions to estimate certain costs for *certain* transfers for a *certain* period. It expressly designated that the exception would expire by July 21, 2020. The CFPB does not have the authority to invent the new permanent exceptions it proposes, which circumvent Congress's intent to make the temporary exception expire.

The proposed changes collectively upend congressional intent in other ways. Combined, they create a two-tiered remittance market. In one significant portion of the market, covered by non-depository money services businesses (MSBs), consumers would generally be protected by the full disclosure and error-resolution requirements that Congress mandated.[63] In the depository-institution segment of the market, on the other hand, consumers would receive such protections only from a small subset of providers. The proposal would completely exempt every depository institution that provides no more than 500 remittances a year—about 90% of institutions—and allow others to give remittance senders estimates instead of actual price information, in certain cases.[64] Not only will the consumers who use exempted depository institutions *not* have any of the protections of the Remittance Rule, but they will also have no way of knowing that had they used a non-bank provider, they would have been entitled to mandated and enforceable disclosures for their remittances.

This result is not what Congress intended when it defined "remittance transfer provider" to include "any person or financial institution" that satisfies the definition[65] and charged the CFPB with the objective of ensuring that "Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition."[66] As the

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62 *See generally* Assessment Report.

63 *See* 84 Fed. Reg. at 67,137 (Dec. 6, 2019) (stating that the CFPB is not aware of any MSB that would fall within the proposed 500-transfer safe harbor).

64 The CFPB has not published any data on the volume of broker-dealer transfers and we have none.

65 15 U.S.C. § 1693*o*-1(g)(3).

66 12 U.S.C. § 5511(b)(4).

CFPB recognized in 2012, when it rejected industry suggestions to exempt all wire transfers from the Rule, "the statute is broad in scope" and was meant to cover banks' and credit unions' methods of transferring money, as well as nonbanks."[67] Moreover, this two-tiered result weakens the EFTA's protections across the market. Without the participation of thousands of bank and credit-union providers in the EFTA consumer-protection framework, consumers will not be able to reliably compare providers to identify the cheapest one.

In sum, the proposal not only would reduce consumer protections, but also could reduce competition and increase prices, results that are exactly the opposite of the goals that Congress intended the Remittance Rule to accomplish. The CFPB should withdraw its proposal in its entirety and instead consider ways to *expand* the applicability of the EFTA's protections for remittances.

A. Exempting all remittances made by institutions that provide 500 or fewer remittances per year from the Rule's coverage is dangerous for consumers, contrary to congressional intent, and completely unjustified.

By statute, the EFTA's remittances protections apply only to transfers made by entities that provide remittances in the "normal course of [their] business."[68] The Remittance Rule's implementation of this limit includes a safe harbor: that an entity does not provide remittances transfers in the normal course of its business if it provided 100 or fewer remittance transfers in the prior year and provides 100 or fewer in the current year.[69] The CFPB now proposes to expand the safe harbor immensely, by substituting 500 transfers for the current limit of 100. It also proposes to change its interpretation of the general definition of "normal course of business" such that making transfers "many times per month" is no longer part of an example of providing remittances in the normal course of business.[70]

The proposed changes undermine consumer protections without any justification. The CFPB should not raise the safe harbor threshold in any way or change its commentary interpreting "normal course of business."

1. The CFPB should reduce, not increase, the safe-harbor threshold.

Already, under the current formulation of the regulation, the safe harbor enables nearly all depository institutions to provide international transfers to consumers without the Remittance Rule's protections. In assessing the Remittance Rule five years after it went into effect, the CFPB found that "[a]pproximately 80% of banks and 75% of credit unions that offer remittance transfers are below the 100-transfer threshold in a given year."[71]

This fact alone suggests that if the CFPB wants to reconsider the safe harbor, it should reduce, rather than increase, the safe-harbor threshold. In 2012, the CFPB concluded that the safe harbor "should be limited in scope," but also explained that it lacked data to assess the scope of the safe

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[67] 77 Fed. Reg. at 6208 (Feb. 7, 2012).

[68] 15 U.S.C. § 1693*o*-1(g)(3) (defining "remittance transfer provider").

[69] Reg. E, 12 C.F.R. § 1005.30(f)(2)(i).

[70] *See* proposed comment 30(f)-2.i.

[71] Assessment Report at 6; *see also id.* at 72, 80.

harbor with precision; various data sets suggested that with a 100-transfer limit, the safe harbor would capture between roughly 40% and roughly 90% of the depository institutions that were covered by such data sets and sent any remittance transfers.[72] Now, the CFPB *knows* that the safe harbor's actual scope is at the high end of this spectrum. And, simply put, that is too big. The language of the "normal course of its business" exemption and other aspects of EFTA show that Congress intended the exemption to be narrow. While allowing this exemption, Congress also made clear that term "remittance transfer provider" should have a broad reach, by specifying that it includes "any person or financial institution" that satisfies the definition.[73] An exemption that covers three-quarters of banks and credit unions is hardly narrow or "limited in scope," and is thus inconsistent with both Congress's intent and the CFPB's earlier conclusions.[74]

2. The proposed safe harbor would harm consumers and contradict Congress's intent by exempting most banks and credit unions.

The CFPB's proposal to increase the threshold to 500 transfers would bring the safe harbor even closer to a complete exemption for the depository-institution segment of the market and is therefore even more at odds with Congress's intent that remittance protections should apply broadly, as well as the CFPB's earlier conclusion that the safe harbor should be "limited in scope."[75] Based on call report data (attached as Exhibit A) and the figures provided in the CFPB's Assessment Report, we estimate that a 500-transfer safe harbor would mean that about 90% of depository institutions would not have to comply with the Rule.[76]

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[72] *See* 77 Fed. Reg. 50,244, 50,250, 50,252 (Aug. 20, 2012).

[73] 15 U.S.C. § 1693*o*-1(g)(3). Congress also signaled that depository institutions should generally fall *within* the Rule's scope, not outside, by specifying that the statute applies both to electronic fund transfers and other transfers, *see id.* § 1693*o*-1(g)(2), and by providing a temporary exception to certain requirements for depository institutions. Any such exception would have been far less necessary if Congress intended that most of this market segment would be exempt from *all* the Rule's requirements. *See* 77 Fed. Reg. at 6208 (concluding that the "unambiguous language of the statute requires coverage" of open network transactions, citing these aspects of the statute).

[74] In 2012, the CFPB discussed its inability to identify the number of transfers sent by "typical" providers; the CFPB should ensure that the Remittance Rule *applies* to such entities, not exempt them. 77 Fed. Reg. at 50,252 (Aug. 20, 2012).

[75] *See generally* 77 Fed. Reg. at 6208 (Feb. 7, 2012) (recognizing that EFTA's remittance protections are "broad in scope" and explaining that the "unambiguous language of the statute" requires coverage of open network transactions).

[76] We estimate that 84% would fall within the safe harbor if the threshold were 200 transfers. These figures are based on analysis of the June 2019 bank call report data and we assume that credit union data would show a similar pattern. We have estimated as follows: (1) entities providing transfers that would otherwise be covered by the Rule are those that responded affirmatively to one of the several questions about methods for sending international remittances transfers; (2) entities falling within the current safe harbor are those that answered in the negative to the question about providing 100 or more transfers; (3) entities that would fall within the proposed 500-transfer safe harbor are estimated to be those that falling within the current safe harbor plus any entities that reported 250 or few transfers across the prior two quarters. Our estimates are consistent with the figures shown in the Assessment Report for 2017. *See* Assessment Report at 71-76, 79-83.

This change would harm consumers by significantly reducing protections for individuals sending money abroad. The CFPB admits that 141,900 remittances per year now covered by the Rule would no longer be covered,[77] and for the individual consumers sending these transfers, the expanded safe harbor would mean the difference between having the Remittance Rule's important consumer protections and not.[78] For example, without the Rule's protections, consumers sending these remittances may receive no disclosures and have no remedy if a provider loses their transfer.

The harm could be disproportionately severe for the consumers sending these transfers, since bank transfers tend to be bigger than MSB transfers—the CFPB noted only in a footnote that the proposal would exempt $2 billion more in bank-provided transfers.[79] Larger transfers mean more money that can be lost, without the Rule's error resolution protections. Further, for a larger transfer, an inaccurate disclosure (or no disclosure at all) can have a larger effect. For example, paying a 1% less favorable exchange rate than one could have otherwise, with full information, will cost more when the transfer size is larger.

The CFPB appropriately recognized this type of risk when, in 2012, it rejected industry suggestions to exempt all open network transfers or transactions above a certain dollar amount. The CFPB then concluded (among other things) that such exemptions would be inconsistent with the statute; that "consumers who choose to transfer funds less frequently but in higher dollar amounts … should receive the same protections as frequent, low-value senders"; and that "given the amounts involved" consumers in the former category "may stand to benefit even more from the disclosures and error resolution rights afforded by the rule."[80] Now, however, the CFPB appears to have changed its position, without explanation, and gives short shrift to the harm that bank- and credit-union senders will suffer by losing the Rule's protections.[81]

The CFPB also fails to recognize the anti-competitive forces this proposal unleashes. By exempting virtually an entire type of remittance provider from the requirement to make uniform disclosures about the price of remittances, it permits those exempted providers *to appear* to offer less expensive and faster remittance services than those offered by the covered providers. This not only harms the

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77 84 Fed. Reg. at 67,137 (Dec. 6, 2019).

78 It is not clear how many consumers are affected. In studying the remittance market previously, the CFPB noted data showing that a significant portion of remittance consumers sends money infrequently, while a similar portion sends very frequently. *See* CFPB, *Report on Remittance Transfers* 4 (July 2011), https://files.consumerfinance.gov/f/2011/07/Report_20110720_RemittanceTransfers.pdf. For this reason, the 500 transfers sent in a year by a bank that the proposal would exempt from the Rule could represent 500 customers or 25.

79 *See* 84 Fed. Reg. at 67,156 n.102; *see also* 84 Fed. Reg. at 67,133 (Dec. 6, 2019) (explaining that banks and credit unions account for about half of the dollar volume of remittances, but a smaller portion of the number of transfers).

80 77 Fed. Reg. at 6211 (Feb. 7, 2012); *see also id.* at 6208.

81 *See* 84 Fed. Reg. at 67,138. The CFPB notes that international money transfers account for a small portion of the total complaints that the CFPB receives, but that figure shows nothing about the impact of the CFPB's proposal, including the harm that consumers would suffer if the CFPB lifted the consumer protections currently in place, for a large portion of providers. Because the CFPB receives complaints about many financial products, the portion of CFPB complaints regarding remittance transfers does not even shed light on the extent of problems in this market as compared to others.

consumers who will no longer be able to price-shop (and use the error resolution procedures of the EFTA), but also could do serious damage to the remittance providers who must comply with the Remittance Rule.

The proposal will also harm consumers who patronize remittance providers that fall within the Remittance Rule's scope. A consumer seeking to send money abroad might find a company required to comply with the Rule, but the consumer would have no way of comparing those prices to those offered at most providers.[82] The proposed safe harbor would put about 3000 banks and 1400 credit unions that provide remittances *outside* the Rule's reach. Available data suggests the proposal would leave just a few hundred financial institutions and several hundred MSBs providing remittances and falling *within* the Rule's scope.[83] The sender would lose the benefit of being able to identify the cheapest provider.

The reach of the proposed safe harbor is additionally troubling because consumers who would prefer to have legal protections will have no clear way of finding the subset of institutions that *do* comply with the Remittance Rule.[84] Indeed, a consumer whose bank falls outside the Remittance Rule's scope would have no way of knowing that *any* other entity provides more consumer protections.[85] And to force consumers to "shop" for companies that provide statutorily-required protections would flip the Remittance Rule on its head, as the Rule is designed to enable consumers to compare providers' *pricing*,[86] not to compare whether entities even *provide* pricing information.[87]

In short, though the proposal refers, at several points, to individuals' "preferred" providers, for customers of entities within and outside the safe harbor, the proposal would reduce the ability to

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[82] The exempted financial institutions would not be required to disclose their prices, and if they did disclose them, the lack of uniformity in the disclosure methodology could eradicate effective price-shopping.

[83] *See* Assessment Report at 71-72 (regarding number of banks and credit unions providing remittances at various levels); June 2019 Call Report data (more recent bank data); 79 Fed Reg. 56,631, 56,635 (Sept. 23, 2014) (estimating that 340 nonbanks provide international money transfers); CSBS, *2017 NMLS Money Services Businesses Industry Report* 4-5 (2018), https://mortgage.nationwidelicensingsystem.org/about/Reports/2017-NMLS-Money-Services-Businesses-Report.pdf (providing various metrics regarding the number of nonbank entities providing domestic or international money transmission). We do not have estimates on other segments of the market.

[84] In discussing the proposal's effects on industry, the CFPB hypothesizes that consumers who care about protections might simply go elsewhere, but it recognizes that such shifts are unlikely. *See* 84 Fed. Reg. at 67,155 (Dec. 6, 2019). Because consumers have no way of knowing about the variation among entities' legal obligations, we agree that such shifts are unlikely.

[85] We looked at the several major banks' websites regarding international transfers, identified through a web search engine, and none advertised whether or not they provide Remittance Rule protections.

[86] *See generally* Assessment Report at 13 & n.27 (citing 77 Fed. Reg. at 6194 (Feb. 7, 2012)).

[87] We have suggested in the past that exempted remittance providers be required to disclose that other providers offered more consumer protections. However, those suggestions were not accepted. Such a disclosure would be even more relevant and important under this current proposal. See Comments to the Bureau of Consumer Financial Protection, 12 CFR Part 1005 Docket No. CFPB-2014-00081, RIN 3170-AA45, Electronic Fund Transfers, Changes to Remittances Protections, by the National Consumer Law Center on behalf of its low-income clients. June 6, 2014. https://www.regulations.gov/document?D=CFPB-2014-0008-0015.

choose, with full information, which entity *should be* their "preferred" provider.[88] And, across the market, any downward price-pressure resulting from transparency could be reduced, because so many providers would no longer be proving transparent pricing information.[89]

3. The proposal revives previously rejected industry requests, with no basis.

The CFPB's proposed expansion of the normal-course safe-harbor lacks any basis. The proposal states that a 500-transfer threshold "may be more appropriate to identify persons who occasionally provide remittance transfers, but not in the normal course of business."[90] But the CFPB provides no data that backs up that assertion. The CFPB notes that industry commenters responding to a CFPB request-for-information suggested a range of different thresholds greater than 100.[91] But as CFPB describes them, industry's positions are similar to those that the CFPB dismissed in 2012, when it first adopted the 100-transfer safe harbor.[92] And the CFPB does not explain or justify its change in position.

The CFPB's assertion also does not make sense. Providing 500 transfers—or an average of about ten transfers per week—sounds quite "normal," not occasional. At that pace, an entity could be providing more than one remittance transfer *every business day*. Notably, this volume of transfers does not equate to simply "satisfy[ing] the needs of a handful of customers sending money abroad monthly," as the CFPB described with regard to the 100-transfer safe harbor.[93]

Similarly, the CFPB's statement that "at this volume, entities are generally offering remittance transfers as an accommodation for their account-holding customers rather than operating a separate remittance transfers line of business" is unsupported by any data and does not justify the proposal. Whatever the business purposes of the remittance services are, the issue is whether they are offered normally, not whether they are generally trying to attract new customers or provide services to current ones.[94]

Alarmingly, the CFPB proposal conflates the expiring temporary exception that allows financial institutions to provide estimates for remittance disclosures[95] with its proposed safe harbor that will exempt most of these institutions from coverage altogether. The CFPB states that its proposal to

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[88] *See generally* 84 Fed. Reg. at 67,158, 67,159 (Dec. 6, 2019).

[89] *See generally* Assessment Report at 93 (explaining that the Remittance Rule could put downward pressure on prices, by increasing consumer knowledge and "thus increasing competition"); *see also* The World Bank, *Remittance Prices Worldwide*, https://remittanceprices.worldbank.org/en/about-remittance-prices-worldwide (discussing the link between "high remittance prices" and "a lack of transparency in the market").

[90] 84 Fed. Reg. at 67,137 (Dec. 6, 2019).

[91] *See* 84 Fed. Reg. at 67,136 (Dec. 6, 2019).

[92] *See* 77 Fed. Reg. at 50,250-52 (Aug. 20, 2012) (in 2012, describing industry requests for safe-harbor thresholds as high as 1000 transfers per transfer method).

[93] 84 Fed. Reg. at 67,135 (Dec. 6, 2019) (citing 77 Fed. Reg. at 50,251).

[94] *See generally* 77 Fed. Reg. at 50,250 (Aug. 20, 2012) (concluding that "normal course" language "was meant to exclude persons that provide remittance transfers on a limited basis").

[95] 15 U.S.C. § 1693*o*-1(a)(4); Reg. E, 12 C.F.R. § 1005.32(a).

expand the safe harbor would ease the burden of the expiring temporary exception.[96] Of course it would. But such a consideration is immaterial. The cost an entity might bear due to the expiration of the Rule's temporary exception for insured depository institutions has nothing to do with whether the entity provides remittances in the normal course of business.

Moreover, the safe harbor reaches far beyond the temporary exception, in two ways. First, while the safe harbor exempts entities from the Rule entirely, the temporary exception means only that a financial institution is permitted to make estimates, if it is unable to know the true price of a remittance transfer "for reasons beyond its control."[97] The temporary exception has no effect on the applicability of any of the other protections of the Remittance Rule. Second, the available data suggests that the temporary exception is not widely used by the entities that the CFPB proposes to exempt by expanding the safe harbor. Bank call report data indicates that less than 10% of the entities providing between 100 and 500 transfer per year use the temporary exception today.[98]

Additionally, the CFPB's suggestion that the cost of compliance is "disproportionate" for an entity providing 500 or fewer transfers cannot justify the proposal.[99] As an initial matter, CFPB data suggests otherwise; it shows that about half of the depository institutions that provide any remittances are providing between 100 and 500 transfers annually in the current market.[100] If, at these volumes (or below), the compliance costs were disproportionate, we would expect to see a different pattern, of entities *avoiding* remittance transfers at these volumes, and instead providing either fewer than 100 or many more than 500 remittance transfers per year. But that pattern is not the one that has emerged.[101] Indeed, the CFPB recognizes that it earlier "found no evidence that, on net, banks or credit unions ceased or limited providing remittance transfers because of the" existing safe-harbor threshold.[102] And, in this proposal, it concludes that an expanded safe harbor is "unlikely" to cause "many institutions" to start providing more transfers.[103]

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96 84 Fed. Reg. at 67,137.

97 *Id.*

98 The CFPB notes in a footnote that none of the small banks that are covered by the Remittance Rule currently rely on the temporary exception. 84 Fed. Reg. at 67,161 n.120 (Dec. 6, 2019). We cannot find any similar analysis in the proposal for banks as a whole. Based on June 2019 call report data, we estimate that among entities not expecting to fall within the existing safe harbor, but that are providing transfers at a rate of fewer than 500 per year, about 8% are using the temporary exception.

99 84 Fed. Reg. at 67,137 (Dec. 6, 2019).

100 84 Fed. Reg. at 67,137 (Dec. 6, 2019); *see also* Assessment Report at 76, 83, 133-38.

101 *See* Assessment Report at 76, 83.

102 84 Fed. Reg. at 67,138 (Dec. 6, 2019).

103 84 Fed. Reg. at 67,155 (Dec. 6, 2019). Additionally, the CFPB proposal lacks any cost data. The agency noted in 2012 that even if compliance costs were relevant to the selection of a safe-harbor threshold, it did not have data on "the challenge of compliance" that would enable it to distinguish among various suggested thresholds. 77 Fed. Reg. at 50,252 (Aug. 20, 2012). In the current proposal, the CFPB still has not cited specific cost or compliance-related data.

More importantly, the concept of "normal course of business" does not tie to an entity's cost of doing business. What matters is how "normally" an entity makes transfers available, not how much a provider spends to make them available.

Finally, the CFPB's suggestion that an expanded safe harbor could benefit consumers by lowering prices, contradicts the intent of the Rule and the CFPB's own data.[104] The Rule was designed to facilitate comparison shopping, which can lead to competition, such that *compliance* with Rule—not exemption from it—would lead to decreased prices. And in this respect, it appears that the current iteration of the Rule has been successful. The CFPB found that prices have decreased since the Rule took effect, and preliminary analysis of statistically robust data sets suggests that the Rule may have contributed to the price decline. The CFPB found no evidence, on net, that compliance with the Rule had led to price increases (which might support the proposal's hypothesis, that *non*-compliance leads to price *decreases*).[105] This analysis suggests that rather than promoting reduced prices, the proposal would give newly exempt providers every incentive to pocket any cost savings—by permitting providers to obscure, rather than disclose, the full costs of their remittance transfers.[106]

B. The proposed permanent exceptions from the requirement to disclose actual prices are unjustified and clearly outside the discretion permitted the CFPB.

The EFTA permits financial institutions, until July 21, 2020, to estimate rather than accurately disclose the amount a recipient will receive, for certain remittance transfers.[107] After that date, banks and credit unions, like other remitters, are required to provide accurate information.[108] The CFPB proposal would further harm consumers and contradict Congressional intent by, in effect, converting this exception that Congress designated as temporary (ending in 2020) into an exception that is permanent, for many of the financial institutions that use it today. Without any legal authority to do so, the CFPB proposes to allow financial institutions—on a permanent basis—to estimate exchange rates—and thus the amount received—in certain cases *when an institution has not made 1,000 or more remittances to the recipient country in the previous year*;[109] and third party fees to be charged on remittances in certain cases *when that institution has not made 500 or more remittances to the recipient <u>institution</u> in the previous year*.[110]

When adopted in 2010, the temporary exception balanced Congress's evident desire to require that all remittance transfer providers provide enforceable promises of the prices of the remittances, with a recognition that financial institutions had traditionally sent money through wire transfers, a

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104 *See* 84 Fed. Reg. at 67,156 (Dec. 6, 2019).

105 *See* Assessment Report at 4-5, 92-96. The proposal ignores this market-wide analysis, while elsewhere (at 67,136) summarizing the input of industry commenters, without any indication as to the accuracy of those commenters' positions or evaluation of how the comments relate to the entities that would fall within the scope of proposed safe harbor.

106 *See* 84 Fed. Reg. at 67,156 (Dec. 6, 2019).

107 15 U.S.C. § 1693*o*-1(a)(4); Reg. E, 12 C.F.R. § 1005.32(a).

108 15 U.S.C. § 1693*o*-1(a)(4)(B); Reg. E, 12 C.F.R. § 1005.32(a).

109 Proposed 12 C.F.R. § 1005.30(b)(4).

110 Proposed 12 C.F.R. § 1005.30(b)(5).

method for sending money that did not always provide the sending institution full information about the price that will be charged. The temporary exception provided an accommodation for financial institutions' existing way of doing business, but, by making the exception temporary, Congress provided a strong incentive for financial institutions to figure out ways to send transfers with full price transparency by July 21, 2020, the latest date when the exception could expire.[111]

Call report data suggests that Congress's use of a temporary exception has, in fact, nudged financial institutions to change their business practices and provide transparency. Each year since the Remittance Rule went into effect, fewer banks have relied on the temporary exception. Overall, the number of bank transfers covered by the exception has decreased significantly.[112] On the June 2019 bank call report, only 10% of banks sending remittances—and falling outside the current safe harbor—reported using the temporary exception at all. And the proposal notes that, from conversations with industry and other input, the CFPB believes that banks are willing to change their business models to reduce their reliance on the temporary exception further.[113] Recent market evolutions may make these transitions even easier.[114]

Especially in light of these trends, the CFPB should not adopt the two new proposed permanent exceptions, which would replace the temporary exception. What the CFPB suggests would be "new" permanent exceptions would operate, in many cases, as an extension and expansion of the old temporary exception.

In effect, the new proposed exceptions would make the temporary exception permanent for many banks and transfers. First: If the CFPB leaves the existing 100-transfer safe-harbor threshold in place (which it should), for the approximately 90% of financial institutions providing 500 or fewer transfers per year, the new exceptions could apply to every transfer provided from a customer's account. This result is because, as the CFPB proposal recognizes, if the total number of transfers that an institution provides per year is less than 500, it will not exceed 1,000 transfers to any one country or 500 transfers to any one institution.[115] Second: Among the financial institutions providing more than 500 transfers per year, only about 10% use the temporary exception and the permanent exceptions could apply to a significant portion of these entities and the transfers for which they currently use the temporary exception.[116] In sum, of the 77 banks that reported using the temporary exception in the June 2019 Call Report, 69 reported using that exception for fewer than 10,000 transfers in the prior two quarters (a figure that would annualize to fewer than 20,000 transfers). At these levels (or even higher), it is plausible that the permanent exceptions, as proposed, could extend

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111 *See generally* 77 Fed. Reg. at 6195-97, 6200, 6208 (Feb. 7, 2012).

112 *See* Assessment Report at 139.

113 *See* 84 Fed. Reg. at 67,158 (Dec. 6, 2019).

114 *See* Assessment Report at 97-104, 139.

115 *See* 84 Fed. Reg. at 67,160 (Dec. 6, 2019). In this respect, the proposed exceptions appear like a doubling-down on the CFPB's proposal to expand the normal-course safe-harbor; the exceptions would likely excuse the same set of entities from key aspects of the Rule.

116 June 2019 call report data shows about 300 banks that reported more than 250 transfers in the prior two quarters (*i.e.*, were on track to provide more than 500 remittance transfers in the year). Of these, only 38 reported using the temporary exception, and 12 reported using the exception for fewer than 500 transfers in the prior two quarters, a rate that suggests 1,000 or fewer in the year.

to all or many of the transfers sent by nearly all banks under the temporary exceptions, given the number of countries in the world and the countless numbers of recipient institutions.

Moreover, in another respect, the CFPB's two proposed permanent exceptions would have a more extensive reach than the temporary exception. The temporary exception allows financial institutions to estimate the amount a recipient will receive rather than providing an exact amount, for certain transfers, only when the institution is "unable to know for reasons beyond its control" the price.[117] The proposed permanent exceptions would allow institutions to estimate exchange rates and certain fees simply when the provider "cannot determine" those elements of price. Without explanation or justification, this new formulation would drop the statutory requirement that the provider's inability to know the price is beyond its control.[118]

1. The proposed permanent exceptions will harm consumers.

This end-run around the temporary exception's expiration date would harm consumers by limiting the protections and benefits they receive from the Rule, including the ability to know precisely how much money a recipient will receive, the ability to accurately identify the cheapest provider, and access to full error resolution protections when the amount received is different from the amount disclosed. As described above, the decrease in price transparency associated with estimates can harm both a particular financial institution's customers (who may not be able to know whether their bank is truly a "preferred" institution), and other consumers, who will not be able to get accurate comparison information from that institution or benefit from market-wide price competition.

Importantly, the CFPB's decision to make the "new" exceptions permanent might substantially increase the extent of this harm. Without the forcing effect of an expiring exception, banks and credit unions that have stopped using the temporary exception could adjust their business models and re-start the use of estimates—thus rolling back protections that they were already providing. Thus, while the numbers of institutions and transfers reliant on the temporary exception now is small, the portion of institutions and transfers that might take advantage of new *permanent* exceptions could be larger.

The CFPB ignores the potential for institutions to take advantage of the proposed new exceptions—and harm consumers—in this way. The CFPB also attempts to downplay the harm that consumers will suffer by receiving estimates, rather than accurate price disclosures, by noting that the CFPB has not found "evidence of significant consumer complaints regarding the use of estimates."[119] This statement is misleading and does not reflect any actual data about consumer harm. The proposal cites the CFPB's Assessment Report, and that report acknowledges that consumers submitting

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[117] 15 U.S.C. § 1693*o*-1(a)(4).

[118] Proposed 12 C.F.R. §§ 1005.32(b)(4)(B), 1005.32(b)(5)(B). The proposed commentary's examples of when the exceptions would apply are additionally concerning because it is not clear whether they account for recent (or future potential) market evolutions that, as the proposal and the CFPB's Assessment Report explain, may *enable* banks to know the price of remittances before they send them. *See* Assessment Report at 97-106; 84 Fed. Reg. at 67,141-42, 67,148 (Dec. 6, 2019); *see also* 79 Fed. Reg. 55,970, 55,982-83 (Sept. 18, 2014) (noting that information aggregators can provide financial institutions some of the required disclosure information).

[119] 84 Fed. Reg. at 67,158 (Dec. 6, 2019).

complaints to the CFPB select certain categories of concerns, none of which is "use of estimates."[120] The Assessment Report shows that, setting aside fraud concerns, about 30% of international money transfer complaints were about the wrong amount being charged or received, confusing or missing disclosures, unexpected or other fees, or other service problems—all categories that could encompass consumer concerns about disclosures that include estimates and thus do not reflect the actual charges to them.[121]

2. The CFPB has no authority to create these permanent exceptions.

Expressly set to expire by July 21, 2020, the temporary exception was established with statutory language that leaves no doubt about Congress's intent that it end. The CFPB lacks authority to ignore this intent and replace the temporary exception with two permanent exceptions that circumvent the temporary exception's statutorily-mandated end date.

The CFPB cites the EFTA's general exception authority, 15 U.S.C. § 1693b(c). But that does not apply here, as such general authority cannot override the more specific temporary-exception provision. In that specific provision, Congress allowed the CFPB to extend the exception only to July 21, 2020, and only for one reason: if termination prior to that date "would negatively affect the ability of [insured banks and credit unions] to send remittances."[122] By delineating the CFPB's extension authority so specifically, Congress made clear that the agency cannot now cite "the ability of" insured institutions "to send remittances" as reason to extend the exception further. Nor can the CFPB rely on other reasons to accomplish the same goal. Yet, that is exactly what the proposal seeks to do.

Moreover, even if EFTA's general exception authority *could* apply, it would not here; the CFPB's proposal falls outside the scope of the authority it cites. First, the CFPB is wrong that the permanent exceptions would "facilitate compliance."[123] The Bureau has equated *facilitating* compliance with allowing banks to *avoid* compliance, simply because they find it too costly. Under this reasoning, almost any exception could be permitted—as long as banks complained that they preferred not to pay the cost of complying. This is not a reasonable interpretation or application of the phrase "facilitate compliance."

Second, the CFPB's suggestion that the exceptions would preserve consumer access contradicts the available data and bears no basis in fact.[124] In its Assessment Report, the CFPB examined consumer access from multiple perspectives and concluded that the data *contradicts* the hypothesis that the Rule has decreased access. Instead, viewed through a variety of lenses, the available data shows that with

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120 Assessment Report at 115.

121 *Id*; *see also* CFPB, *CFPB Consumer Response Consumer Complaint Form Product and Issue Options* 25 (Eff. Apr. 24, 2017), https://files.consumerfinance.gov/f/documents/201704_cfpb_Consumer_Complaint_Form_Product_and_Issue_Options.pdf (showing current list of issues that consumers can select, including "other service problem," which is explained to include pricing problems).

122 15 U.S.C. § 1693*o*-1(a)(4)(B); *see generally RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645-46 (2012).

123 *See* 84 Fed. Reg. at 67,148, 67,151 (Dec. 6, 2019).

124 *See* 84 Fed. Reg. at 67,148, 67,151 (Dec. 6, 2019).

the Rule in place, consumer access to and use of remittances has been increasing—even among banks and credit unions and even while use of the temporary exception has decreased.[125] These findings suggest that even when the temporary exception expires, consumer access will be maintained or continue to increase. And they provide no support for the CFPB's suggestion of the opposite effect.

Notably, the proposal appears to equate the number of banks providing remittances with access. Certainly, the CFPB appears to believe that it is in the banks' interests to preserve their current business models. But, from a consumer perspective, and looking across the market, the CFPB has already recognized—in its own Assessment Report—that the number of banks providing remittances does not present a complete picture of "access." What matters is whether consumers are able to obtain the services they need.[126] The CFPB does not appear to have any data suggesting that without the proposed exceptions, consumers will lose easy access to desired transfers–or even that particular banks or credit unions are *actually* likely to reduce services. At best, the CFPB repeats the hypotheticals that industry commenters have posed about what "may" happen. In practice, however, the CFPB has found that the Rule has not led to a meaningful net loss in the number of providers, even while reliance on the temporary exception has decreased.[127]

Third, for similar reasons, the CFPB's speculation that the proposed exceptions "could … help maintain competition in the marketplace" cannot support use of EFTA's exception authority.[128] The CFPB already concluded that the remittances market, under the Rule, is competitive and experiencing continued innovation, as well as decreasing prices and increasing consumer access—while also noting that the CFPB lacked evidence sufficient to draw a conclusion about the Rule's precise effects on competition.[129] Without any new data, the CFPB has no basis now to draw such a conclusion to industry's advantage, suggesting that *continuing* the temporary exception, in much the same form as it currently applies, is necessary to maintain or increase competition. Moreover, if the Remittance Rule operates in accordance with the CFPB's original hypotheses, then the proposed exceptions should reduce, rather than increase, competition. Designed to "give[] consumers greater knowledge of prices and ability to shop and increase[] their willingness to try new providers," full application of the Remittance Rule, with accurate disclosures, could "increas[e] competition and put[] downward pressure on prices."[130] The proposed exceptions would have the opposite effect,

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[125] *See* Assessment Report at 72-73, 81, 91-93, 139; *see also* Financial Health Network, *Financial Underserved Market Size Study* 18 (2019), https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2019/12/20160608/Market-Size-Report.pdf (showing growth in remittances market).

[126] *See* Assessment Report at 72 (stating that "the number of remittances that consumers choose to transfer with banks" is a "better measure of access to remittance transfers by banks" than "[t]he number of banks that offer and transfer remittances"). Notably, in the section 1022 analysis, the CFPB concludes that it is "unlikely" that without the proposed exception related to fees, an individual would be unable to find *any* provider to send a requested transfer, even if one particular bank is unable to do so. 84 Fed. Reg. at 67,159 (Dec. 6, 2019).

[127] *See* Assessment Report at 143.

[128] 84 Fed. Reg. at 67,148, 67,151(Dec. 6, 2019).

[129] *See* Assessment Report at 97-106, 143-45.

[130] Assessment Report at 93; *see also* 77 Fed. Reg. at 6194, 6272 (Feb. 7, 2012).

allowing entities to continue obscuring their prices and thus limiting price transparency and any resulting competition.

Fourth, for all of the above reasons, the CFPB's suggestion that prices may increase, without new exceptions, does not support use of the EFTA's exception authority.[131] All of the predicates to the hypothesized price-increase—market exit, a decrease in competition, an increase in costs, and entities passing those costs on to consumers—are unsupported. Even during a time period when entities were decreasing their use of the temporary exception, the CFPB concluded that market data did not support the hypothesis that compliance costs were "raising prices enough to decrease demand"—or raising prices *at all*.[132] The CFPB has no basis to turn around now and suggest the opposite—particularly because its own proposal recognizes that it lacks data to assess the costs to providers of providing accurate disclosures, predict how providers would respond to such costs, or estimate the number of consumers who would receive accurate vs. estimated information.[133]

3. The CFPB otherwise lacks justification for the proposed permanent exceptions.

For similar reasons, the policy reasons that the CFPB asserts for its proposed new exceptions contradict or are unsupported by available data. As described above, the CFPB's concerns about market exit and increased prices are unsupported or exaggerated.[134]

Additionally, the CFPB's suggestion that entities need a broad and continuing exception for exchange-rate disclosures conflicts with its own findings: the CFPB concluded that very large banks use the temporary exception to estimate fees, not exchange rates; that small banks are not using the temporary exception at all; and that across the market, "insured institutions are predominantly using the temporary exception to estimate covered third-party fees, rather than exchange rates."[135]

Moreover, the thresholds that the CFPB proposes for its permanent exceptions—1,000 transfers to one country in its local currency or 500 transfers to a single recipient institution— appear pulled out of thin air. The CFPB suggests that these thresholds are necessary to keep entities in the market because if they were lower, entities might find the cost of compliance too high.[136] But the CFPB does not appear to have analyzed the cost dynamics involved for any recipient country or institution, let alone analyzed these dynamics across the market. It provides no reason that 1,000 is a more appropriate figure than 5, 25, 50, or 100, for example.[137]

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131 *See* 84 Fed. Reg. at 67,145, 67,148, 67,149, 67,151, 67,158 (Dec. 6, 2019).

132 Assessment Report at 92, 94.

133 *See generally* 84 Fed. Reg. at 67,154 (Dec. 6, 2019) (recognizing string of effects that need to be analyzed in order to assess the effects of the proposal on consumers).

134 84 Fed. Reg. at 67,145, 67,149 (Dec. 6, 2019).

135 84 Fed. Reg. at 67,157, 67,158, 67,161 n.120 (Dec. 6, 2019).

136 *See* 84 Fed. Reg. at 67,146, 67,150 (Dec. 6, 2019).

137 The proposal states that one entity provided CFPB with per-country information about the use of the temporary exception, but the proposal does not include that data. *See* 84 Fed. Reg. at 67,144 (Dec. 6, 2019). We would comment on the specific data if the CFPB had made it available for comment. We nonetheless note that one institution's experience can hardly be the basis for a market-wide rule, given the potential for variance across providers, countries, etc. *See generally* Assessment Report at 54, 57-58, 97-106(discussing how

The CFPB also does not justify why any exception should be permanent. The proposal, like earlier CFPB analyses, recognizes that market evolutions are giving financial institutions more options for disclosing precise exchange rates and fees, but inexplicably creates an exception that lasts forever.[138] In doing so, the CFPB ignores the important forcing-effect of a compliance deadline, the existing trend away from reliance on the temporary exception, and the evolution of methods for sending money.

Finally, we note that the CFPB's suggestion that its proposed exceptions might apply to non-insured institutions is baseless.[139] As explained above, Congress intended EFTA's remittances protections to apply broadly, and decided that the temporary exception should apply only to financial institutions. Rolling back already-required protections in other segments of the market would harm consumers and undermine the purpose of EFTA; there is no reason or authority for extending any new exception to non-insured entities.

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We appreciate your consideration of our views, and, for the reasons stated, urge the CFPB to withdraw this entire proposed regulation.

Respectfully submitted:

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market is divided into corridors, the variety of models that providers develop, in terms of how many corridors they serve, and market innovations);; 77 Fed. Reg. at 6197-6198 (Feb. 7, 2012) discussing variety of remittance models that banks and credit may use).

[138] *See* Assessment Report at 97-106; 84 Fed. Reg. at 67,141-42, 67,148 (Dec. 6, 2019); *see also* 79 Fed. Reg. at 55,981-83 (Sept. 18, 2014).

[139] *See* 84 Fed. Reg. at 67,146, 67,150 (Dec. 6, 2019).

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