COMMENTS
to the
Bureau of Consumer Financial Protection
12 CFR Part 1005
Docket No. CFPB-2012-0050[1]
RIN 3170-AA33
Electronic Fund Transfers
Changes to Remittances Protections

by the
National Consumer Law Center
on behalf of its low income clients
as well as
Consumer Action
National Association of Consumer Advocates
National Legal Aid and Defender Association
U.S. PIRG
California Reinvestment Coalition
Legal Assistance Foundation of Chicago
Empire Justice Center of New York
Legal Services of New York City
Neighborhood Economic Development Advocacy Project (NEDAP)
North Carolina Justice Center
South Carolina Appleseed Legal Justice Center
Virginia Citizens Consumer Council
Mountain State Justice of West Virginia

and the following law professors:[2]
Associate Dean **Richard M. Alderman**, Director, Center for Consumer Law, University of Houston Law Center
Professor **Jean Braucher**, Roger C. Henderson Professor of Law, University of Arizona
Professor **Mark E. Budnitz**, Georgia State University College of Law
Professor **Kurt Eggert**, Chapman University School of Law
Professor **Kathleen C. Engel**, Associate Dean, Suffolk Law School
Professor **Elizabeth Renuart**, Albany Law School
Professor **Norman I. Silber**, Hofstra University School of Law, Visiting Professor, Yale Law School
Professor **Jeff Sovern**, St. John's University School of Law

The **National Consumer Law Center**[3] ("NCLC") submits the following comments on behalf of its low-income clients, as well as the listed national and statewide organizations, all

[1] 77 Fed. Reg 77188 (December 31, 2012).
[2] Affiliations for all law professors are for identification purposes only.
[3] The **National Consumer Law Center, Inc. (NCLC)** is a non-profit Massachusetts corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of twenty practice treatises and annual supplements on consumer credit laws, including *Consumer Banking and Payments Law* (4th ed. 2009), which has several

representatives of low and moderate income senders of remittances. In addition, the above-listed law professors teach and research extensively in the areas of consumer and/or payments law, have signed on to these comments. All of these organizations and individuals have serious concerns with the proposed exceptions to consumer protections included in this docket.

The Consumer Financial Protection Bureau ("CFPB") has proposed three reductions in consumer protections for remittance senders. One of these reductions is quite serious: eliminating from coverage under the error resolution rules the delivery of the remittance into the wrong account because of the sender's mistake with the account number.

The first proposed reduction relates to whether the sending remittance provider is responsible for disclosing a tax imposed on the receipt of the remittance other than a national tax; the second proposed change would allow the initial disclosure to the sender to not include a charge imposed by the recipient bank on the recipient. Given the extensive accessibility to all types of arcane information available in this sophisticated technological age, we do not agree that – with the appropriate support and encouragement from the CFPB – the necessary information could not be made available to remittance transfer providers. We urge the CFPB to make both of these two changes temporary in nature, thereby providing strong incentives to the industry to create databases with the information necessary to comply with the delayed disclosure requirements.

However, it is the third proposed change on which we focus our comments. This change will exclude from a covered error under the Electronic Funds Transfer Act a remittance that is sent by electronic transfer deposited into the wrong account, when the sender provided the incorrect account number, even when the proper name and other identifying information has been provided. This would mean that the sender would lose the entire remittance when a single digit of an account number is incorrect, without any remedy.

The statute was deliberately crafted to incentivize the industry to create the same type of protections against loss in remittances as are currently applicable to credit card transactions. The statute unquestionably places the burden of a loss from an error (even an error of the consumer-sender) on the remittance provider. The burden was placed on the provider because it is the provider who can best insure against the loss, and best protect itself from these losses. The statute does not cover fraud, of course, just error. The effect of the proposed rule is to make remittances from financial institutions, using the ACH system, less secure, and less protective of remittance senders, than other transfers -- like through Western Union.

---

chapters devoted to electronic commerce, electronic deposits, access to funds in bank accounts, and electronic benefit transfers. NCLC also publishes bimonthly newsletters on a range of topics related to consumer credit and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted trainings for tens of thousands of legal services and private attorneys on the law and litigation strategies to deal with the electronic delivery of government benefits, protection of exempt benefits, predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of all federal laws affecting consumer credit since the 1970s. NCLC's attorneys regularly provide comprehensive comments to the federal agencies on the regulations under these laws. These comments are written by Professor Mark E. Budnitz of Georgia State University College of Law, and NCLC attorney Margot Saunders.

This proposed change seriously, and erroneously, undermines the critical new protections for international remittances required by Congress in 2010 as part of the Dodd Frank Act.[4] Indeed, it was the purpose of the new law to incentivize the financial services industry to create protections – for themselves and their customers – against these types of errors. Our comments primarily address this aspect of the proposed regulations.

A. Industry Needs to be Incentivized to Reduce Losses

The Bureau justifies the proposed revision to the error resolution rules excluding a sender's mistakes regarding the intended recipient's account number by saying it "will more closely match existing practice."[5] However, it obviously was Congress' intention to *change existing practice* because it does not protect consumers.

The Bureau states in support of the proposed revisions that many providers have told the Bureau "that they have not yet developed security procedures that enable them to be able to confirm the accuracy of account numbers provided by senders before sending a transfer.[6]" This is then used as the basis for not requiring the development of those security procedures. That analysis turns the purpose of the statute on its head.

We disagree with the Bureau's assumption that change is neither necessary nor appropriate. If this change is difficult to do immediately, then the Bureau should postpone the applicability of this section of the rule. The industry clearly needs to be pushed to create the changed systems to protect consumers: the law clearly provided that push. It seems inappropriate for the Bureau to undermine Congressional intent and eliminate on a permanent basis any need for the industry to create these protections from loss.

The point of the new remittance law is to *change* the law to provide better protections for consumers sending money overseas. The fear, expressed by the Bureau in its prefatory remarks, is that requiring the remittance industry to establish procedures to protect consumers from loss will drive some in the financial services industry to cease providing remittance transfers. But, while there should always be a balance between consumer protection and the recognition of the burden of that protection on industry, this proposal goes too far to soften the burden on industry.

Consumers are not well-served if the industry is not incentivized to protect consumers from loss. Just as passengers in automobiles would not be well-served if the federal government reduced safety protections to enable the less expensive manufacture of automobiles as a way of promoting car ownership, remittance senders are not well-served by the Bureau's facilitation of more remittance providers if some of those providers do not have adequate protections from loss in place.

The Bureau acknowledges several times that the chances there will be a wrong account number supplied "appear to be quite rare."[7] As the Bureau states: "First, remittance transfer providers typically take steps to ensure senders carefully enter and review account numbers. Second, most incorrect account numbers do not correspond to an actual account at the recipient's

---

[4] New section § 919 of the Electronic Fund Transfer Act, 15 USC §1693o-1, Public Law 111-203, 124 Stat. 1376 (2010).
[5] 77 Fed. Reg 77188, 77198 (December 31, 2012).
[6] 77 Fed. Reg 77188, 77197 (December 31, 2012).
[7] 77 Fed. Reg 77188, 77189, 77197, 77206 (December 31, 2012).

institution. Third, the Bureau understands that some recipient institutions take further measures to limit transfers being deposited into the wrong account, such as by developing systems that allow for additional verification of account numbers or by working with senders to improve accuracy at the time transfers are requested."[8] These facts indicate that there is an insufficient basis for claiming that industry will be exposed to huge losses if they are liable for these mistaken transfers. Consequently, the Bureau's proposal to allow industry to avoid all liability for these losses, for the foreseeable future, is poor policy.

The Bureau also expresses concern for smaller providers and their inability to influence the systems used to send payments.[9] While it is no doubt true that each small provider acting alone lacks the bargaining power to exert sufficient influence, as all small providers will be subject to the same rule, they can act collectively and should have greater influence than the Bureau acknowledges. This practice has been well developed in the credit card context, where small providers band together to have a greater influence on the marketplace.

B. The Rule Should Require the Development of Security Procedures

Unfortunately, the Bureau's proposed exception accepts the status quo on the present lack of a security procedure and offers no incentives to develop such a security procedure. In doing so, it encourages the industry not to bother developing one. The Bureau should not be so quick to doubt the ability of senders and third party vendors to develop a security procedure.

The Bureau assumes that no security procedure is possible in the foreseeable future, and unlike UCC Article 4A-205, discussed below, the proposed regulation eliminating liability for these mistakes includes no provision to place liability on providers when such security procedures become available.

Developing security procedures to determine the accuracy of account numbers in remittance transactions will admittedly be challenging, especially when interacting with financial institutions in less-cooperative nations. Yet it seems premature to believe that it will be impossible for these security procedures to be developed. It is our understanding that some in the financial services industry have already developed protections against mistaken transfers in account-to-account transfers, especially where the sender also has supplied the recipient's correct name.

However, the Bureau's regulations need to provide the incentive for the development of these procedures, as they may be costly, by ultimately imposing liability on the provider when an error is made. The industry's ability to adapt to stricter requirements is illustrated by the implementation of sophisticated security procedures by banks seeking to comply with the Federal Financial Institutions Examination Council's (FFIEC) authentication standards as stated in its Guidance on that issue.[10] In response to the authentication requirements of the FFIEC, companies

[8] 77 Fed. Reg 77188, 77198 (December 31, 2012).
[9] 77 Fed. Reg 77188, 77198 (December 31, 2012).
[10] In October 2005, the agencies of the Federal Financial Institutions Examination Council ("FFIEC"), responding to increased online banking fraud, issued guidance titled "Authentication in an Internet Banking Environment." *See* Fed. Fin. Insts. Examination Council, Authentication in an Internet Banking Environment (Aug. 8, 2001), *available at* http://www.ffiec.gov/pdf/authentication_ guidance.pdf. This Guidance was intended to aid financial institutions in "evaluating and implementing authentication systems and practices whether they are provided internally or by a service provider." The Guidance provides that "financial institutions should periodically ... [a]djust, as appropriate, their

have produced compliance programs that financial institutions buy.[11] Those companies saw the market potential created by the FFIEC guidance and acted upon banks' needs. Many banks adopted the new authentication procedures offered by these companies, and were able to protect themselves and their customers from loss as a result. Thus the FFIEC's guidance – incentivizing and encouraging banks to provide more protections for consumers – helped both banks and their customers. This is a lesson that the Bureau should follow in this instance.

Furthermore, there are actions providers can take while these security procedures are being developed. The Bureau should encourage the industry to develop creative solutions in the interim that will lower the risk of provider liability. For example, if a consumer uses the same provider to regularly transfer money to the same family member, a security procedure suggested by a comment to UCC Art. 4A could be employed:

> A security procedure may be designed to detect an account number that is not one to which Sender normally makes payment.[12]

While these security procedures are in the process of being developed, the Bureau also might consider a solution far less drastic than the one proposed, but that would offer relief to the vast majority of senders, who are also those most in need of protection. The rule could maintain the present general liability provision, but allow a limited exception in the case of a remittance over a set amount. For instance, the limited exception might provide that if the sender requests a remittance over $10,000, the parties could agree that liability will be on the sender, not the provider. The data indicates that most transfers are in the $300-$400 range.[13]

C. UCC's Article 4A Provisions Are Not the Appropriate Basis for Protections for Remittance Senders

The Bureau notes that "the proposed changes will adhere more closely [to] state law as it existed prior to EFTA § 919."[14] The Bureau then justifies the revision because it is consistent with that state law, specifically UCC Art. 4A, especially section 4A-207.[15] The problem is that the Bureau has not acknowledged that Congress *obviously was not satisfied with using 4A as its model in drafting remittance requirements*. Congress could have copied the language from 4A-207 if it wanted to make the exception the Bureau now proposes, but it did not. Congress did the exact opposite. Congress deliberately ensured that the harsh rules of 4A-207 do not apply to remittances. It accomplished this by recognizing and *not changing* the rule in the UCC that any electronically transferred remittance otherwise governed by the UCC would be preempted by the new the federal, consumer protection law, instead of by state law.[16] It is therefore, entirely backwards, and in derogation of the clear intent

---

information security program in light of any relevant changes in technology, the sensitivity of its customer information, and internal or external threats to information."

[11] For an illustration of how the FFIEC guidance created the proper incentives for banks, protecting customers as well, *see Patco Construction Co., Inc. v. People's United Bank* , 684 F.3d 197 (1st Cir. 2012).

[12] UCC 4A-205, Comment 1.

[13] *See e.g.,* "Remittances and The Charitable Deduction: A New Approach to Encouraging Development in Mexico," 14 NYU Journal of Legislation & Public Policy 565, 604 (2011) (data from 2008)).

[14] 77 Fed. Reg 77188, 77198 (December 31, 2012).

[15] 77 Fed. Reg 77188, 77198 (December 31, 2012).

[16] The Bureau has recognized this itself: UCC Article 4A-108 provides that Article 4A does not apply "to a funds transfer, any part of which is governed by the [EFTA]. Under EFTA Section 919, wire transfers sent on a consumer's

of Congress, for the Bureau to defer to a state law which Congress deliberately *declined* to apply to these very transactions.

It is also important to note that Article 4A was not written with consumer transactions in mind, much less consumer protection. This is evident from section 4A–108, which excludes transactions governed by the EFTA, as well as the Prefatory Note to Article 4A and official comments. For example, the Prefatory Note states: "The typical funds transfer involves a large amount of money. Multimillion dollar transactions are commonplace. The originator of the transfer and the beneficiary are typically sophisticated business or financial organizations."

As one comment notes, the interests that were considered were "those of the banks that provide funds transfer services and the commercial and financial organizations that use the services…."[17] The interests of consumers were not considered because they were not seen as users of the wholesale wire transfers that are the principal focus of Article 4A.

Since the focus of 4A is on commercial parties, it seems fair for section 4A-207 to require a business sending funds to know the exact account number of the recipient: another company, who is to receive the funds. It is unfair, however, to impose this responsibility on an unsophisticated consumer, because the consumer has also supplied the recipient's name. The name, not the account number, is the most obvious and simplest way to ensure that the proper party receives the funds. Consequently, it is contrary to Congressional intent to use Art. 4A as a model for the proposed exception to the remittance rules.

In addition, it is inappropriate to pull one rule out of one section of Art. 4A and propose to graft it as an exception to the Bureau's regulation while establishing a very different set of rules for other errors. The drafters of Article 4A made it clear that the article should be considered as a whole, and not have particular provisions adopted piecemeal. After first noting that funds transfers under Article 4A "involve competing interests – those of the banks that provide funds transfer services and the commercial and financial organizations that use the services, as well as the public interest," the drafters stated: "The rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties…."[18] Moreover, Article 4A is to be treated as a self-contained unit. "[R]esort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this article."[19]

The inappropriateness of snatching one provision in Article 4A, and using it to justify the proposed liability rule in the entirely different context of remittances is illustrated by section 4A–205. Section 4A–205 applies to the situation where the beneficiary (the recipient) is identified *only* by an account number. If the sender and the receiving bank have agreed to a security procedure that is designed to detect an erroneous account number, "the risk of loss with respect to the error of the sender is shifted to the bank which has the burden of recovering the funds from the beneficiary."[20]

---

behalf that are remittance transfers will now be governed in part by the EFTA. As a result, it appears that, by operation of Article 4A-108, Article 4A will no longer apply to such consumer wire transfers." *See* 76 Fed Reg 29902, 29908 (May 23, 2011).

[17] UCC 4A-102. Comment.

[18] UCC 4A-102. Comment.

[19] UCC 4A-102. Comment.

[20] UCC 4A–205. Comment 1.

Section 4A-207, on which the Bureau relies, must be seen in light of section 4A-205, which establishes a different rule if there is a security procedure. The drafters of Article 4A evidently contemplated that senders and receiving banks would enter into these agreements, and balanced the rules of section 4A-207 with those of section 4A-205.

The Bureau has mistakenly looked at one aspect of state law, written for commercial transfers, used by businesses, deliberately rejected by Congress as applicable, and has erroneously made the rule for this state law applicable to small remittances made by consumers. This is wrong.

D. UCC Articles 3 and 4 Provide Relevant Guidance for Where the Loss Should Fall

Imposing liability on the financial institution providing the payment service when the provider has done nothing wrong may seem unfair. But it is not unprecedented. In check transactions, when a thief forges the account holder's signature and neither the account holder nor the bank failed to exercise due care, the UCC places the liability on the bank rather than the account holder. This is fair because the bank is the party that is better able both to absorb the loss and to create protections to guard against the occurrences of these losses. It is the same situation with unauthorized charges for credit cards. The banks are required by the Truth in Lending Act to absorb and spread the losses from wrongful charges on credit cards. The drafters of the respective laws governing these payment mechanisms recognized that if industry is required to pay for the losses incurred from these problems, industry will develop robust methods to prevent these losses. Everyone benefits: consumers enjoy the protections from unaffordable losses; industry profits from the increased usage of the payment mechanism.

Under certain circumstances, however, the UCC does impose liability on the account holder, the party comparable to the sender in a remittance transaction. But it does so generally in situations where the account holder is a commercial party. In Section 3-405, for example, liability is on the account holder who is an employer. Placing the loss on an employer is believed to be fair because "[a]n employer can insure this risk by employee fidelity bonds."[21] The examples in 3-404, Comment 2 all involve commercial account holders. A comment explains that "most of the cases to which [3-404(b)] applies will be cases of employee fraud."[22]

E. The Consumer Should Not Bear the Loss

The fundamental policy issue is who should bear the loss when the consumer has given the provider the recipient's name and what the consumer believes is the recipient's correct account number. This is a situation where the consumer has made an innocent mistake. While Article 4A-207 places the liability upon the sender if there is no security procedure, Article 4A was intended to apply to commercial parties who can be expected to be highly skilled in ordering wire transfers since ordinarily the transfers are for very large amounts. "Multimillion dollar transactions are commonplace."[23] It may be reasonable to, in effect, assume that the commercial sender fails to exercise ordinary care if an incorrect account number is provided to the sending bank. It is unfair and unreasonable, however, to place the same responsibility upon a low income, unskilled, migrant who is sending money to his or her family in another country.

[21] UCC 3-405, Comment 1
[22] UCC 3-405, Comment 2.
[23] UCC 4A Prefatory Note.

While the Bureau's proposed revision requires the bank to provide a notice to the consumer that the transfer may not be made correctly if the exact account number is not provided by the sender, this disclosure lacks the standards found in many consumer statutes. There is no requirement that the notice be clear and conspicuous. In addition, there is no requirement that the notice be given in the consumer's language, even if the provider conducts the transaction in that language.

F. The EFTA Error Resolution Procedure Applies to Incorrect Account Numbers

If consumers instruct their banks to make domestic electronic fund transfers but mistakenly provide an incorrect recipient account number, the definition of "error" in Reg. E 1005.11(a)(ii) applies, making the mistake subject to the error resolution procedure. But, under the Bureau's proposed exception for remittances, supplying an incorrect account number in an international transfer would not be an error if the provider supplies the required disclosure. This would create the anomalous and unreasonable result in which the consumer engages in identical conduct in both situations, but has the benefit of an error resolution procedure in one and not the other. It is also clearly against Congressional intent to add to the protections available to remittance senders, rather than reduce these protections.

A careful reading of section 1005.11(a) demonstrates that Reg. E's definition of "error" includes providing an incorrect recipient account number. Section 1005.11(a)(i) obviously refers to an error made by someone other than the sender or the bank (unauthorized use). Sections 1005.11(a)(iii)-(iv) refer to mistakes made by the bank. Section 1005.11(v) refers to an incorrect transfer to a consumer at an ATM. Section 1005.11(vii) refers to a consumer's request for documentation, additional information or clarification.

Section 1005.11 (a)(ii), in contrast, is phrased in very general terms; it is not limited to any particular party or situation, and includes an incorrect electronic fund transfer from the consumer's account. The plain language of the provision excludes no one. The error might be attributable to the consumer, a financial institution, the ACH, a creditor, or whomever. It would require a very strained statutory interpretation to somehow read that language to exclude the very party the EFTA & Reg. E are designed to protect---the consumer. Surely if Congress and the Federal Reserve Board intended to deny a crucial protection to consumers they would have done so explicitly. The Bureau should not undermine these consumer protections.

This straightforward statutory interpretation merely involves reading the "plain language" of the regulation. In addition, this interpretation has the advantage of being consistent with the purpose of the EFTA.[24] In contrast, an interpretation excluding consumer errors is in direct conflict with the EFTA's "primary objective," which is: "the provision of individual consumer rights."[25]

The Bureau should not adopt the proposed revision that deprives consumers of an error resolution procedure they have enjoyed for many years under the EFTA. The remittance rules

[24] "(b) Purposes. It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems. The primary objective of this subchapter, however, is the provision of individual consumer rights. 15 U.S.C. § 1693 (b).
[25] 15 U.S.C. § 1693 (b).

should be a step forward for consumers, not a step back.