Consumer Compliance Outlook®

Second Issue 2016

Inside

A Federal Reserve System publication with a focus on consumer compliance issues

Smartphone interactive scan

An Overview of the Regulation E Requirements for Foreign Remittance Transfers

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Editor's note: *In 2012,* Consumer Compliance Outlook *published an article on the Consumer Financial Protection Bureau's (CFPB) foreign remittance transfer rule under Regulation E.*[1] *Since then, the CFPB has amended the rule several times.*[2] *In light of the amendments, we are publishing this updated version of the article to include the material changes.*

Changes to the rule since it was first issued in 2012 include, among others:

Coverage

- Clarifying that U.S. military installations in foreign countries are located in a U.S. state for purposes of the rule. The rule only applies to transfers to designated recipients in foreign countries, so transfers to an installation would not be covered by the rule, while transfers from an installation to a foreign country would be covered.
- Providing guidance on how a provider can determine if a sender is making a remittance transfer primarily for personal, family, or household purposes.

Disclosures

- Adding a new disclosure to the prepayment form, when third-party fees and taxes may apply, stating that third-party fees or taxes may apply to the remittance transfer, which could result in the designated recipient receiving less than the amount disclosed.

Use of estimates

- Extending the sunset date for the temporary provision allowing insured depository institutions and credit unions to rely on estimates from July 21, 2015, to July 21, 2020.
- Publishing a safe-harbor list of recipient countries qualifying for the permanent exception for the use of estimates in lieu of the exact amounts because the laws of these countries do not permit the provider to determine the exact amounts.

Error resolution

- Explaining that when a transfer is delayed because the provider or third party was investigating suspicious, blocked, or prohibited activity that could not have been reasonably foreseen, the delay is not an error.
- Clarifying that when a provider makes a refund because a sender provided incorrect or insufficient information that prevented the transfer from being completed as requested, any taxes actually collected and fees imposed by an intermediary may be deducted from the refund, except for the fees the intermediary will refund to the provider.

The World Bank estimates that the global market for foreign remittance transfers, in which consumers electronically transfer funds to recipients in another country,

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Consumer Compliance Outlook *is published quarterly and is distributed to state member banks and bank and savings and loan holding companies supervised by the Board of Governors of the Federal Reserve System. The current issue of* **Consumer Compliance Outlook** *is available on the web at* www.consumercomplianceoutlook.org.

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Revised Interagency Questions and Answers Regarding Community Reinvestment

On July 25, 2016, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency (agencies) published final revisions to the Interagency Questions and Answers (Q&As) Regarding Community Reinvestment in the *Federal Register*.[1] The agencies publish the Q&As to provide guidance on the Community Reinvestment Act (CRA) implementing regulations.

In the revised version, the agencies added six new Q&As and revised nine existing ones. They did not adopt one of the two proposed revisions to guidance concerning the availability and effectiveness of retail banking services in response to comments they received but did adopt the other proposed revision to this guidance. The changes focus on the following aspects of CRA performance evaluation:

- Availability and effectiveness of retail banking services
- Innovative or flexible lending practices
- Community development-related issues, including:
  - economic development
  - community development loans and activities that revitalize or stabilize
  - underserved nonmetropolitan middle-income geographies
  - community development services
- Responsiveness and innovativeness of an institution's loans, qualified investments, and community development services

Here, we provide the full text of the six new Q&As and summarize the nine that were revised.

NEW Q&AS

COMMUNITY DEVELOPMENT SERVICES

1. Q&A §____.24(a)—1: How do examiners evaluate retail banking services and community development services under the large institution service test?

Retail banking services and community development services are the two components of the service test and are both important in evaluating a large institution's performance. In evaluating retail banking services, examiners consider the availability and effectiveness of an institution's systems for delivering banking services, particularly in low- and moderate-income geographies and to low- and moderate-income individuals; the range of services provided in low-, moderate-, middle-, and upper-income geographies; and the degree to which the services are tailored to meet the needs of those geographies. Examples of retail banking services that improve access to financial services, or decrease costs, for low- or moderate-income individuals include:

- low-cost deposit accounts;
- electronic benefit transfer accounts and point-of-sale terminal systems;
- individual development accounts;
- free or low-cost government, payroll, or other check-cashing services; and
- reasonably priced international remittance services.

In evaluating community development services, examiners consider the extent to which the institution provides such services and their innovativeness and responsiveness to community needs. Examples of community development services are listed in Q&A __.12(i)—3. Examiners will consider any information provided by the institution that demonstrates community development services benefit low- or moderate-income individuals or are responsive to community development needs.

2. Q&A §___.24(e)—2: In evaluating community development services, what quantitative and qualitative factors do examiners review?

The community development services criteria are important factors in the evaluation of a large institution's service test performance. According to the regulation, the agencies evaluate the extent to which the financial institution provides community development services as well as the innovativeness and responsiveness of such services. Examiners consider both quantitative and qualitative aspects of community development services during the evaluation. Examiners also assess quantitative factors to determine the extent to which community development services are offered and used. The review is not limited to a single quantitative factor. For example, quantitative factors may include the number of:

- low- or moderate-income participants;
- organizations served;
- sessions sponsored; or
- financial institution staff hours devoted.

Examiners will also consider qualitative factors by assessing the degree to which community development services are innovative or responsive to community needs. See Q&As §____.21(a)—4 and §____.21(a)—3. These performance criteria recognize that community development services sometimes require special expertise and effort on the part of the institution and provide benefit to the community that would not otherwise be possible. Such an assessment will depend on the impact of a particular activity on community needs and the benefits received by a community. See Q&A § ___.28(b)—1. For example, a financial institution employee's unique expertise and service on the board of a community organization may demonstrate these qualitative factors when the employee's ongoing engagement significantly improves the products, services, or operations of the community development organization. Examiners will consider any relevant information provided by the institution and from third parties that documents the extent, innovativeness, and responsiveness of community development services.

RESPONSIVENESS

3. Q&A §____.21(a)—3: ''Responsiveness'' to credit and community development needs is either a criterion or otherwise a consideration in all of the performance tests. How do examiners evaluate whether a financial institution has been ''responsive'' to credit and community development needs?

There are three important factors that examiners consider when evaluating responsiveness: quantity, quality, and performance context. Examiners evaluate the volume and type of an institution's activities (i.e., retail and community development loans and services and qualified investments) as a first step in evaluating the institution's responsiveness to credit and community development needs. In addition, an assessment of ''responsiveness'' encompasses the qualitative aspects of performance, including the effectiveness of the activities. For example, some community development activities require specialized expertise or effort on the part of the institution or provide a benefit to the community that would not otherwise be made available. In some cases, a smaller loan may have more benefit to a community than a larger loan. In other words, when evaluated qualitatively, some activities are more responsive than others. Activities are more responsive if they are successful in meeting identified credit and community development needs. For example, investing in a community development organization that specializes in originating home mortgage loans to low- or moderate-income individuals would be considered more responsive than an investment of the same amount in a single-family mortgage-backed security in which the majority of the loans are to low- or moderate-income borrowers. Although both of these activities may receive consideration as a qualified investment, the former example would be considered to be more responsive than the latter. Examiners evaluate the responsiveness of an institution's activities to credit and community development needs in light of the institution's performance context. That is, examiners consider the institution's capacity, its business strategy, the needs of the community, and the opportunities for lending, investments, and services in the community. To inform their assessment, examiners may consider information about credit and community development needs and opportunities from many sources, including:

- demographic and other information compiled by local, state, and federal government entities;
- public comments received by the agency, for example, in response to its publication of its planned examination schedule;
- information from community leaders or organizations;
- studies and reports from academic institutions and other research bodies;
- consumer complaint information; and
- any relevant information provided to examiners by the financial institution that is maintained by the institution in its ordinary course of business.

Responsiveness to community development needs and opportunities in an institution's assessment area(s) is also a key consideration when an institution plans to engage in community development activities that benefit areas outside of its assessment area(s). Q&A § _____.12(h)—6 states that an institution will receive consideration for activities that benefit geographies or individuals located somewhere within a broader statewide or regional area that includes the institution's assessment area(s) even if they will not benefit the institution's assessment area(s), as long as the institution has been responsive to community development needs and opportunities in its assessment area(s). When considering whether an institution has been responsive to community development needs and opportunities in its assessment area(s), examiners will consider all of the institution's community development activities in its assessment area(s). Examiners will also consider as responsive to assessment area needs community development activities that support an organization or activity that covers an area that is larger than, but includes, the institution's assessment area(s). This is true if the purpose, mandate, or function of the organization or activity includes serving geographies or individuals located within the institution's assessment area(s), even though the institution's assessment area(s) did not receive an immediate or direct benefit from the institution's participation in the organization or activity. For example, suppose an institution were to invest in a statewide community development fund that was organized with the purpose of providing community development loans throughout the state in which the institution is located. Examiners would consider this investment when evaluating the institution's responsiveness to community development needs and opportunities in its assessment area(s) even if the fund had not provided a loan within the institution's assessment area(s).

INNOVATIVENESS

4. Q&A §____.21(a)—4: What is meant by ''innovativeness''?

''Innovativeness'' is one of several qualitative considerations under the lending, investment, and service tests. The community development test for wholesale and limited purpose institutions similarly considers ''innovative'' loans, investments, and services in the evaluation of performance. Under the CRA regulations, all innovative practices or activities will be considered when an institution implements meaningful improvements to products, services, or delivery systems that respond more effectively to customer and community needs, particularly those segments enumerated in the definition of community development. Institutions should not innovate simply to meet this criterion of the applicable test, particularly if, for example, existing products, services, or delivery systems effectively address the needs of all segments of the community. See Q&A §_____.28—1.

Innovative activities are especially meaningful when they emphasize serving, for example, low- or moderate-income consumers or distressed or underserved nonmetropolitan middle-income geographies in new or more effective ways. Innovativeness may also include products, services, or delivery systems already present in the assessment area by institutions that are not leaders in innovation — for example, due to the lack of available financial resources or technological expertise — when they subsequently introduce those products, services, or delivery systems to their low- or moderate-income customers or segments of consumers or markets not previously served. Practices that cease to be innovative may still receive qualitative consideration for being flexible, complex, or responsive.

REVITALIZE OR STABILIZE UNDERSERVED NONMETROPOLITAN MIDDLE-INCOME GEOGRAPHIES

5. Q&A §___.12(g)—4: Can examples of community development activities discussed in a particular Q&A also apply to other types of community development activities not specifically discussed in that Q&A if they have a similar community development purpose?

Yes. The Interagency Q&As provide examples of particular activities that may receive consideration as community development activities. Because a particular Q&A often describes a single type of community development activity, such as a community development loan, the corresponding examples are of community development loans. However, because community development loans, qualified investments, and community development services all must have a primary purpose of community development, a qualified investment or community development service that supports a community development purpose similar to the activity described in the context of the community development loan would likely receive consideration under the applicable test. The same would be true if the community development activity described in a particular Q&A were a qualified investment or community development service. For example, Q&A § _____.12(h)—1 provides an example of a community development loan to a not-for-profit organization supporting primarily low- or moderate-income housing needs. Similarly, a grant to the same not-for-profit organization would be considered a qualified investment or technical assistance, such as writing a grant proposal for the not-for-profit organization, would be considered a community development service. Further, if a financial institution engaged in all of these activities, each would be considered under the applicable test. See Q&A §_____.23(b)—1.

Moreover, lists of examples included throughout the Q&As are not exhaustive. A Q&A may include examples to demonstrate activities that may qualify under that Q&A, but the examples are not the only activities that might qualify. Financial institutions may submit information about activities they believe meet the definition of community development loan, qualified investment, or community development service to examiners for consideration.

ALTERNATIVE SYSTEMS FOR DELIVERING RETAIL BANKING SERVICES

6. Q&A §____.24(d)(4)—1: How do examiners evaluate the range of services provided in low-, moderate-, middle-, and upper income geographies and the degree to which those services are tailored to meet the needs of those geographies?

Examiners review both information from the institution's public file and other information provided related to the range of services offered and how they are tailored to meet the particular needs of low- and moderate-income geographies. Examiners always review the information that institutions must maintain in their public files: a list of services generally offered at their branches, including their hours of operation; available loan and deposit products; and transaction fees as well as descriptions, where applicable, of material differences in the availability or cost of services at particular branches. See 12 CFR _____.43(a)(5). The information provided by the financial institution to identify the types of services offered and any differences in services among its branches in different geographies may indicate how its services (including, where appropriate, business hours) are tailored to the convenience and needs of its assessment area(s), particularly low- or moderate-income geographies or low- or moderate-income individuals. See 12 CFR ll, Appendix A, Section (b)(3). Examiners also review any other information provided by the institution, such as data regarding the costs and features of loan and deposit products, account usage and retention, geographic location of accountholders, the availability of information in languages other than English, and any other relevant information demonstrating that its services are tailored to meet the needs of its customers in the various geographies in its assessment area(s). Any information that institutions may maintain regarding services offered through alternative delivery systems (see Q&A §_____.24(d)(3)—1) and through collaborations with government, community, educational, or employer organizations to offer or expand the range of services or access to services, particularly designed to meet the needs of their assessment area(s), including low- and moderate-income communities, will also be considered. Examiners will also review information provided by the public through comments or community contacts.

REVISED Q&AS

The agencies revised the following Q&As:

DEFINITIONS

1. Q&A §_____.12(g)(3)—1: This Q&A reviews the definition of community development, which includes "activities that promote economic development by financing businesses or farms that meet the size eligibility standards of the Small Business Administration's Development Company or Small Business Investment Company programs or have gross annual revenues of $1 million or less." The agencies revised it to clarify the meaning of the phrase "promote economic development."

2. Q&A §_____.12(h)—1: This Q&A provides examples of community development loans. The agencies revised it to expand the examples to include loans to finance certain renewable energy or energy-efficient technologies.

3. Q&A §_____.12(g)(4)(iii)—4: This Q&A provides examples of activities that qualify as revitalizing or stabilizing underserved nonmetropolitan middle-income geographies that meet essential community needs. The agencies revised it to expand the examples to include new or rehabilitated communications infrastructure, such as one for broadband internet services that serve the community, including low- or moderate-income individuals, and a new or rehabilitated flood control measure, such as a levee, that serve the community, including low- and moderate-income residents.

4. Q&As §_____.12(g)—1: This Q&A concerns the definition of community development. The agencies revised it to clarify that qualified community development activities include workforce development or job training programs for low- or moderate-income or unemployed persons.

5. Q&A §_____.12(t)—4: This Q&A provides examples of qualified investments. The agencies revised it, consistent with revised Q&A 12(g)—1 discussed above, to expand the examples to include workforce development or job training programs for low- or moderate-income or unemployed persons.

6. Q&A §_____.12(i)—3: This Q&A provides examples of community development services. The agencies revised it to delete the retail banking services listed as examples of community development services in Q&A § ___.12(i)—3. These examples have been included in .24(a)—1, discussed previously, and in .26(c)(3)—1, on community development services by an intermediate small bank.

LENDING TEST

7. Q&A §_____.22(b)(5)—1: This Q&A addresses flexible or innovative lending practices. The agencies revised it to add two new examples of innovative or flexible lending practices: 1) using alternative credit histories, such as utility or rent payments, to evaluate low- or moderate-income individuals lacking conventional credit histories and who would be denied credit under the institution's traditional underwriting standards; and 2) providing small dollar loan programs with reasonable terms and offered in a safe and sound manner, including evaluating the applicant's ability to repay the loan.

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Compliance Alerts

The Consumer Financial Protection Bureau (CFPB) issues a final rule for prepaid consumer accounts.

On November 22, 2016, the CFPB issued a final rule under Regulation E (Electronic Fund Transfer Act) and Regulation Z (Truth in Lending Act) to provide consumer protections for prepaid accounts. 81 Fed. Reg. 83,934 (November 22, 2016). Prepaid accounts are defined to include payroll card accounts and government benefit accounts. In addition, prepaid accounts include: 1) an account marketed or labeled as prepaid that can be accepted at multiple unaffiliated merchants for goods and services or usable at automated teller machines (ATMs); and 2) an account issued on a prepaid basis or capable of storing and loading funds, whose primary function is to conduct transactions with multiple unaffiliated merchants for goods or services, to conduct transactions at ATMs, or to conduct person-to-person transfers, and that is not a checking, share draft, or negotiable order of withdrawal account.

Certain accounts are excluded from the definition of prepaid account, including accounts for health savings, flexible spending, medical savings, health reimbursement, dependent care, or transit or parking reimbursement. The rule also does not apply to gift certificates; store gift cards; loyalty, award, or promotional gift cards; and general-use prepaid cards marketed as gift cards or certificates. Gift cards and gift certificates are generally covered by provisions in the Credit Card Accountability, Responsibility and Disclosure Act of 2009, as implemented in §1005.20 of Regulation E. The CFPB determined that the gift card market could be adversely affected if it was also subject to this prepaid rule. The protections in §1005.20, concerning expiration dates and fees, continue to apply to these products.

The final rule includes two new disclosure forms specific to covered prepaid accounts and applies existing Regulation E substantive consumer protections, with some modifications, to these accounts. Before a prepaid product is acquired by a consumer, a financial institution must generally provide both short- and long-form disclosures in a tabular format, although in some cases, the long form can be provided after acquisition. The short form highlights key account information and certain fees, including periodic fees, per purchase fees, ATM withdrawal and balance inquiry fees, cash reload fees, customer service fees, and inactivity fees. The long form must list all fees along with certain other disclosures. If an account is purchased through a retail store, the short-form disclosure must be provided on or visible through the outside packaging material for the prepaid account access device. Model forms are available to facilitate compliance.

The Regulation E substantive protections include error resolution rights, liability limits for unauthorized transactions, and at least 21 days' advance notice of certain changes to the terms and conditions of the account. The error resolution procedures and liability limits are generally similar to the existing requirements under Regulation E, with some modifications. For example, institutions may take up to 45 days to investigate an error without having to provide provisional credit for an unverified account. Institutions must also provide periodic statements or alternatively can provide all of the following: account balance via telephone, 12 months of account transaction through the Internet, and 24 months of history upon request.

The rule generally requires issuers to submit to the CFPB new and amended prepaid account agreements and notification of withdrawn agreements no later than 30 days after the issuer offers, amends, or ceases to offer the agreement. If an issuer is required to submit a prepaid account agreement to the CFPB, and the prepaid account is offered to the general public, the institution must also post the account agreement in a prominent and readily accessible location on its website. If a prepaid account agreement is not posted on the issuer's website, the issuer must provide a consumer with a copy of the consumer's prepaid account agreement no later than five business days after receiving the request.

The rule also provides protections under Regulation Z if the issuer of the prepaid account allows the consumer to access a separate line of credit offered by the issuer, its affiliate, or partner, and the credit can be accessed during a transaction with the card, which the rule identifies as a hybrid prepaid-credit card. Issuers must wait 30 days after a prepaid account is registered before soliciting a credit feature and must obtain the consumer's consent. Regulation Z's protections for credit cards apply to hybrid prepaid-credit cards, including the ability-to-repay requirement in §1026.51, monthly billing statements for credit transactions under §1026.7(b), limits on fees during the first year of the account under §1026.52, restrictions on raising rates for an existing balance under §1026.55, and 45-day advance notice of changes to the credit account under §1026.9(c)(2). For prepaid accounts without a credit feature, the Regulation Z credit card protections would not apply.

The rule is effective October 1, 2017, although the requirement to submit prepaid account agreements to the CFPB is not effective until October 1, 2018. The CFPB has created an implementation page, including an executive summary and coverage chart, at www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/prepaid-rule/.

Agencies issue a proposed rulemaking to implement the private flood insurance requirements of the Biggert-Waters Flood Insurance Reform Act (BWA).

On November 7, 2016, the Board of Governors of the Federal Reserve System (Board), the Farm Credit Administration (FCA), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), and the Office of the Comptroller of the Currency (OCC) (agencies) issued a rulemaking proposal to implement the private flood insurance requirements of the BWA. 81 Fed. Reg. 78063 (November 7, 2016). The BWA amended the Flood Disaster Protection Act of 1973 (FDPA) to require lenders to accept a private flood insurance policy in satisfaction of the FDPA's mandatory flood insurance purchase requirement if the policy meets the statutory definition of "private flood insurance." In the proposal, the agencies define "private flood insurance" as a policy that:

- is issued by an insurance company that is licensed, admitted, or otherwise approved to engage in the business of insurance by the insurance regulator of the state or jurisdiction in which the property to be insured is located; or, in the case of a policy of difference in conditions, multiple peril, all risk, or other blanket coverage insuring nonresidential commercial property, is recognized, or not disapproved, as a surplus lines insurer by the state insurance regulator of the state or jurisdiction in which the property to be insured is located;
- provides coverage at least as broad as the coverage under a standard flood insurance policy (SFIP), when considering deductibles, exclusions, and conditions offered by the insurer;
- requires the insurer to provide written notice 45 days before canceling or not renewing flood insurance coverage;
- provides information about the availability of flood insurance coverage under the National Flood Insurance Program (NFIP);
- includes a mortgage interest clause similar to the clause contained in an SFIP;
- notifies the insured that any lawsuit related to a claim must be filed no later than one year after the date of a written denial for all or part of a claim under a policy; and
- contains cancellation provisions that are as restrictive as the provisions contained in an SFIP.

To facilitate compliance, the proposal includes a compliance aid provision under which a policy would be deemed to be "private flood insurance" if the following conditions are satisfied: 1) the policy includes a written summary that demonstrates how the policy meets the definition of private flood insurance by identifying the provisions of the policy that meet each criterion in the definition and confirms that the insurer is regulated in accordance with that definition; 2) the lender verifies in writing that the policy includes the provisions identified by the insurer in its summary and that these provisions satisfy the criteria included in the definition; and 3) the policy or an endorsement to the policy includes the statement: "This policy meets the definition of private flood insurance contained in 42 U.S.C. 4012a(b)(7) and the corresponding regulation."

The proposal also provides guidance on other types of flood insurance policies issued by private insurers that lenders may accept at their discretion, provided the following criteria are met:

- The policy is issued by an insurer that is licensed, admitted, or otherwise approved to engage in the business of insurance by the insurance regulator of the state or jurisdiction in which the property to be insured is located or, in the case of a policy of difference in conditions, multiple peril, all risk, or other blanket coverage insuring nonresidential commercial property, is issued by a surplus lines insurer recognized, or not disapproved, by the insurance regulator of the state or jurisdiction in which the property to be insured is located;
- The policy covers both the mortgagor(s) and mortgagee(s) as loss payees;
- The policy provides for cancellation after reasonable notice to the borrower only for reasons permitted by FEMA for an SFIP, in any case of nonpayment, or when cancellation is mandated pursuant to state law; and
- The policy is either:
    - "at least as broad" as an SFIP; or
    - provides coverage that is similar to an SFIP policy, considering deductibles, exclusions, and conditions offered by the insurer; and the lender compares the private policy with an SFIP and documents its finding that the policy provides sufficient protection of the loan.

The proposal also defines the term mutual aid society and would permit a lender to accept a private policy issued through a mutual aid society, if certain conditions are satisfied.

Each regulator determines for the institutions it supervises if a policy issued by a mutual aid society meets the requirements. The proposal states that the Board, FDIC, and NCUA "expect that cases in which they approve policies issued by mutual aid societies to be rare and limited." The OCC and FCA "propose to conduct their own evaluations using the criteria that institutions are expected to consider" under the proposed mutual aid provision.

The comment period closes on January 6, 2017, 60 days after the notice was published in the *Federal Register.* ■

News from Washington: Regulatory Updates*

The Board of Governors of the Federal Reserve System (Board) issues revised interagency examination procedures for the Military Lending Act (MLA). On September 29, the Board issued Consumer Affairs (CA) Letter 16-6 transmitting revised interagency examination procedures for the MLA. In a July 2015 final rule, the Department of Defense (DOD) amended its MLA implementing regulation, codified at 32 C.F.R. Part 232, to extend the protections of the MLA to a wider range of closed-end and open-end credit products, including credit cards. Consequently, the amended MLA regulation generally applies to all consumer credit other than home-secured credit and loans to finance the purchase of motor vehicles and other consumer goods that are secured by the purchased item. For extensions of credit covered by the rule, the Military Annual Percentage Rate (MAPR) applicable to the loan may not exceed 36 percent. Among a range of other amendments, DOD's final rule modifies: the fees that must be included when calculating the MAPR; the optional safe-harbor provisions for creditors to determine whether consumers are entitled to MLA protections; and MLA disclosure requirements. The compliance date for the final rule was October 3, 2016, but for credit card accounts, the compliance date is October 3, 2017 (which may, at DOD's option, be extended by one year). The interagency MLA examination procedures have been amended to reflect the changes made by the DOD to its regulation in the July 2015 final rule.

The DOD publishes MLA interpretive rule. On August 26, 2016, the DOD published in the *Federal Register* an interpretive rule, in a Q&A format, providing guidance regarding certain questions it received on compliance with its July 2015 MLA final rule amending the MLA implementing regulation. The full guidance is available at www.gpo.gov/fdsys/pkg/FR-2016-08-26/pdf/2016-20486.pdf.

The Consumer Financial Protection Bureau (CFPB) proposes updates to the TILA-RESPA Integrated Disclosure (TRID) rule and issues an updated version of its small entity compliance guide. On August 15, 2016, the CFPB published a proposal in the *Federal Register* to amend Regulations Z and X to implement changes to TRID. The changes are intended to codify some of the informal guidance the CFPB has provided in webinars, compliance guides, and other media to provide clarity concerning issues entities have encountered in implementing TRID. Among other proposed revisions, the proposal would:

- permit a creditor, in instances where changed circumstances (as defined by the rule) occur after provision of a Closing Disclosure, to reset applicable good faith tolerances by providing a revised Closing Disclosure within three business days of the discovery of the changed circumstance;
- provide accuracy tolerances for the Total of Payments disclosure that parallel existing finance charge tolerances;
- apply a zero tolerance category to fees where the creditor fails to provide a written list of settlement providers;
- clarify when disclosures can be shared with various parties involved in the mortgage origination process;
- provide further guidance on construction loan disclosures;
- clarify that closed-end consumer credit transactions secured by a cooperative, which are considered to be personal property in some states, are subject to TRID regardless of how state law classifies them; and
- adjust a partial disclosure exemption that mainly affects housing finance agencies and nonprofits.

The comment period closed on October 18, 2016. The CFPB also released a revised version of its TRID small entity compliance in October 2016, including updates incorporating guidance from its webinars.

Agencies issue revised interagency examination procedures for Regulation P. On June 8, 2016, the Board issued CA Letter 16-3 regarding revised interagency examination procedures for Regulation P (privacy of consumer financial information). The procedures were revised to reflect Section 75001 of the Fixing America's Surface Transportation (FAST) Act, which amended Section 503 of the Gramm-Leach-Bliley Act (GLBA). GLBA Section 503, as implemented by Regulation P, generally requires a financial institution to provide an annual notice to its customers of its policies for disclosing and protecting nonpublic personal information. To reduce the compliance burden, the amendment provides that a financial institution is not required to provide an annual notice if: 1) it shares nonpublic personal information solely in accordance with certain exceptions to GLBA requirements under §§502(b)(2) (corresponding to §1016.13 of Regulation P) or 502(e) (corresponding to §§1016.14 and .15 of Regulation P); and 2) it has not changed its policies for disclosing nonpublic personal information since its most recent disclosure to its customers. This change became effective December 4, 2015, when the FAST Act was signed into law. On a related note, on July 11,

* Links to the announcements are available in the online version of *Outlook* at www.consumercomplianceoutlook.org.

2016, the CFPB published a notice of proposed rulemaking in the *Federal Register* to amend Regulation P to implement Section 75001.

The CFPB proposes to prohibit pre-dispute arbitration agreements that waive a consumer's right to participate in a class-action lawsuit. On May 24, 2016, the CFPB published a notice in the *Federal Register* seeking comment on a rulemaking proposal for consumer arbitration agreements. Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) directed the CFPB to study the effect of mandatory arbitration clauses in agreements for consumer financial services and products and authorized the CFPB to issue any regulations it believes are necessary to protect consumers, consistent with its findings. In 2015, the CFPB published the required arbitration study, which reviewed arbitration clauses in six consumer financial markets: credit cards, checking accounts, prepaid cards, payday loans, private student loans, and mobile wireless contracts. The proposal has two main requirements: 1) it would prohibit covered providers of consumer financial services and products from using pre-dispute arbitration agreements to prevent a consumer from participating in a class-action lawsuit and would require providers to insert language into their arbitration agreements reflecting this limitation; and 2) it would require providers using pre-dispute arbitration agreements to send records related to their arbitration proceedings, such as claims and awards, to the CFPB for its monitoring purposes. For transparency, the CFPB would plan to publish redacted records in some form. The comment period closed on August 22, 2016.

Federal banking agencies issue a policy statement concerning the standards to assess the diversity policies and practices of regulated entities. The Dodd-Frank Act directed the Board, the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) to each establish an Office of Minority and Women Inclusion and to develop standards to assess the diversity policies and practices of supervised institutions. In response, the agencies published a Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies on June 10, 2015. To provide further guidance, the agencies published a related FAQ on August 6, 2016, available at www.federalreserve.gov/newsevents/press/bcreg/bcreg20160802b1.pdf.

Agencies issue interagency guidance regarding deposit account reconciliation practices. On May 18, 2016, the Board, the CFPB, the FDIC, the National Credit Union Administration, and the OCC issued interagency guidance regarding financial institutions' deposit account reconciliation practices. The guidance highlights the requirement in the Expedited Funds Availability Act, as implemented by Regulation CC, 12 C.F.R. Part 229, that financial institutions make funds that have been deposited in a transaction account available for withdrawal within prescribed time limits as well as the Federal Trade Commission Act's prohibition against unfair or deceptive acts or practices. The guidance also explains the agencies' supervisory expectations regarding institutions' account deposit reconciliation practices.

Congress temporarily extends the period of protection for servicemembers against foreclosure and evictions after service to one year and changes the location of the Servicemembers Civil Relief Act (SCRA) in the U.S. Code. The SCRA provides certain protections to servicemembers after they complete service, including a time period during which: 1) a court may stay proceedings on real property owned before military service began; and 2) any sale, foreclosure, or seizure of the property (based on breach of the mortgage or other security) is invalid unless issued with a court order or waiver agreement. Congress extended the post-service protection period from three to nine months in 2008 and subsequently to one year; the latter extension expired on January 1, 2016. On March 31, 2016, President Barack Obama signed into law the Foreclosure Relief and Extension for Servicemembers Act of 2015, Pub. L. 114-142, which again extends the protection period to one year after service. The law became effective the day it was signed and will sunset on January 1, 2018, unless extended again. If Congress fails to act again before the sunset date, the protection period will revert to three months. The SCRA is also affected by a change to its codification in the U.S. Code. The Office of the Law Revision Counsel of the U.S. House of Representatives in late 2015 changed the codification of the SCRA from 50 U.S.C. App. 501 et seq. to 50 U.S.C. 3901 et seq. All citations to the SCRA should reflect this change. The latest version of the SCRA, including the revised citations, is available at uscode.house.gov/view.xhtml?path=/prelim@title50/chapter50&edition=prelim. ■

On the Docket: Recent Federal Court Opinions*

REGULATION Z — TRUTH IN LENDING ACT (TILA)

The 11th Circuit holds that an assignee of a residential mortgage loan is not liable for a servicer's alleged failure to provide a payoff balance. *Evanto v. Federal Nat. Morg. Ass'n.,* 814 F.3d 1295 (11th Cir. 2016). Pursuant to 15 U.S.C. §1641 (e)(1)(a), residential mortgage loan assignees are only liable for TILA violations apparent on the face of the disclosure statement (and, even then, not in instances involving involuntary assignment). In this case, the borrower obtained a residential mortgage loan that was later sold to Fannie Mae. The loan was serviced by a third party. After the borrower defaulted and foreclosure proceedings were initiated, he requested a payoff balance from the third-party servicer. The borrower alleged that the third-party servicer did not provide the payoff balance within seven business days of his request as required by TILA, 15 U.S.C. §1639g, and Regulation Z, 12 C.F.R. §1026.36(c)(3). Fannie Mae moved to dismiss the suit on the basis that the plaintiff failed to state a claim on which relief could be granted. The district court agreed, dismissing the suit because the failure to provide a payoff balance is not a violation apparent on the face of TILA disclosures. On appeal, the 11th Circuit affirmed, observing that disclosures are documents that set forth the terms of a loan and are provided before the extension of credit, but a payoff balance cannot be made available until after a loan has been made ("There is no way that the failure to provide a payoff balance can appear on the face of the disclosure statement."). Accordingly, the court affirmed the district court's dismissal of the suit.

The Ninth Circuit rules that a 2009 TILA amendment requiring notice to borrowers when a residential mortgage loan is transferred does not apply retroactively. *Talaie v. Wells Fargo Bank, N.A.,* 808 F.3d 410 (9th Cir. 2015). In 2009, Congress amended TILA to require that when a residential mortgage loan is sold, transferred, or assigned, the new owner or assignee of the loan must provide notice, in writing, to the borrower within 30 days. See 15 U.S.C. §1641(g). The statute allows borrowers to sue for up to $4,000 in statutory damages in individual claims and up to $1 million in statutory damages in a class-action lawsuit along with actual damages, costs, and attorney's fees. In this class-action lawsuit, the plaintiffs alleged that U.S. Bank violated this provision by not providing notice for mortgage loans Wells Fargo Bank transferred to U.S. Bank in 2006. The issue in the case was whether §1641(g) applied retroactively to loans transferred before the 2009 TILA amendment was enacted. The court explained that the Supreme Court has ruled that retroactive application of statutes is "disfavored" and that this presumption can only be overcome when Congress has expressed a clear and unambiguous intent to apply a law retroactively. The court examined the text of the amendment and its legislative history and found no evidence that Congress intended for it to apply to loans whose ownership was transferred before it was enacted. The court also noted that it would have been impossible for creditors to comply with §1641(g) in connection with loans transferred more than a month before the statute was enacted given that notice must be provided within 30 days of the transfer. Accordingly, noting that its holding was consistent with various other district court decisions interpreting §1641(g), the court affirmed the lower court's dismissal of the case.

REGULATION B — EQUAL CREDIT OPPORTUNITY ACT (ECOA)

Supreme Court equally divided regarding whether loan guarantors are applicants under the ECOA. *Hawkins v. Community Bank of Raymore,* 136 S.Ct. 1072 (March 22, 2016). The scope of the ECOA is generally limited to credit applicants, except that implementation of Regulation B — as promulgated by the Federal Reserve Board and later republished by the CFPB — defines "applicant" in 12 C.F.R. §1002.2(e) to include "guarantors" solely for the purposes of Regulation B's spousal signature provisions, 12 C.F.R. §1002.7(d). In 2014, the Sixth and Eighth Circuit Courts issued conflicting decisions about whether spousal guarantors qualify as credit applicants covered by the ECOA. In each case, creditors argued that Regulation B's definition of applicant to include guarantors is contrary to Congress's definition in Section 702 of ECOA, 15 U.S.C. §1691a(b) and its intent when it enacted the statute and is therefore invalid. In *Hawkins v. Community Bank of Raymore*, 761 F.3d 937, 941 (8th Cir. 2014), the Eighth Circuit held that a "guarantor does not request credit and therefore cannot qualify as an applicant under the unambiguous text of the ECOA." The court therefore affirmed the district court's determination that guarantors are not applicants under the ECOA and its dismissal of the case involving spousal guarantors who sought to have their guaranties invalidated because they were allegedly obtained in violation of §1002.7(d).

* Links to the announcements are available in the online version of *Outlook* at www.consumercomplianceoutlook.org.

However, in *RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC,* 754 F.3d 380 (6th Cir. 2014), the Sixth Circuit reached the opposite conclusion, holding that §1002.7(d)'s protections for spousal guarantors was valid because the ECOA's definition of applicant was ambiguous and could "encompass all those who offer promises in support of an application — including guarantors, who make formal requests for aid in the form of credit for a third party." The court also examined the Board's rationale when it included guarantors in Regulation B's definition of applicant solely for purposes of §1002.7(d)(5) (which it referred to as the spouse-guarantor rule) and found that it was reasonable.

On March 22, 2016, the Supreme Court affirmed, by an equally divided court, the Eighth Circuit's decision in *Hawkins*. Under the court's procedures, a tie vote has the effect of affirming the decision below without creating a binding precedent.

FAIR CREDIT REPORTING ACT (FCRA)

Supreme Court holds that a "bare" procedural FCRA violation in the absence of concrete harm is insufficient to confer Article III standing. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (May 16, 2016). Under Article III of the Constitution, only persons suffering an actual or imminent concrete and particularized injury in fact that resulted from a defendant's conduct and that can likely be redressed by a favorable decision have standing to invoke the jurisdiction of the federal courts. Several federal appeals courts were divided on whether a plaintiff who cannot prove actual or imminent harm from a federal law violation satisfies this standing requirement when a federal law provides for statutory damages (predetermined damages that must be paid if the plaintiff establishes a violation). The Supreme Court accepted the review of the Ninth Circuit's decision in *Robins v. Spokeo, Inc.*, 742 F.3d 409 (2014) to resolve the circuit split.

The plaintiff alleged that Spokeo, an information-gathering website that offers various options for finding information about people, willfully violated the FCRA by including inaccurate personal information about him on its website that could potentially adversely affect his employment prospects as well as his ability to obtain credit and insurance. For willful violations, the FCRA allows statutory damages of up to $1,000 per violation, 15 U.S.C. §1681n(a); the plaintiff only sought such statutory damages. The district court dismissed the lawsuit for lack of standing on the grounds that the plaintiff did not allege an injury in fact and that any injuries that he did allege were not caused by the defendant's actions. On appeal, the Ninth Circuit reversed the district court's dismissal of the matter and remanded the case for further proceedings consistent with its decision. Specifically, the Ninth Circuit determined that it was not necessary for the plaintiff to prove any actual harm: "When, as here, the statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages."

Moreover, the court found that the plaintiff's alleged violation of his statutory rights created by the FCRA satisfied Article III's injury-in-fact requirement and that the plaintiff adequately pleaded causation and redressability. After the matter was appealed to the Supreme Court, it affirmed that the injury-in-fact requirement has both "concreteness" and "particularity" components and found that the Ninth Circuit had erroneously solely focused on particularity. Observing that particularity refers to an injury affecting a plaintiff in a "personal and individual way," the court further explained that "[a] 'concrete' injury must be 'de facto'; that is, it must actually exist." The court added that "[a]lthough tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous decisions that intangible injuries can nevertheless be concrete" and that the risk of real harm can satisfy the concreteness requirement. The court vacated the Ninth Circuit's judgment and remanded the matter to determine if the plaintiff had alleged an FCRA procedural violation involving a degree of risk of harm sufficient to meet Article III's concreteness requirement or had merely alleged a bare procedural violation without any material risk of harm ("An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm."). ■

continued from page 1

was $581.6 billion in 2015.[3] The United States ranked as the top transmitter, sending $56.3 billion in transfers to recipients in foreign countries in 2014.[4] Many states have money transmitter laws and examine transmitters through their state banking departments, but until Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in 2010, no federal consumer protection law directly regulated foreign remittance transfers.

During congressional hearings conducted before the law's enactment, witnesses testified about consumer protection issues for foreign remittance transfers. According to a report of the U.S. Senate Committee on Banking, Housing, and Urban Affairs, immigrants send "substantial portions of their earnings to family members abroad. These senders of remittance transfers are not currently provided with adequate protections under federal or state law. They face significant problems with their remittance transfers, including being overcharged or not having the funds reach intended recipients."[5] The hearings suggested the need for reliable and standard disclosures, especially for the amount of the transfer the recipient would receive.[6]

In response to these concerns, Congress amended the Electronic Fund Transfer Act (EFTA) in Section 1073 of the Dodd-Frank Act to add new EFTA Section 919,[7] which created four new compliance requirements for foreign remittance transfers. Section 919:

- requires disclosures about important transaction terms, error resolution, and cancellation;
- establishes error resolution procedures;
- establishes cancellation and refund policies; and
- establishes a remittance transfer provider's liability for the acts of its agents.[8]

In May 2011, the Federal Reserve Board (Board) published a rulemaking proposal to amend Regulation E and its official staff commentary to implement Section 919's requirements.[9] Because the Dodd-Frank Act transferred rulemaking authority for the EFTA from the Board to the CFPB, effective on July 21, 2011, the CFPB inherited the responsibility for completing the rulemaking.

In February 2012, the CFPB published the final rule, which largely adopted the Board's proposal.[10] The rule, which became effective on February 7, 2013, is codified in subpart B to Regulation E, 12 C.F.R. §§1005.30–1005.36. The CFPB also subsequently amended the final rule several times. This article reviews the rule, including certain changes since 2012 noted at the beginning of this article.

DEFINITIONS

Before discussing the final rule, it is helpful to review several definitions it created:[11]

- **Agent:** An agent, authorized delegate, or affiliate of the remittance transfer provider (as determined under state or applicable law) who, in connection with a foreign remittance transfer, acts for that remittance transfer provider.
- **Business day:** Any day in which the offices of a remittance transfer provider are open to the public for carrying on substantially all business functions.
- **Designated recipient (recipient):** A person who the sender specifies and authorizes to receive a remittance transfer in a foreign country. The rule and commentary provide guidance as to when a recipient is located in a foreign country. In 2014, the CFPB clarified that a designated recipient does not include a transfer to persons at U.S. military installations in foreign countries because they are treated by the rule as being on U.S. soil.[12]
- **Preauthorized remittance transfer:** A remittance transfer authorized in advance to recur at substantially regular intervals.
- **Remittance transfer:** An electronic transfer of funds conducted by a remittance transfer provider at the request of a sender to a designated recipient. Small transfers in the amount of $15 or less are excluded. Commodity and securities transfers, as defined in §1005.3(c)(4), are also excluded.
- **Remittance transfer provider (provider):** A person who provides remittance transfers for a consumer in the normal course of business, regardless of whether the consumer holds an account with such person.
- **Sender:** A consumer in a state who, primarily for personal, family, or household purposes, asks a provider to send a remittance transfer to a recipient.[13] As discussed previously, the rule considers a U.S. military installation in a foreign country to be located in a U.S. state. The CFPB explained the effect of this in its small entity compliance guide: "A transfer from the U.S. to an individual or an account located on a base in a foreign country is not an international money transfer for purposes of the rule, while a transfer from the base to a foreign country is an international remittance transfer."[14]

COVERAGE

The rule applies to *providers*, who are defined as persons providing remittance transfers to consumers in the "normal course of business." To facilitate compliance, the CFPB established a bright-line safe harbor to determine when an institution makes transfers in the normal course of business. Specifically, the rule provides that a person who made 100 or fewer remittance transfers in the previous calendar year and continues to make 100 or fewer remittance transfers in the current year is deemed to not be providing remittance transfers in the normal course of business.[15]

The CFPB also established a transition period for providers who made fewer than 100 transfers in the previous year and then make more than 100 in the current year. In that case, once the provider exceeds 100 transfers in the current year and is determined to provide remittance transfers in the normal course of business, the provider has a reasonable period of up to six months to comply with the remittance transfer requirements in subpart B of Regulation E.[16] The provider is not subject to subpart B compliance requirements for any remittance transfers made during the transition period.

While the bright-line rule creates a safe harbor, it does not preclude the possibility of a provider conducting more than 100 transfers per year without triggering a determination that it does so in the normal course of business. The Official Staff Commentary (commentary) provides further guidance on the meaning of the "normal course of business" with a facts and circumstances test:

> Whether a person provides remittance transfers in the normal course of business depends on the facts and circumstances, including the total number and frequency of remittance transfers sent by the provider. For example, if a financial institution generally does not make international consumer wire transfers available to customers but sends a couple of international consumer wire transfers in a given year as an accommodation for a customer, the institution does not provide remittance transfers in the normal course of business. In contrast, if a financial institution makes international consumer wire transfers generally available to customers (whether described in the institution's deposit account agreement or in practice) and makes transfers multiple times per month, the institution provides remittance transfers in the normal course of business.[17]

Providers who conduct more than 100 transfers per year but believe they are still exempt from the regulation should review the facts and circumstances test carefully to verify if they are eligible for the exemption.

DISCLOSURE REQUIREMENTS FOR PROVIDERS: §1005.31

Disclosures

When a sender requests a remittance transfer, the provider must deliver prepayment disclosures listing critical terms of the transaction and, if the consumer continues with the transaction after receiving the disclosures, a post-payment receipt that repeats the prepayment disclosures and includes additional information such as error resolution rights. Disclosures generally must be provided in writing.[18] To reduce regulatory burden, the rule also includes an option to provide a combined disclosure prior to payment, in lieu of the prepayment disclosure and receipt.

Prepayment Disclosures

When a sender requests a remittance transfer, the provider must disclose the information listed below (as applicable) in a retainable form before payment is made.[19] But if the transaction is conducted orally or entirely by mobile telephone via mobile application or text message, the prepayment disclosures may be provided orally, by mobile application, or by text message, provided that the right of cancellation (discussed later in the article) is also disclosed either orally or by mobile application or text message.[20]

The following information must be disclosed using substantially similar terms:[21]

- **Transfer amount:** The amount that will be transferred to the recipient disclosed in the currency used to fund the remittance transfer. But if other fees or taxes are imposed by someone other than the provider, the amount that will be transferred to the recipient must be disclosed in the currency in which the funds will be received.
- **Transfer fees and transfer taxes:** Any fees and taxes imposed on the remittance transfer by the provider and disclosed in the currency used to fund the remittance transfer.
- **Total:** The total amount of the transaction disclosed in the currency used to fund the remittance transfer. The total is calculated by adding the transfer amount, transfer fees, and transfer taxes.
- **Exchange rate:** The rate used by the provider for the transfer, rounded to at least two and no more than four decimal places. A provider must round consistently for each currency.
- **Other fees and other taxes:** Any covered third-party fees imposed on the remittance transfer by a person other than the provider, disclosed in the currency in which the funds will be received by the designated recipient.
- **Total to recipient:** The amount the designated recipient will receive, disclosed in the currency in which the funds will be received by the designated recipient and based on the exchange rate listed in the prepayment disclosure prior to any rounding. This does not include noncovered third-party fees or taxes collected by a person other than the provider regardless of whether such fees or taxes are disclosed pursuant to this section.
- **Statement that noncovered third-party fees or taxes may apply to the remittance transfer and result in the designated recipient receiving less than the amount disclosed:** A provider may only include this statement if such fees or taxes do or may apply, using the language of Model Forms A-30(a)–(c) as applicable or substantially similar language. The provider has the option of disclosing the amount of these fees and taxes. If the provider

chooses this option, it must disclose fees and taxes in the currency in which the funds will be received using the actual information or estimates, as long as the estimates are derived from reasonable sources of information.

The disclosures for the transfer amount, transfer fees and taxes, and the total show the sender the total cost of the transaction in the sender's currency (the amount the sender is transmitting plus any fees and taxes), while the remaining disclosures provide a breakdown of the net amount the recipient receives (the amount the sender transmitted less any applicable fees or taxes) in the currency in which the funds will be received. The exchange rate is required to enable the sender to understand the conversion from the sender's currency to the recipient's currency. To facilitate compliance, Model Form A-30 shows a prepayment disclosure with all of the required terms. Model Form A-33 is similar except that it does not show an exchange rate because it is based on a dollar-to-dollar transfer.

Receipt
If a consumer continues with the transfer after receiving the prepayment disclosures, a receipt must be provided (generally when payment is made) that includes all of the prepayment disclosures and these additional disclosures (using the following or substantially similar terms), as applicable:[22]

- The date on which funds will be available to the designated recipient in the foreign country, using the term *Date Available*. Providers are not permitted to use a range of dates. If the provider does not know the exact date, it may disclose the latest date by which funds will be available. It may also indicate that funds may be available sooner than the date disclosed using the term *may be available sooner.*
- The name and, if provided, the telephone number and/or address of the designated recipient, using the term *Recipient*.
- The statement about the sender's rights to resolve errors and cancel the transaction, using the language in Model Form A-37. If the transfer is scheduled by the sender at least three business days before the date of the transfer, the cancellation disclosure must reflect the requirements of §1005.36(c).
- The name, phone number, and website of the remittance transfer provider.
- A statement that the sender can contact the state agency that licenses or charters the remittance transfer provider and the CFPB for questions or complaints, using language set forth in Model Form A-37. The disclosure must include the name, telephone number, and website of the state agency and the CFPB. Providers can use the format of Model Forms A-32, A-34, A-35, and A-39 (as applicable) to satisfy these requirements.[23]

For transactions conducted by telephone, mobile application, or text message, the receipt may be mailed or delivered to the sender no later than one business day after payment. However, for telephone transactions, if a payment was made by transferring funds from the sender's account held by the provider, the receipt may be provided on or with the next regularly scheduled periodic statement for that account or within 30 days after payment if no periodic statement is provided.

Model Form A-31 shows a receipt based on the same transaction used in the Model Form A-30 prepayment disclosure. Model Form A-34 is similar except that it does not show an exchange rate because it is based on a dollar-to-dollar transfer.

Combined Disclosure Option
To reduce the compliance burden, the rule includes an option for providers to combine the prepayment disclosures and the receipt.[24] If a provider selects this option, it must provide the combined disclosure prior to payment. If the sender proceeds with the transaction after receiving the combined disclosure, the provider must deliver written or electronic proof of payment when the transaction is paid. The proof of payment may appear on the combined disclosure or a separate piece of paper.[25]

Language Requirements
When disclosures are provided in a retainable form, providers have two compliance options for the languages used for the disclosures. The first option is to provide the disclosures in English and each of the foreign languages principally used by the provider to advertise, solicit, or market remittance transfers at the office where a sender conducts the transaction or asserts an error.[26] For example, if the provider's office contains advertisements for remittance transfers in English, Spanish, and Vietnamese, providers could make disclosures in all three languages.

The second language disclosure option is to provide the disclosures in English and (if applicable) the foreign language primarily used by the sender to conduct business with the provider. For example, if the sender requests the transfer in Spanish, providers could provide the disclosures in English and Spanish. But if the sender requests the transfer in English, only disclosures in English are required.[27] The commentary for §1005.31(g) provides additional guidance on the language requirements, including a detailed discussion of the factors relevant to determining the language or languages a provider principally uses to advertise, solicit, or market remittance transfer services and the language primarily used by the sender with the remittance transfer provider to conduct the transaction or assert an error. For example, if a sender requests remittance transfer information from a provider in English about sending a remittance transfer to a person in Mexico, and the provider and the sender begin communicating in Spanish, Spanish is the language primarily used to conduct the transaction.[28] To facilitate compliance, some of the model forms show disclosures printed in Spanish.[29]

ESTIMATES: §1005.32

Disclosures must be accurate when the sender makes a payment.[30] However, because providers may not always be able to determine all of the transaction terms with certainty, the rule permits the use of estimates for certain terms in three circumstances.

Temporary Exception for Depository Institution or Credit Union
First, providers that are either an insured depository institution or a credit union may rely on estimates that are "reasonably accurate" when the exact amounts cannot be determined for reasons beyond their control.[31] This exception only applies to the exchange rate and fees and taxes imposed by other persons. The transfer must also be sent from the sender's account with the depository institution or credit union. The exception is temporary and was scheduled to sunset on July 21, 2015; however, Congress authorized the CFPB to extend it by rule for five additional years if necessary to allow depository institutions and credit unions to continue offering foreign remittance transfers.[32] On September 18, 2014, the CFPB exercised this authority to extend the temporary exception until July 21, 2020.[33]

The commentary for §1005.32(a)(1) provides guidance and examples for determining whether disclosures are within the institution's control and whether estimates may be used under this exception. For example, if the exchange rate is determined when the funds are deposited in the recipient's account and the institution does not have a correspondent relationship with the recipient's institution, estimates for the exchange rate are permitted.[34] Institutions should review the commentary carefully to determine if they may rely on estimates for any of the required disclosed terms.

This exception is important for the many depository institutions and credit unions that make foreign remittance transfers using open-network systems such as wire transfers or an international automated clearing house (ACH). In an open-network system, the provider usually does not have a relationship with all of the intermediaries involved in completing the transaction. As a result, it may be difficult for an open-network provider to disclose certain terms, such as the fees imposed by an intermediary or the taxes imposed in the recipient's country.

This contrasts with a closed-network system, in which the provider has relationships with the other intermediaries involved in the transaction. For example, a Western Union remittance transfer initiated in the United States will likely be sent to the local Western Union office in the recipient's country. In a closed-network system, the provider can ascertain some of the transaction terms that must be disclosed from the other intermediaries with which it has a relationship.

Permanent Exception for Transfers to Certain Countries
The second exception is permanent and applies to all providers. It permits estimates under two circumstances: 1) if a remittance transfer provider cannot determine the exact amounts when disclosure is required because of a recipient nation's laws, or 2) the methods by which transfers are made to a recipient nation do not permit providers to know the amount of currency to be received.[35] The latter circumstance will apply only to an international ACH on terms negotiated between the U.S. government and the recipient country's government, in which the exchange rate is set by the central bank of the recipient country or other governmental authority on the business day after the provider has sent the remittance transfer.[36] The commentary for §1005.32 provides helpful guidance for determining if either of the two exceptions applies.

To facilitate compliance, the CFPB established a safe-harbor list of countries that qualify for the second exception. Five countries are currently on the list: Aruba, Brazil, China, Ethiopia, and Libya.[37] A provider can still use estimates for a country not on the list if the provider determined that the requirements of §1005.32(b)(1)(i) apply to the designated recipient's country, but the provider would not obtain a safe harbor.[38]

In an open-network system, the provider usually does not have a relationship with all of the intermediaries involved in completing the transaction. As a result, it may be difficult for an open-network provider to disclose certain terms ...

Methodology for Calculating Estimates
If a provider relies on estimates, it must comply with the requirements in §1005.32(c) for the methodology to be used in calculating estimates for the exchange rate, the transfer amount in the recipient's currency, other fees and taxes, and the amount of currency the designated recipient will receive. The commentary for §1005.32(c) provides further guidance on the estimates methodology.

ERROR RESOLUTION: §1005.33

Because Congress created specific error resolution procedures for remittance transfers, which the CFPB implemented in §1005.33, the regular error resolution procedures for electronic fund transfers in §1005.11 generally do not apply to remittance transfer providers. Instead, the procedures in §1005.33 apply, subject to certain exceptions.

Issues Covered by Error Resolution
The following issues are subject to error resolution procedures:

- An incorrect amount paid by a sender unless the disclosure was an estimate and the difference results from application of the actual exchange rate, fees, and taxes, rather than any estimated amounts
- A computational or bookkeeping error made by the provider
- The failure to make funds available to a designated recipient in the amount of currency stated in the disclosure, unless any of the following apply:
  - The disclosure was an estimate and the difference results from the application of the actual exchange rate, fees, and taxes, rather than any estimated amounts.
  - The failure resulted from extraordinary circumstances outside the provider's control that could not have been reasonably anticipated.
  - The discrepancy resulted from third-party fees or taxes collected by a person other than the provider, and the provider disclosed on the prepayment or combined disclosure that the amount received could be less because of taxes and fees.
- The failure to make funds available to a designated recipient by the date stated in the disclosure unless any of the following apply:
  - The failure resulted from extraordinary circumstances outside the provider's control that could not have been reasonably anticipated.[39]
  - The delays resulted from the remittance transfer provider's fraud screening procedures or in accordance with the Bank Secrecy Act, Office of Foreign Assets Control requirements, or similar laws or requirements.[40]
  - The sender or person acting in concert with the sender acted with fraudulent intent.[41]
  - The sender provided an incorrect account number or institution information to the provider, provided certain conditions are met.[42]
  - The sender requested documentation, additional information, or clarification concerning a remittance transfer.

The commentary provides additional guidance on errors. For example, if a designated recipient receives less than the amount the provider disclosed to the sender because the provider and the provider's agent in the foreign country used different exchange rates, an error has occurred.[43] Similarly, if the amount the designated recipient receives is less than the disclosed amount because of local taxes in the recipient's country or fees assessed by the provider's agent in the foreign country that were not disclosed, an error has occurred.[44] However, discrepancies resulting from the use of estimates do not qualify as errors unless the provider failed to use the methodology for making estimates in §1005.32(c).[45]

The commentary further clarifies the exception to the definition of error when providers fail to make funds available on the date specified on the receipt or combined disclosure because of extraordinary circumstances outside the provider's control that could not have been reasonably anticipated. The commentary cites as examples "war or civil unrest, natural disaster, garnishment or attachment of the funds after the transfer is sent, and government actions or restrictions that could not have been reasonably anticipated by the remittance transfer provider, such as the imposition of foreign currency controls."[46]

In addition, the commentary clarifies the exception to the definition of error when an incorrect amount is received because of extraordinary circumstances outside the provider's control that could not have been reasonably anticipated. The commentary provides the following examples: "war or civil unrest, natural disaster, garnishment or attachment of some of the funds after the transfer is sent, and government actions or restrictions that could not have been reasonably anticipated by the remittance transfer provider, such as the imposition of foreign currency controls or foreign taxes unknown at the time the receipt or combined disclosure is provided."[47]

Issues Not Subject to Error Resolution
The rule also identifies sender requests that do not qualify as errors triggering error resolution procedures:

- An inquiry about the status of remittance transfers, unless the funds from the transfer were not made available to a designated recipient by the disclosed date of availability
- A request for information for tax or recordkeeping purposes
- A change requested by the designated recipient
- A change in the amount or type of currency received by the designated recipient from the amount or type of currency stated in the disclosure provided to the sender if the provider relied on information provided by the sender[48]

Procedure When Provider Confirms an Error Has Occurred
A provider must investigate an alleged error promptly and determine if an error occurred within 90 days of receiving an error notice.[49] If the provider finds that an error has occurred, the sender must be offered the option of obtaining a refund or making funds necessary to resolve the error available to the recipient within one business day or as soon as reasonably practicable. In addition, if the error involves a failure to make funds available on the date specified on the receipt or combined disclosure, the remittance transfer provider must also refund any fees and (to the extent not prohibited by law) taxes imposed for the remittance transfer unless the sender provided incorrect or insufficient information to the remittance transfer provider. If the sender provided incorrect or insufficient information, fees imposed by an intermediary as part of the first unsuccessful attempt may be deducted from

the refund, unless the intermediary ultimately will refund those fees to the provider.[50]

If a financial institution receives an error notice involving an incorrect electronic fund transfer from the sender's account held by the institution and used to fund a remittance transfer, it must investigate under the Regulation E error procedures in §1005.11, provided the institution was not the remittance transfer provider.[51] However, if the institution is also the provider for the transaction, the §1005.33 procedures apply.[52]

Reasserting an Error

If a provider completes an investigation that fully complies with the requirements of §1005.33, and the sender reasserts the error, the provider is not obligated to reinvestigate unless the error is asserted again after the provider responded to a sender's request for documentation or for additional information or clarification concerning a remittance transfer.

Unauthorized Remittance Transfers

If a sender alleges an unauthorized electronic fund transfer for payment of a remittance transfer, the error resolution procedures in §§1005.6 and 1005.11 apply to the account-holding institution. For an alleged unauthorized use of a credit account to pay for a remittance transfer, the creditor must use the error resolution provisions in Regulation Z, 12 C.F.R. §1026.12(b), if applicable, and §1026.13.

Policies and Procedures and Record Retention

Providers must establish policies and procedures to comply with the requirements of the remittance transfer regulations and retain records of senders' error notices and documentation and the provider's responses for at least two years.

CANCELLATION AND REFUND POLICIES: §1005.34

A sender generally has 30 minutes after payment to cancel the transaction provided the recipient has not yet picked up the funds and the provider is able to identify the transaction to be canceled.[53] Once a provider receives a valid cancellation request, it has three business days to refund the total amount of funds the sender provided, including fees and taxes (unless prohibited by law). The provider cannot impose fees for canceling the transaction.[54]

PROVIDER'S LIABILITY FOR THE ACTS OF ITS AGENTS: §1005.35

Because remittance transfers involve multiple parties and countries, Congress was concerned about the consumer's ability to redress errors caused by parties acting on behalf of a provider and included a provision in EFTA §919(f) that makes providers liable for the acts of their agents, authorized delegates, or affiliates. The rule implements this requirement in §1005.35 of Regulation E, under which a provider is liable for any violation of subpart B of Regulation E when an agent or authorized delegate acts on behalf of the provider. EFTA §919(f) also provides that a regulator enforcing compliance with these requirements may consider, when taking action against the provider, the extent to which the provider has policies and procedures in place, including procedures to exercise oversight of agents or authorized delegates acting on behalf of the provider.[55]

TRANSFERS SCHEDULED IN ADVANCE: §1005.36

The compliance requirements for transfer scheduled in advance are slightly different with respect to the use of estimates and cancellation. When a sender requests a single transfer or the first in a series of recurring transfers to occur at least five business days before a future transfer date, the provider may provide estimates for certain terms in the prepayment disclosures and the receipt provided at the time of payment.[56] If a provider gives the consumer disclosures that include estimates under this exception, a second receipt with accurate figures must be provided generally no later than one business day after the transfer has been made.[57]

For each subsequent transfer in a series of recurring transfers, the provider need not deliver a prepayment disclosure. However, if certain information has changed with respect to what was disclosed with the first preauthorized remittance transfer, the provider must deliver a receipt within a reasonable period before the date of the transfer.[58] If estimates were provided or an updated receipt was unnecessary, the provider must deliver an accurate receipt no later than one business day after the transfer.[59]

With respect to the cancellation requirements, when transfers are scheduled at least three business days before transfer, senders may cancel the transfer if the provider receives the request at least three business days before the scheduled transfer. For single transfers scheduled at least three business days in advance or the first transfer in a series of preauthorized remittance transfers, the date of the transfer must be disclosed on the receipt.[60] For subsequent transfers, senders must also be informed of future transfer dates.[61]

Conclusion

The changes the CFPB has made to the remittance transfer rule since it was first published in 2012 are an important reminder that financial institutions must have procedures in place to monitor and implement regulatory changes; to test systems to ensure the changes are implemented properly, including disclosure software; and to provide adequate training for staff on the changes. Specific issues should be discussed with the CFPB and your primary regulator. ■

Endnotes

[1] https://consumercomplianceoutlook.org/2012/third-quarter/overview-of-new-regulation-e-requirements/
[2] Links to the final rule and its amendments, including descriptions of the amendments, are available on the CFPB's website at www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/electronic-fund-transfers-regulation-e/. On November 22, 2016, the CFPB issued a final rule under Regulation E on prepaid accounts, which also made minor changes to the foreign remittance transfer rule that CFPB stated are intended to continue the current application of those rules to prepaid products. 81 Fed. Reg. 83,934 (November 22, 2016).
[3] *Migration and Remittances Recent Developments* and *Outlook* (World Bank Group, April 2016), p. 6, available at http://pubdocs.worldbank.org/en/661301460400427908/MigrationandDevelopmentBrief26.pdf.
[4] *Migration and Remittances Factbook 2016* (Third Edition, World Bank Group), p. 31, available at http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1199807908806/4549025-1450455807487/Factbookpart1.pdf.
[5] S. Rep. 111-176, at 179 (2010)
[6] The hearings and legislative history are discussed in the final rule for foreign remittance transfers. See 77 Fed. Reg. 6,194, 6,199 (February 7, 2012).
[7] The Dodd-Frank Act, Section 1073. Section 919 of the EFTA is codified at 15 U.S.C. §1693o-1.
[8] In addition to creating federal consumer protections for foreign remittance transfers, the Dodd-Frank Act provided the CFPB with the legal authority to examine and supervise larger nonbank participants, in particular consumer financial services markets. See 12 U.S.C. §5514(a)(1)(B). In September 2014, the CFPB issued a final rule implementing its supervision and examination of the larger nonbank participants in the international money transfer market, defined as nonbanks that conduct at least 1 million aggregate annual international money transfers. 79 Fed. Reg. 56,631 (September 23, 2014) (codified at 12 C.F.R. §1090.107).
[9] 76 Fed. Reg. 29,902 (May 23, 2011)
[10] 77 Fed. Reg. 6,194 (February 7, 2012)
[11] 12 C.F.R. §1005.30
[12] Comment 30(c)—2.i
[13] A financial institution can determine if a transfer is for personal, family, or household purposes by examining the type of account from which the transfer is made. If the account is used for personal, family, or household purposes, the institution can assume the transfer was for that purpose – unless the institution has specific information to the contrary. See Comment 30(g)—2.iii.
[14] See International Fund Transfers Small Entity Compliance Guide, p. 14 (V. 3.0 August 22, 2014).
[15] 12 C.F.R. §1005.30(f)(2)(i)
[16] 12 C.F.R. §1005.30(f)(2)(ii)
[17] Comment 30(f)—2(i)
[18] The regulation has a limited exception for oral disclosures for certain oral telephone transactions and error resolution notices. See §1005.31(a)(3) and (4). Disclosures required by §§1005.31 and .36 may be provided by fax when the sender is not in the provider's office. See Comment 31(a)(2)—5.
[19] 12 C.F.R. §1005.31(b)(1)
[20] 12 C.F.R. §1005.31(a)(5); see Comment 31(a)(5)—1.
[21] 12 C.F.R. §1005.31(b)(1)
[22] 12 C.F.R. §1005.31(b)(2)
[23] Comment 31(b)(2)—4
[24] 12 C.F.R. §1005.31(b)(3)
[25] Comment 31(b)(3)—1
[26] 12 C.F.R. §1005.31(g)
[27] Comment 31(g)—1.ii
[28] Comment 31(g)—2.i
[29] See Model forms A-38, A-39, A-40, and A-41.
[30] 12 C.F.R. §1005.31(f)
[31] 12 C.F.R. §1005.32(a)
[32] 12 U.S.C. §1693o–1(a)(4)(B)
[33] 12 C.F.R. §1005.32(a)(2). 79 Fed. Reg. 55,970 (September 18, 2014)
[34] Comment 32(a)(1)—2.i
[35] 12 C.F.R. §1005.32(b)(1)
[36] 77 Fed. Reg. at 6,245-46
[37] 78 Fed. Reg. 66,251 (November 5, 2013)
[38] 12 C.F.R. §1005.32(b)(1)(ii)
[39] 12 C.F.R. §1005.33(a)(1)(iv)(A)
[40] 12 C.F.R. §1005.33(a)(1)(iv)(B). The CFPB clarified in a later amendment that this includes a provider or third party investigating potentially suspicious, blocked, or prohibited activity that could not have been reasonably foreseen. See Comment §1005.33(a)—7.
[41] 12 C.F.R. §1005.33(a)(1)(iv)(C)
[42] 12 C.F.R. §1005.33(a)(1)(iv)(D)
[43] Comment 33(a)—3.i
[44] Comments 33(a)—3.ii and 33(a)—3.iii
[45] Comment 33(a)—3.v
[46] Comment 33(a)—6
[47] Comment 33(a)—4
[48] 12 C.F.R. §1005.33(a)(2)(iv)
[49] 12 C.F.R. § §1005.33(c)(1)
[50] Comment 33(c)—12
[51] 12 C.F.R. §1005.33(f)(1)
[52] For transfers funded by an extension of credit, different rules apply. See 12 C.F.R. §1005.33(f)(2).
[53] 12 C.F.R. §1005.34(a)
[54] 12 C.F.R. §1005.34(b)
[55] A related question is the effect of the final rule on wire transfers covered by Article 4A of the Uniform Commercial Code (UCC). Article 4A establishes the legal framework for the rights and responsibilities of the parties to a wire transfer, including intermediaries. However, Article 4A does not apply to transactions covered by the EFTA, and consumer remittance transfers are now governed by Section 919 of the EFTA as a result of the Dodd-Frank Act amendments to the EFTA. Therefore, if a provider was held liable to the consumer under §1005.35 for an error committed by an agent, the provider could not look to the UCC to determine its rights against the agent. Other aspects of consumer remittance transfers previously governed by Article 4A are also affected. This issue was discussed in the CFPB's 2012 final rule. See 77 Fed. Reg. at 6,211-12. In response to concerns about this issue for Fedwire transfers, the Board amended §210.25 of its Regulation J to clarify that Article 4A applies to Fedwire transfers. As a result of the Board's amendment, which became effective on July 12, 2012, consumer remittance transfers conducted through Fedwire will still be subject to Article 4A unless there is a conflict with Section 919 of the EFTA, in which case the EFTA will prevail. See 77 Fed. Reg. 21,854, 21,856 (April 12, 2012).
[56] 12 C.F.R. §1005.36(a)(1)(i)
[57] 12 C.F.R. §1005.36(a)(1)(ii)
[58] 12 C.F.R. §1005.36(a)(2)(i)
[59] 12 C.F.R. §1005.36(a)(2)(ii)
[60] 12 C.F.R. §1005.31(b)(2)(vii)
[61] 12 C.F.R. §1005.36(d)

Regulatory Calendar*

Effective Date†	Implementing Regulation	Regulatory Change
N/A††	Reg. H	Interagency proposed rule concerning when lenders can accept private flood insurance
1/1/18	Reg. C	Final rule implementing Dodd-Frank Wall Street Reform and Consumer Protection Act changes to the Home Mortgage Disclosure Act
10/19/17	Regs. Z and X	Final rule to amend certain mortgage servicing provisions
10/1/17	Regs. E and Z	Final rule for prepaid accounts
10/3/16	32 C.F.R. Part 232	Final rule amending Military Lending Act regulations to expand coverage; the Department of Defense recently published guidance on the regulations
6/10/16	Regs. J and L	Final rulemaking adjustments to submission of filings under the Interstate Land Sales Full Disclosure Act
12/4/15	Reg. P	Proposed rule to implement changes to annual privacy notice pursuant to §75001 of the Fixing America's Surface Transportation Act

* Links to the regulatory changes are available in the online version of *Outlook* at tinyurl.com/calendar-cco.

† We have listed the primary effective date. Some final rules have multiple effective dates for different provisions.

†† Rulemaking proposals generally do not have an effective date.

Revised Interagency Questions and Answers Regarding Community Reinvestment continued from page 5

SMALL INSTITUTION PERFORMANCE STANDARDS

8. Q&A §_____.26(c)(3)—1: This Q&A reviews the services examiners consider when evaluating an intermediate small bank under the community development test. The agencies revised it to clarify that maintaining banks with branches and other facilities in low- or moderate- income geographies, designated disaster areas, or distressed or underserved nonmetropolitan middle-income geographies qualifies as community development services under the community development test for intermediate small banks.

SERVICE TESTS FOR LARGE BANKS

9. Q&A §_____.24(d)(3)—1: This Q&A discusses how examiners evaluate alternative systems for delivering retail banking services. The agencies revised it to list additional factors that examiners may consider when evaluating whether a financial institution's alternative delivery systems are available and effective in delivering retail banking services in low- and moderate-income geographies and to low- and moderate-income individuals, including online and mobile banking services as examples of alternate delivery systems.

The changes to the Q&As became effective on July 25, 2016. ■

Endnote

[1] 81 Fed. Reg. 41,506 (July 25, 2016)

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2016–2017 Calendar of Events

February 19–22	**ABA National Conference for Community Bankers** JW Marriott Orlando, Grande Lakes Orlando, FL
March 24–30	**ABA Compliance School — Foundational** Doubletree Hilton Mission Valley San Diego, CA
March 29–31	**ABA Real Estate Lending Conference** Hyatt Regency Orlando Orlando, FL