

2. Dodd-Frank Act and Remittances to Post-Conflict Countries: The Law of Unintended Consequences Strikes Again

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The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “Act”) was enacted in the United States in response to the financial crisis that began in 2007. There are many reasons that have been identified as a significant cause of the crisis,¹ and, in response, the Dodd-Frank Act mandates a wide array of changes in the regulation of financial institutions and financial products. The Act is an omnibus legislative document that contains hundreds of sections and more than 800 pages of text. Many of those sections relate to consumer protection. As such, the Act established a new agency, the Consumer Financial Protection Bureau (CFPB), which received almost all of the consumer protection powers of the federal banking agencies.²

Among them is the power to implement and enforce most sections of the Electronic Funds Transfer Act (EFTA).³ In addition, section 1073 of the Dodd-Frank Act amended the EFTA to provide a new regulatory framework for remittance transfers made from the United States to a foreign country.⁴ The regulatory framework includes detailed disclosure requirements and error resolution procedures, and establishes significant civil liability (both fines and potential class action suits) for violation of these requirements.⁵

This section will discuss the regulatory implementation of section 1073, and focus on the impact this new regulatory regime will have on remittance transfers to post-conflict countries. The section concludes that the proposed regulatory

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1 See, e.g., Financial Crisis Inquiry Commission, *Financial Crisis Inquiry Report* (Jan. 2011); Gary Gorton, *Questions and Answers about the Financial Crisis Prepared for the U.S. Financial Crisis Inquiry Commission* (Feb. 20, 2010), available at <http://tinyurl.com/financial-inquiry>.

2 12 U.S.C. §§ 5581-5583.

3 Dodd-Frank Act § 1084.

4 15 U.S.C. § 1693o-1.

5 *Id.*

treatment may have the unintended consequence of impeding the use of regulated remittance transfer providers for sending funds to these countries.

THE IMPORTANCE OF REMITTANCES FOR POST-CONFLICT COUNTRIES

Post-Conflict Countries

A post-conflict country is typically defined as a nation that is emerging from a severe conflict. In these countries, open warfare has ended, but a potential for violence remains.⁶ Studies have shown that post-conflict situations are characterized by human loss, destruction of infrastructure and means of production, as well as adverse economic and political consequences.⁷ The main goals of post-conflict transition and recovery are achieving peace, sustaining economic growth, and reducing poverty.⁸ The establishment of sustainable institutions is often the most important step in achieving security and growth in post-conflict situations.⁹

In post-conflict situations, there is an absence of war, but not necessarily real peace. The end of fighting offers an opportunity to work towards lasting peace, but that requires the establishment of viable institutions, capable of sustaining lasting security for the entire population.¹⁰ Extended conflict leads to the collapse of the systems and institutions that make a stable society function and these are the systems that need to be resurrected.¹¹ The instability common in post-conflict countries constrains investment.¹² The collapse in law and order is disruptive to political and economic governance, thereby increasing uncertainty and making contract enforcement difficult.¹³ Dramatic changes in financial rules and practices may be common in these nations, financial infrastructure is damaged, and financial conduits may not function properly. Business norms may change dramatically due to changes in economic conditions or government

6 Peter Wallensteen, *Understanding Conflict Resolution: War, Peace and the Global System* (SAGE Publications 2007).

7 Paul Collier, *Doing Well out of War* (The World Bank 1999).

8 U.S. Agency for International Development (USAID), *Understanding the Post-Conflict Country* at 3 (2009).

9 Lakhdar Brahimi, *State Building in Crisis and Post-Conflict Countries* at 3-4 (United Nations 2007).

10 *Id.*

11 *Id.*

12 Janvier Nkurunziza, *Civil War and Post-Conflict Reconstruction in Africa* at 23 (United Nations Conference on Trade and Development 2008).

13 *Id.*

leadership. Formal payments systems and financial intermediation may function poorly or not at all.¹⁴

Role of Remittances in Post-Conflict Countries

Remittances are funds sent home by nationals living and working in other countries, usually to family members in the country of origin. In achieving stability and economic security, post-conflict nations rely heavily on these remittances.¹⁵ The funds are widely distributed and flow to many areas that are neglected by other forms of aid.¹⁶ Funds sent from abroad are generally spent on individual or household private needs, such as food and housing, and create ripple effects throughout the local economy.¹⁷ Remittances help the national balance of payments, boost economic development, and improve the general standard of living.¹⁸

There is no question that remittances have become a critical source of foreign currency for many post-conflict nations. Countries in conflict generate significant diasporas, a portion

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of which prefers its new life to repatriation after the conflict but seeks to support relatives who remained behind.¹⁹ As a result, in post-conflict areas, remittances have become a critical source of capital for development and stability.²⁰ In many post-conflict nations remittances exceed the total amount of official development assistance, and in about one-third of all developing countries, remittances

14 Rob Mills and Qimiao Fan, *Investment Climate in Post Conflict Situations*, World Bank Policy Research Working Paper 4055 at 11 (2006).

15 Organization for Economic Cooperation and Development, *Conflict and Fragility, Fragile States Resource Flows and Trends*, 42 (2013).

16 Russell King and Julie Vullnetari, *Remittances, Return, Diaspora: Framing the Debate in the Context of Albania and Kosovo*, *Southeastern Europe and Black Sea Studies*, 9:4, 385–406, 390 (2009).

17 *Id.*

18 K. M. Abdul Azeed and M. Begum, *International Remittances: A Source of Development Finance*, 4 *International NGO Journal* 299, 301–04 (2009).

19 US Agency for International Development, *Understanding the Post-Conflict Country Analytical Template* at 34 (September 2009).

20 In 2010, formal remittance flows worldwide exceeded \$440 billion, with approximately \$330 billion sent to developing countries. This is three times the amount of official aid provided to these nations, and approximates the aggregate amount of foreign direct investment in these countries. The World Bank, *Migration and Remittances Fact Book 2011* (2nd Ed. 2011).

exceed all capital flows.²¹ A recent World Bank study found that remittances “play a vital and life-sustaining role for millions of vulnerable people in poor countries, particularly in post-conflict countries and in situations where formal financial services and infrastructures are nonexistent.”²²

In addition, remittances tend to be markedly more stable than other private capital flows, such as portfolio investments and bank credits.²³ The importance of remittances in helping post-conflict countries was emphasized in a report issued by the International Peace Academy, which stated:

Nearly all the countries in the conflict, war-to-peace transition, and crisis categories are highly dependent on remittances. The slow recovery of livelihoods and persistent violence or repression ensure high levels of migration and the need for remittances in such countries for several years after conflict and crises have ended. By all accounts, migrant remittances reduce poverty in important ways in developing countries. Research shows that migrants transfer funds and invest in their countries of origin at times when international investment has all but disappeared. By serving these purposes in countries emerging from or still experiencing conflicts . . . remittances can be seen as a *sine qua non* for peace and rebuilding.²⁴

Impact of Regulation

Studies indicate that a significant portion of remittance transfers flow through unregulated channels and the use of such informal channels hampers efforts to prevent funds from flowing to entities that engage in criminal or terrorist activities.²⁵ The preference among remitters for informal transfer mechanisms partly reflects low financial literacy, as well as widespread distrust of government

21 *Id.* at 1758.

22 M. Maimbo and D. Ratha, *Remittances: Development Impact and Future Prospects* at 13 (World Bank 2005).

23 Historically, remittances have been stable and even countercyclical, tending to rise during times of financial crisis and natural disasters because migrants living abroad send more money to help their families back in places of origin. United Nations Development Program, *Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty* at 129 (2011), available at <http://tinyurl.com/UNDP-MDG-Progress>.

24 Patricia Weiss Fagen and Micah N. Bump, *Remittances in Conflict and Crises: How Remittances Sustain Livelihoods in War, Crisis and Transitions to Peace*, International Peace Academy and Georgetown University at i (2005) (hereinafter “Fagen and Bump”).

25 That unregulated transfer systems are open to abuse—ranging from money laundering to support for terrorist activity—is well documented. *Id.* at 11.

and financial institutions.²⁶ Resorting to informal channels also results from the deterrent effect of what is viewed by the immigrant community as the “intimidating regulatory apparatus” erected to staunch money laundering and terrorist financing.²⁷

Studies have indicated that the remittances most adversely affected by regulatory control are those transferring funds to countries where governments are weak, institutions are not reliable, and criminal activity is high.²⁸ These are the characteristics of many post-conflict nations. As a result, a substantial number of migrants who consider supporting their families to be an urgent commitment do not use regulated remittance services.²⁹ The unintended consequences of the regulatory scheme in the U.S. was noted in a 2005 study by the International Peace Academy:

The regulatory system in place—especially in the United States following the Patriot Act of 2001—was intended to prevent abuses. It may well be serving this purpose. . . but the cost has been high. Indeed, burdensome regulations challenge the ability of legitimate institutions and businesses to process money lawfully. The regulations impose stiff economic and bureaucratic burdens. . . The use and, at times, abuse of regulations has led to blacklisting remittance transfer agencies on the basis of perceived irregularities or minor infractions. The system put in place to target criminal elements has resulted instead in a system where the small operations most likely to serve particularly difficult areas are at a decided disadvantage.³⁰

While these studies concerned regulatory controls designed primarily to prevent money laundering and to restrict the flow of funds to criminal and terrorist organizations, some of the same unintended effects may be seen with respect to

26 S. Brown, *Can Remittances Spur Development? A Critical Survey*, 8 *International Studies Review* 55, 56 (2006).

27 *Id.*; A. Catalina, C. Bansak, and S. Pozo, *On the Remitting Patterns of Immigrants: Evidence from Mexican Survey Data*. Paper presented at the Payments in the Americas Conference. Federal Reserve Bank of Atlanta, October 7–8 (2004).

28 Fagen & Bump, *supra* note 22, at 9. A recent World Bank report noted “scant attention” paid to the impact of regulation on the flows of funds to poor and post-conflict nations. The report suggested that “the effects of policies and regulations on the availability of financial services and the range of products available and attractive to a low-income clientele requires more attention and, in some cases, reduced regulatory burdens to make them viable.” *The World Bank, Remittances: Development Impact and Future Prospects* 71 (Samuel M. Maimbo ed., Dilip Ratha ed., 2005).

29 Fagen & Bump, *supra* note 22, at 10.

30 Fagen & Bump, *supra* note 22, at 11.

the new consumer protection regulations mandated by section 1073 of the Dodd-Frank Act.

THE DODD-FRANK ACT

Legislative History

Section 1073 of the Dodd-Frank Act amended the EFTA by providing for detailed disclosures of numerous items in connection with a remittance transaction, establishing rules for correcting errors in the remittance process, and authorizing fines and civil actions for failure to comply with various mandates.³¹

The impetus for this part of the legislation may be traced to a 2005 report issued by the Appleseed Fund for Justice and Appleseed Foundation (“Appleseed”) calling for greater transparency in the remittance market.³² The report found that the then-existing disclosures often made it hard for consumers to understand the full costs of sending a remittance before they engage in a transaction, including transaction fees and the exchange rate spread. In 2007, Appleseed testified before the House Committee on Financial Services that immigrants face enormous fluctuations and inconsistencies in pricing for remittances, even within the same company.³³ Appleseed recommended that the Federal Reserve Board should be granted rulemaking authority to delineate disclosure requirements, in consultation with consumer participants and representatives of the remittance industry. In 2009, Appleseed again testified before the House Financial Services Committee, but in this testimony, they recommended specific minimum disclosures.³⁴ In particular, Appleseed felt that baseline disclosures must include the fee for sending the remittance; the current exchange rate; the day and time the remittance will be available for pickup; and a sample of the remittance cost.³⁵ Appleseed also recommended that disclosure should occur visually before the transaction; that there should be a mechanism for error resolution; and that dis-

31 15 U.S.C. § 1693o-1 (2012).

32 Ana Baddour & Sonja Danburg, *Creating a Fair Playing Field for Consumers: The Need for Transparency in the U.S.-Mexico Remittance Market* (Appleseed, 2005).

33 *Remittances: Access, Transparency, and Market Efficiency: A Progress Report: Hearing Before the Subcomm. on Domestic and Int'l Monetary Policy, Trade, and Tech. of the H. Comm. on Fin. Serv.*, 110th Cong. 3 (2007) (statement of Annette LoVoi, Field Director, Appleseed).

34 *Remittances: Regulation and Disclosure in a New Economic Environment: Hearing Before the Subcomm. on Fin. Inst. of the H. Comm. on Fin. Serv.*, 111th Cong. 8–9 (2009) (statement of Annette LoVoi, Field Director, Appleseed).

35 *Id.*

closures should be both in English and in the foreign language used in the three markets that the provider sends most of the remittances.³⁶

Legislative Text

Interestingly, various studies have found that increasing competition in the marketplace and other factors drove down the cost of remittance transfers, especially in the Latin American market, without the need for further regulation.³⁷ Nevertheless, Congress adopted a new and comprehensive remittance law in the Dodd-Frank Act, in order to “establish minimum protections for remittances sent by consumers in the United States to other countries.”³⁸ The legislation was based on the concern that senders of remittance transfers “face significant problems with their remittance transfers, including being overcharged or not having the funds reach intended recipients.”³⁹

Pursuant to section 1073 of the Dodd-Frank Act, before making a remittance transfer to a foreign country, a remittance transfer provider⁴⁰ must disclose, at the time when the consumer requests a remittance transfer, but prior to making any payment:

- the amount of currency to be received by the recipient in the currency to be received;
- the amount of any fees charged by the transfer provider; and
- the exchange rate accurate to the one-hundredth of one percent.⁴¹

36 *Id.*

37 See, e.g., Manuel Orozco, *International Flow of Remittances: Cost, Competition and Financial Access in Latin America and the Caribbean—Toward an Industry Scorecard 4* (2006), available at <http://tinyurl.com/Remittance-Flow> (Technology may also be a driving factor). See also The World Bank, *Global Economic Prospects: Economic Implications of Remittances and Migration 137–38* (2006); Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6199 (Feb. 7, 2012) (to be codified at 12 CFR Part 1005). The U.S. General Accountability Office (GAO) found that the average cost of sending remittances from the United States to Latin America (particularly Mexico) declined from 12.5 percent to 7 percent from 2003 to 2005, and where comparable to the fees charged by banks, credit unions and the U.S. Postal Service. U.S. Gov’t Accountability Office, GAO-006-204, *International Remittances*, 3–4 (2005).

38 S. Rep. No. 111-176, 176 Sec. 1076 at 179176 (2010).

39 *Id.*

40 Defined to include any institution that makes remittance transfers to a foreign country in the regular course of business. The CFPB regulation states that an institution is presumed not to meet this standard if it made less than 100 transfers in the previous year, and continues to make less than 100 transfers in the current year.

41 15 U.S.C. § 1693o-1(a)(2).

Following the payment of money to the remittance transfer provider, the customer must obtain:

- a written receipt that includes all of the information disclosed before payment;
- the promised date of delivery;
- the name of the recipient;
- a statement about consumer rights for error resolution; and
- the state and federal agencies that regulate the provider.⁴²

Disclosures must be in English and in each of the foreign languages principally used by the remittance transfer provider, or any of its agents, to advertise, solicit, or market, either orally or in writing, at that office.⁴³ Disclosures must be accurate when made, but the statute specifically provides that *insured depository institutions* may be allowed by the regulator to use reasonably accurate estimates for a limited period, ending on July 21, 2015, unless further extended by regulations.⁴⁴

REGULATORY IMPLEMENTATION

Proposed and Final Rules Issued in 2012 and 2013

The original regulatory proposal to implement section 1073 was drafted by the Board of Governors of the Federal Reserve System, and published for comment by that agency on May 23, 2011.⁴⁵ On July 21, 2011, regulatory authority was transferred to the CFPB.⁴⁶ This agency issued a final regulation and a series of interpretations implementing section 1073 of the Dodd-Frank Act on February 7, 2012 (“February Final Rule”).⁴⁷ Prior to the rule going into effect, the Bureau

42 *Id.*

43 15 U.S.C. § 1693o169301693o-1(b). (2012).

44 15 U.S.C. § 1693o-1(a)(4). (2012).

45 Electronic Fund Transfers, 76 Fed. Reg. 29902 (proposed May 23, 2011) (to be codified at 12 CFR Part 205).

46 Dodd-Frank Act, 12 U.S.C. § 5582 (authorized the Secretary of the Treasury to designate a specific date for the transfer of consumer protection functions from the Federal banking agencies to the CFPB.). The Secretary selected July 21, 2011 as the designated transfer date. 75 Fed. Reg. 57252-3533 (Sept. 20, 2010).

47 Electronic Fund Transfers (Regulation E) 77 Fed. Reg. at 6194; Electronic Fund Transfers (Regulation E) 77 Fed. Reg. 50244, 50282 (Aug. 20, 2012) (to be codified at 12 CFR Part 1005) (The CFPB issued a modification to the final rule, establishing that a company that made less than 100 remittance transfers in a year was not covered by the regulation. The August amendment also addressed compliance issues raised when remittance transfers are scheduled on a regular basis in advance).

issued a new proposed regulation December 31, 2012 that would make several significant changes in its original rule,⁴⁸ and at the same time announced that it was going to delay the effective date of the February Final Rule until after it considers the proposed amendments.⁴⁹ On May 22, 2013 the agency published in the Federal Register a new final regulation making three significant changes to the remittance regulation, and setting the effective date for regulatory compliance as October 28, 2013.⁵⁰

The regulatory implementation creates a number of practical compliance problems for remittance transfer providers that could well result in increasing the cost of, or reducing the availability of, remittance services.⁵¹ However, the adverse impact of these regulations on remittances to post-conflict countries will be much greater than for remittances sent to countries that have a stable and well-functioning government with a transparent financial regulatory structure.

The most significant problems include harsh penalties imposed on remittance companies for minor or inadvertent misstatements relating to the mandated disclosures; the imposition of liability for the acts of literally thousands of agents and representatives around the globe; and the costs imposed on remittance companies to correct mistakes even if the mistake was due to customer errors.⁵² Even the CFPB has expressed concern that the new regulatory structure may result in companies exiting the field or reducing offerings by not sending remittances to areas where it would be more difficult to obtain the data that must be

48 Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 77188 (proposed Dec. 31, 2012) (to be codified at 12 CFR Part 1005).

49 Electronic Fund Transfers (Regulation E) Temporary Delay of Effective Date, 78 Fed. Reg. 6025 (Jan. 29, 2012).

50 Electronic Fund Transfers (Regulation E), 78 Fed. Reg. 30662 (May 22, 2013).

51 See, e.g., Joint Trade Association Comment Letter on the Proposed Amendments to Regulation E to Implement Section 1073 of the Dodd-Frank Act, Federal Reserve Board Doc. No. 1419, July 22, 2011. The CFPB acknowledged the possibility of adverse consequences of its regulation, including increased consumer costs and a decrease in the availability of remittance services at 77 Fed. Reg. 6201-02, 6208, 6218, 6220, 6224, 6279-82.

52 Any company that fails to comply with the EFTA or implementing regulations will face civil liability for actual damages and statutory damages of between \$100 and \$1,000 per violation. Class action liability for each violation is capped at \$500,000 or 1 percent of the net worth of the company, whichever is less. Attorney fees are also awarded in a successful claim. 15 U.S.C. §1693m. (2012). In addition, the CFPB may levy administrative civil money penalties. 15 U.S.C. § 1693o. (2012). Intentional violations are subject to criminal penalties including imprisonment for up to one year. 15 U.S.C. § 1693n.

disclosed.⁵³ Recently, the Federal Home Loan Bank of New York announced that in response to the new regulatory environment, it would no longer be providing remittance transfer services for its member institutions.⁵⁴

With respect to remittance transfers to post-conflict nations, disclosures relating to third-party fees and exchange rates are especially troubling. The remainder of this section will explain the nature of the compliance problems caused by the regulation, recent efforts by the CFPB to address at least some of these concerns, and why much more needs to be done in response.

Disclosure of Third-Party Fees

Pursuant to the regulation issued on February 7, 2012, remittance transfer companies must provide “accurate” disclosures before any money is exchanged (pre-payment disclosures) and a post-payment receipt that contains the pre-payment information, as well as additional disclosures. One of the more problematic requirements is to disclose all fees that may be charged by *third parties*, whether or not the remittance transfer provider has knowledge of such fees.⁵⁵ The 2012 final rule provides that *insured depository institutions* may make good-faith estimates of these fees if they lack actual knowledge (at least until July 21, 2015),⁵⁶ but the agency chose not to exercise its discretion to afford similar treatment to other remittance providers.⁵⁷ Thus, under the 2012 regulation, except for insured depository institutions, fees imposed by third parties must be itemized and accurately disclosed, even if the amount of the fee is not known by the remittance transfer provider when the transaction is initiated.

There are several reasons why remittance providers may not be able to comply with the disclosure requirement when transmitting funds to post-conflict countries. For example, remittance funds may be sent abroad either through a

53 According to the CFPB, “some remittance transfer providers and industry associations have indicated that some providers are considering exiting the market or reducing their offerings, such as by not sending transfers to corridors where tax or fee information is particularly difficult to obtain, or by limiting the size or type of transfers sent in order to reduce any risk associated with mis-deposited transfers.” Electronic Fund Transfers (Regulation E), 77 Fed. Reg. at 77190.

54 Press Release, Federal Home Loan Bank of New York, *FHLBNY to Stop Processing International Wire Transfers at Year-End* (Nov. 30, 2012) available at <http://tinyurl.com/FHLBNY-press>.

55 12 CFR § 1005.31. (2011).

56 See 15 U.S.C. § 1693o1693016930-1(a)(4) (2010) (specifically authorizes the CFPB to allow insured depository institutions to use estimates for certain disclosures. . .).

57 The regulation tracks the statute in this case, since 15 U.S.C. § 16930-1(a)(4) allows the CFPB to authorize estimates for insured depository institutions until July 21, 2015, unless further extended by the agency.

“closed network,” in which all of the intermediaries are agents of the remittance provider, or through an “open network,” such as through wire transfers.⁵⁸ An open network is composed of intermediary financial institutions.⁵⁹ The funds are transmitted from one financial institution to another as it winds its way to the recipient. The transaction may be routed differently, depending upon a number of factors beyond the control of the remittance transfer provider. Therefore, when funds are transmitted through an open network, the specific intermediary institutions and the exact amount of third party transaction fees cannot be determined beforehand.⁶⁰ When funds are transmitted to a post-conflict region, the remittance provider is less likely to have an office or other presence in the region. As a result, in many post-conflict areas, the open network framework will be an important transmission method, but the remittance provider will not be able to determine in advance the exact route that the funds will traverse nor the fees that will be imposed by third party intermediaries.

The problem is worse in post-conflict nations where the transparency and sufficiency of the financial regulatory structure may be lacking. Without a strong financial regulatory structure, entities receiving remittance payments for disbursement to the recipient may be able to establish fees that vary based on local economic conditions, relationships with the consumer, or other factors intrinsic to that particular entity. In some cultures, the exact fee that some third parties may charge could be subject to negotiation and bargaining between the consumer and the paying entity. The U.S. regulatory requirements for advance notice and/or publication of consumer fees is certainly not the norm in many

58 Wire transfers are generally open network transactions that can reach virtually any bank worldwide through national payment systems that are connected through correspondent and other intermediary bank relationships. Providers of wire transfers usually charge up-front fees at the time of the transaction. In some cases, intermediary institutions impose additional fees (sometimes referred to as “lifting fees”) and recipient institutions may also charge fees for converting funds into local currency and/or depositing them into recipients’ accounts. See generally Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194 - 6198 (in-depth discussion of open networks and wire transfers).

59 *Id.* at 6197.

60 In an open network, the sending institution may not have a contractual relationship with the receiving institution. Rather, in an open network transaction, the sending institution will send payment instructions and funds to a correspondent institution, which will then transmit the instructions and funds to the recipient institution directly or indirectly through other intermediary institutions. The identity of the intermediary institutions is not always known because more than one transfer route is possible. There is no global practice regarding communication between these various institutions regarding fees. *Id.*

parts of the post-conflict world, and the regulatory language does not take that into account.⁶¹

CFPB Response Relating to Third-Party Fees

The 2013 regulation deals with only one aspect of the problems relating to third-party fees. It provides that such fees need not be disclosed, but only if they are imposed by the recipient's institution, and only if that institution is not considered to be an agent of the remittance transfer provider.⁶² The recipient's institution must be a bank or similar financial institution, and the funds must be placed into an "asset account," such as a savings account or checking account. The requirement to disclose accurately all fees charged in other circumstances, for example, by intermediary institutions in an open network, was not changed. This will make the use of open networks by remittance transfer providers (other than depository institutions) difficult if not impossible.

Definition of Agent

One practical difficulty in applying even this limited exemption is that the term "agent" is not clearly defined. The term "agent" is defined, for other purposes, to mean "agent, authorized delegate, or person affiliated with a remittance transfer provider, as defined under State or other applicable law, when such agent, authorized delegate, or affiliate acts for that remittance transfer provider."⁶³ The 2013 amendment added, however, that this definition applies "except as otherwise provided."⁶⁴ The preamble explains that this "except as otherwise provided" clause was added to clarify that the term "agent" may be modified by the provisions in the rule regarding fee disclosures.⁶⁵ However, there is no specific reference to the definition of the term "agent" in these sections of the rule. Thus, it is not clear to what extent the existing definition of "agent" applies to the exemption from disclosure of the fees charged by the recipient's institution.

61 See, e.g., B. Narteh, *Challenges of Marketing E-Banking Services in a Developing Country: The Case of Ghana*, 17 *J. of Internet Banking and Commerce* 10 (2012), <http://www.arraydev.com/commerce/jibc/>; L. Brix and K. McKee, *Consumer Protection Regulation in Low-Access Environments: Opportunities to Promote Responsible Finance*, CGAP Focus Note No. 60 (2010).

62 CFR §30(h)(2).

63 12 CFR §1005.30(a).

64 12 CFR §1005.30.

65 78 Fed. Reg. 30666.

Some guidance may be found in the preamble, which explains that the CFPB is “not adjusting the required disclosures for transfers that a recipient picks up at a *paying agent*.”⁶⁶ In other words, if the recipient’s institution is deemed to be a “paying agent” under applicable law, the fee must be disclosed even if the remittance transfer provider cannot determine the amount of the fee. The preamble notes that the recipient’s institution *may* also be an agent of the remittance transfer provider. The preamble states: “(I)f the designated recipient’s institution is an agent of the provider . . . the provider must disclose all fees imposed on the remittance transfer.”

The problem is made more complicated because there is no guidance regarding the applicable law to be used for determining if the recipient’s institution is an “agent” or “paying agent” of the remittance transfer company. The 2012 regulation states that when determining when an entity is an “agent” of a remittance provider, reference should be made to “State or other applicable law.”⁶⁷ This could refer to the State where the remittance transfer provider is located, the State where the transaction occurred, the home State of the consumer, or the law of the foreign country in which the remittance is sent. Each of these jurisdictions may have different rules for determining if the recipient’s institution is the “agent” or “paying agent” of the transfer provider. Thus, without further clarification, a remittance provider may face liability for not precisely disclosing the fees charged by the recipient’s non-affiliated depository institution that is deemed under applicable law (which is not defined) to be the “paying agent” of the remittance company.

Limitation to Depository Institutions

The 2013 amendment may also be criticized for limiting the exemption to a recipient’s depository institution (e.g., a bank, savings association, or credit union). According to the World Bank, three-quarters of the world’s poor don’t have a bank account, not only because of poverty, but also because of the cost, travel distance, and amount of paperwork involved in opening an account.⁶⁸ In post-conflict nations the percent of the population with access to bank accounts is reduced further by the degradation of the country’s financial system that results from warfare, enhanced concerns about the security of the nation’s financial institutions, potential for sharp changes in exchange rates, and the fear of

66 78 Fed. Reg. 30673.

67 12 CFR § 1005.30(a).

68 See: <http://tinyurl.com/WB-Unbanked>.

government corruption. Thus, limiting the benefit of the exemption to transfers made into a recipient's "asset account" at a bank or similar depository institution is particularly disadvantageous to the remittance transfer providers seeking to provide services to post-conflict areas.

Exclusion for Transfers to Credit Card, Prepaid Card, or a Virtual Account Held by an Internet-Based or Mobile Telephone Company

The CFPB considered, but specifically declined, expanding the fee disclosure exemption to include transfers to credit cards, prepaid cards, and virtual accounts held by internet companies (e-wallets) and mobile phone companies (mobile phone payments). According to the Bureau, the systems for offering such transfers are not yet fully developed and currently most of these transfers are provided through systems in which remittance transfer providers have contractual arrangements with the recipient institutions, or the providers and the recipient institutions operate within one single network.⁶⁹ The Bureau concluded that, going forward, "arrangements will *likely* permit providers to exercise some control over, or learn about, fees charged by recipient institutions [emphasis added]."⁷⁰

In the case of post-conflict nations, the failure to provide flexibility for transfer into such non-bank accounts, and in particular to mobile phones and other devices, is particularly problematic. In these nations the use of mobile banking devices has become a financial lifeline for much of the population. In 2009, the

Both the World Bank and the U.S. Agency for International Development support and encourage the use of mobile devices for money transfers. These agencies have found that mobile phones are widely available in developing nations and have the added benefit of allowing access to funds without the need to travel through dangerous countryside.

Global System for Mobile Communications Association reported more than four billion mobile phone subscriptions globally, with 80 percent of new connections in emerging markets and mostly by lower-income consumers.⁷¹ Both the World Bank and the U.S. Agency for International Development support and encourage

69 78 Fed. Reg. 30673.

70 *Id.*

71 USAID, *Enabling Mobile Money Interventions* at 2 (2010).

the use of mobile devices for money transfers.⁷² These agencies have found that mobile phones are widely available in developing nations and have the added benefit of allowing access to funds without the need to travel through dangerous countryside.⁷³ The use of mobile phones for monetary transactions is expanding dramatically in post-conflict areas, and is supported by the U.S. government. For example, beginning in 2007 the USAID began to actively assist in the development of mobile banking in Afghanistan,⁷⁴ and the U.S. Department of Defense has invested \$2 million to establish mobile phone and other forms of electronic banking in Iraq.⁷⁵

As the CFPB has stated, the use of e-wallets and mobile phones for monetary transactions is a developing model. It is not clear how these systems will ultimately develop, and it is not clear that every country will have a similar model. For example, in some countries the funds must pass through a domestic banking institution before they are transferred to a mobile device. In other models, the transfer can be made directly to the phone or internet provider. In some countries only one internet provider may be authorized, while in other nations there may be no restriction on the number of internet providers. However, under the CFPB regulation, the fees charged by mobile device providers to transfer funds into their customers' mobile accounts must be disclosed by the U.S. remittance transfer provider prior to the transaction, even if the U.S. remittance company has no knowledge of the fee, or no practical way of determining the fee in advance.

The World Bank has found that a major obstacle to the increased use of mobile phones and other forms of e-money is overly complex or stringent regulation.⁷⁶ The Consultative Group to Assist the Poor (CGAP), which is housed at the World Bank, recommends that policymakers and regulators should be careful not to unnecessarily inhibit the use of mobile phone for monetary transfers through regulatory overreach. Instead, the CGAP urges that rules should be implemented gradually and should be designed to evolve as the industry expands

72 *Id.* at 5, noting that the use of mobile devices provides a safe and secure way of transferring funds without necessitating the transport of currency through the more dangerous countryside. The USAID has undertaken significant efforts to support mobile banking projects in many post-conflict areas, including Ethiopia, El Salvador, Nigeria, Afghanistan, and Malawi. The World Bank strongly supports the development of mobile money infrastructure, and recently issued a report highlighting the benefits of mobile money for developing countries. See, The World Bank, "Maximizing Mobile" at chapter 4 (2012).

73 *Id.*

74 USAID, *Enabling Mobile Money Interventions* at 19.

75 USAID, *Enabling Mobile Money Interventions* at 16 (2010).

76 *Id.* at page 10.

and matures. The ultimate goal should be to allow for oversight without stifling innovation.⁷⁷

Nevertheless, the Bureau determined not to include transfers to credit cards, prepaid cards, mobile phones, and e-wallets because it believes that future development of the use of these instruments for money transfer “will likely permit providers to exercise some control over, or learn about, fees charged by recipient institutions.”⁷⁸ It is not clear how the Bureau came to this conclusion. There is considerable risk, however, that the Bureau’s regulation will lead to this result, even if other payment models would provide more competition, less costs for the recipient, or provide better ways to address the specific needs of consumers in post-conflict areas.

Open Networks and Intermediary Institution Fees

The 2013 regulation does not ameliorate the problems identified in the original rule with respect to remittances carried over open networks, such as wire transfers or the Automated Clearinghouse System (ACH).⁷⁹ As explained previously, the exact amount of fees charged by open network intermediaries must be disclosed prior to and at the time a consumer initiates a remittance transfer. However, this information is unknowable under current systems until *after* the remittance transaction has been completed and the funds delivered. Remittances to post-conflict countries may rely on open networks since these companies are less able to move funds through closed networks in areas with a higher potential for violence, damaged transportation and other necessary infrastructure, high levels of poverty, and a lack of governmental regulatory oversight and police protection. If the use of open networks is restricted because the fees cannot be determined with certainty before the transaction is entered into, the result will be significantly less availability for regulated transfers, and consumers will be driven to use unregulated methods of remitting funds to these areas.

77 Consultative Group to Assist the Poor. (January 2008). *Regulating Transformational Branchless Banking: Mobile Phones and Other Technology to Increase Access to Finance*. Focus Note #43. <http://tinyurl.com/CGAP-BranchlessBanking>.

78 78 Fed. Reg. 30673.

79 The ACH system is a funds transfer system that provides for the clearing and settlement of batched electronic transfers for participating depository institutions. In contrast, wires transfers are typically higher-dollar, individual (not batched) credit transactions that settle between depository institutions immediately. The originator of an ACH transfer generally authorizes its depository institution to send a payment instruction. The depository institution combines the payment instruction with payment instructions from its other customers and sends them to an ACH operator—the Federal Reserve Bank’s Fed ACH or The Clearing House’s Electronic Payments Network—for processing. Board of Governors of the Federal Reserve System, Report to Congress on the Use of Automated Clearing Systems for Remittance Transfers to Foreign Countries (July 4, 2011).

Foreign Taxes

Under the 2012 regulation, remittance providers would have to disclose all taxes imposed on a remittance transfer, including taxes assessed by a local, state, provincial or regional foreign government.⁸⁰ In its 2013 rulemaking, the CFPB recognized that the determination of all foreign taxes, and keeping that information current, would be a difficult and costly undertaking. It therefore determined to amend the regulation to only require the disclosure of foreign taxes that are “collected on the remittance transfer by the provider.”⁸¹

The new regulatory language raises the question of whether a tax collected by a paying agent would be considered a tax collected by the remittance transfer provider. Generally, the actions of an agent are attributed to the principal, and thus a tax collected by the recipient’s institution could be viewed as a tax collected by the remittance transfer provider, if the recipient’s institution is determined to be the agent of the transfer provider. As discussed previously, the regulation does not provide a clear definition of the term “agent” or even the appropriate State or foreign law to consult. On the other hand, it is possible that the rule only intends to capture taxes collected directly by the remittance transfer provider and not by the provider’s agents. This is an area where additional guidance from the CFPB would be helpful.

Exchange Rates

The remittance regulation requires a remittance transfer provider to disclose the exchange rate used by the provider, rounded consistently for each currency to no fewer than two decimal places and no more than four decimal places.⁸² The 2013 regulation did not make any changes to this requirement.

While the exchange rate may be determined with certainty for certain products, this is not true in all cases. In post-conflict countries there will likely be far more volatility in the exchange rate than in more settled nations. To account for this risk, remittance companies may offer transfers with an exchange rate that is set when the recipient picks up the funds.⁸³ This would not be possible under the regulation, since it requires disclosure of the exchange rate when transfer is initiated.

80 12 CFR § 1005.31.

81 78 Fed. Reg. 30674–77.

82 12 CFR § 1005.31(b)(1)(iv).

83 77 Fed. Reg. 6196 (Feb. 7, 2012) (so called “floating rate” transfers are described).

Further, remittance transfers to post-conflict nations may rely on open network systems. Determining the exchange rate in advance in open network transactions is not always possible.⁸⁴ A sending institution may exchange the currency at the time of transfer, using an exchange rate that the sending institution sets. In such cases, the principal amount will then be transferred in the foreign currency. Even if the funds are to be received in a foreign currency, however, the sending financial institution may not conduct the foreign exchange itself. Some financial institutions, particularly smaller institutions, may not participate in any foreign currency markets.⁸⁵ In other cases, the sending institution may choose not to trade an illiquid currency or a consumer may request that the transfer be sent in U.S. dollars. In these cases, the first cross-border intermediary institution in the recipient's country, or the recipient's institution, may set the exchange rate that applies to the transfer. Under these conditions, the remittance company may not know the exact exchange rate that will be applied until the transferred funds are received.

The potential for making an error of as little as one-hundredth of one percent when disclosing exchange rates could create significant risks to the remittance provider, especially when making a transfer to a post-conflict country. As a result, the cost of such transfers may increase, or the availability of such services through regulated companies may be inhibited.⁸⁶ And once again, post-conflict nations will typically have more volatile movements in exchange rates, and, thus, will be particularly disadvantaged by strict application of this disclosure requirement.

Date When Funds Will Be Available

The receipt that must be given by the remittance transfer provider to the sender must include the date in the foreign country on which funds will be available to the designated recipient.⁸⁷ Due to the instability in post-conflict countries, remittance providers may not be able to provide a firm date by which the funds

84 *Id.* At 6197.

85 See discussion of the mechanics of setting foreign exchange rates at 77 Fed. Reg. 6197.

86 *Supra* note 55 at 6220, a discussion of comments including a Federal Reserve Bank commenter, as well as industry commenters, arguing that requiring a fixed exchange rate for purposes of providing an exchange rate disclosure would result in less favorable exchange rates for senders. These commenters stated that if providers are required to fix the exchange rate, they will increase the spread they use in order to minimize the risks associated with rate volatility, so the cost of sending remittance transfers would increase for senders. A major remittance transfer provider warned the CFPB that it would stop providing service to approximately 10,000 foreign locations that currently offer only floating rates.

87 12 CFR 1005.31(b)(2).

will be available in all cases. CFPB guidance appears to recognize that fighting and other disruptions may delay the date on which funds will be ready for disbursement, and provides an exception for 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.⁸⁸ Many of the causes for delay in receiving funds when sent to a post-conflict region can be anticipated, but the length or severity of the disruption cannot be determined in advance. The CFPB was notified during the comment period that infrastructure deficiencies in some countries may make it impossible to determine the actual date on which funds will be available, but did not address this problem in its 2013 regulation.

Foreign Laws Prohibiting Compliance

In its 2012 rule, the CFPB addressed the problem that the laws of certain foreign countries effectively prohibit compliance with its disclosure requirements.⁸⁹ As such, the CFPB created an exception that permits remittance transfer providers to use estimates, rather than exact numbers, if the provider cannot determine the exact amounts when disclosure is required because of a recipient nation's laws.⁹⁰ However, since this exception only applies when there is a national law that prevents compliance with the disclosures, it will not be of assistance when compliance is made impossible due to the local political, economic, regulatory, and social conditions, such as may exist in post-conflict nations.

CFPB Can Do More

The CFPB has broad authority to create exceptions and limitations to the statutory provisions on remittance transfer providers. Section 904 of the EFTA governs all of the CFPB's rulemakings under the EFTA.⁹¹ This section specifically states that the EFTA regulations may contain "such classifications, differentiations, or other provisions, and may provide for such adjustments and

88 12 CFR §1005.33.

89 Electronic Fund Transfers (Regulation E) 77 Fed. Reg. 50244.

90 The August regulation also created an exception for international ACH transfers where the terms of the transfer have been negotiated by the United States Government and the recipient country's government, and where the exchange rate is set by the recipient country on the business day after the provider has sent the remittance transfer. The CFPB has published a list of the countries that qualify under the second exception. These countries are: Aruba, Brazil, China, Ethiopia, and Libya. See Consumer Financial Protection Bureau, Remittance Rule Safe Harbor Countries List (Sep. 26, 2012), available at <http://tinyurl.com/Safe-Harbor-List>.

91 15 U.S.C. § 1693b.

exemptions for any class of electronic fund transfers or *remittance transfers*, as in the judgment of the CFPB are necessary and proper to effectuate the EFTA.” Likewise, section 1022 of the Dodd-Frank Act, which is the CFPB’s general authority to issue regulations for federal consumer laws (including the EFTA), provides that the CFPB may conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products from any rule.⁹² Taken together, these statutory provisions leave no question that the CFPB has plenary authority to develop regulations that can create exemptions, differentiations, adjustments, and exceptions from the general requirements, and the CFPB can classify products as subject to or not subject to regulation, and otherwise tailor its regulations to achieve the purposes of the EFTA and the policy objectives of section 1022 of the Dodd-Frank Act. The legal authority of the CFPB to make adjustments to the disclosure rules to take into account the special circumstances of post-conflict nations is clear.

CONCLUSION

The Dodd-Frank Act amendments to the Electronic Funds Transfer Act, and the implementing regulations issued by the CFPB, are intended to provide enhanced consumer protections to U.S. residents sending funds to foreign countries. The legislation and regulations were designed for a model in which the remittance transfers are subject to known rules and regulations, where all fees can be determined beforehand, and where exchange rates and timing can be predicted with near certainty. This model does not exist for remittances sent to many post-conflict countries. In these nations, the financial regulatory structure is weak, the political and legal infrastructure unstable, and corruption or fear of corruption prevalent. Under these circumstances, it is difficult, if not impossible, to know with certainty many of the facts that the regulation requires remittance providers to disclose accurately when the remittance is initiated. The CFPB has made attempts to deal with these issues, but much more needs to be done to assure that these new rules will not inhibit fund transfers to post-conflict regions.

92 12 U.S.C. § 5512 (b)(3).