M&T Bank

July 22, 2011

Via Electronic Delivery

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

Re: Docket No. R – 1419 and RIN 7100 – AD 76
Proposed Amendments to Regulation E
to Implement Section 1073 of the Dodd-Frank Act

Dear Sirs/Madames:

M&T Bank is pleased to have the opportunity to offer its thoughts to the Board of Governors of the Federal Reserve System (the "Board") in response to the Board's solicitation of public comment on the Board's proposed rules in regard to remittance transfers, which were published in the Federal Register on May 23, 2011 (the "Proposed Rule"). The Proposed Rule was promulgated by the Board to implement the requirements of Section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). Section 1073 amends the Electronic Fund Transfer Act ("EFTA") to add a new section 919 to that act for the purpose of establishing certain protections for consumers sending remittance transfers from the United States to other countries.

At the outset, we would like to say that, while we appreciate the Board's efforts in attempting to fashion a set of rules that further the objectives of the remittance transfer provisions of the Dodd-Frank Act and are mindful of the need to provide consumers with adequate protections with respect to their remittance transfer transactions, we confess to being extremely disappointed with the Proposed Rule, which, in our view, fails on many levels to strike a proper balance between the legitimate needs of consumers and the interests of financial institutions that provide remittance transfer services. Most notably, these failings can be attributed to the fact that the Proposed Rule establishes compliance standards for remittance transfer providers that are largely designed with closed-end remittance transfer models in mind and completely ignores the operational realities associated with open-end payment networks, such as those used to send wire transfers and ACH payments.

In a closed-end payment network, the transmittal of a remittance transfer occurs wholely within a single payment network, with the transfer of funds being controlled from beginning to end by the entity that is the remittance transfer provider. In such transactions, the sender of the payment initiates the transfer of funds through the same entity (i.e., the remittance transfer provider) from which the designated recipient collects the transferred funds at the endpoint of the transaction. Accordingly, in regard to remittance transfers that take place in such a closed-end network environment, we can understand that the Proposed Rule, perhaps, makes sense, since a remittance transfer provider that operates in such an environment has complete control over all aspects of the funds transfer and possesses information with respect to the entirety of the transaction from beginning to end.

In contrast, applying the Proposed Rule to open-end remittance transfer models, such as wire transfers and ACH payments, is akin to trying to fit a square peg into a round hole – no matter how hard you try, it just does not work. In an open-end payment network, remittance transfers involve the transmittal of funds from a sending bank (i.e., the remittance transfer provider) to their ultimate destination at an unaffiliated institution for credit to the account of the designated recipient, and, along the way, the transferred funds may pass through one or more intermediary institutions before arriving at the recipient bank. Unlike their counterparts in closed-end payment networks, remittance transfer providers in open-end payment networks have relatively little control over the transferred funds once the funds leave their hands. As a consequence, they have access to significantly less information about the transaction. In this context, making remittance transfer providers responsible for disclosing to senders information that they do not have ready access to and for making senders whole for errors for which they are not at fault and not in a position to prevent is not justified by any logic and is completely inequitable, notwithstanding the merit worthiness of the objectives of the remittance transfer rules.

We are most concerned that the Proposed Rule would have a devastating impact on banks' wire transfer services, seriously impeding their ability to provide consumer-initiated wire transfer services and exposing them to unwarranted liability risk. More specifically, the Proposed Rule will:

- undermine the long established legal framework that allocates the rights and obligations among the parties to a wire transfer by rendering Article 4A of the Uniform Commercial Code ("UCC 4A") inapplicable to international wire transfers initiated by consumers and creating legal uncertainty in regard to the rules that are to apply to such transactions.

- cause a massive disruption in wire transfer services by superimposing rules that will inevitably cause lengthy delays in the execution of consumer-initiated international wire transfers as a result of (i) the time it will take to obtain the information needed to make the required prepayment and receipt disclosures, and (ii) the likely decision of most institutions to hold onto the funds to be transferred until the lapse of the sender's right to cancel the transaction.

- expose banks providing wire transfer services to considerably more liability risk for consumer-initiated international wire transfers than exists under current applicable law due to disclosure and error resolution rules that make remittance transfer providers responsible for matters beyond their control;

- significantly increase the cost of wire transfer services to pay for system and operational enhancements needed to achieve compliance, as well as to compensate for the additional liability risk to financial institutions;

- place U.S. banks that offer wire transfer services at a competitive disadvantage with banks in other countries that would not be subject to the remittance transfer requirements by making it difficult for U.S. banks to retain wealth customers who will be able to take their business elsewhere to get more efficient and accommodating wire transfer service;

- establish compliance standards without regard to the operational realities of the wire transfer business, making it inevitable that banks will not be able to achieve compliance;

- harm consumers by creating a compliance environment that will dissuade certain banks from providing wire transfer services to their consumer customers or by making such services so cost prohibitive that wiring funds will no longer be a viable option for consumers who require remittance transfer services.

As the Board recognizes, "remittance transfers" are most typically cross-border person-to-person payments of relatively low value. Most often, such transfers are made for the maintenance and support of the recipient and/or other relatives of the sender (rather than payments to businesses or payments made in exchange for goods or services). We certainly understand why Congress would want to extend legal protections to senders of such remittance transfers, and if the Proposed Rule was limited in its application to these kinds of transfers, the Proposed Rule would be more in line with the legislative intent underlying the remittance transfer provisions of the Dodd-Frank Act.

It is most unfortunate that the term "remittance transfer" in section 1073 of the Dodd-Frank Act is painted with such a broad brush definition so as to sweep within its ambit many kinds of transfers, including wire transfers and ACH payments, that are atypical of remittance transfers in their traditional sense. To remedy this situation, we urge that the Board utilize its authority under section 904(c) of the EFTA to carry out Congressional intent by focusing its rulemaking on traditional remittance transfers and extending the protections authorized under section 1073 of the Dodd-Frank Act exclusively to senders of such remittance transfers who are in need of those protections.

Accordingly, we are of the view that the final rule should exempt from the definition of remittance transfer any transaction that (i) is not a transmittal of funds to a natural person, and (ii) is in amount in excess of an established dollar threshold that is high enough to protect consumers who send remittance transfers as they are traditionally understood.

It is our understanding that, prior to the Board's issuance of the Proposed Rule, at least one bank industry trade group wrote to the Board, suggesting that the Board set a $500 ceiling on remittance transfers, so that cross-border payments that exceed that amount would not be subject to the remittance transfer rules. To say the least, we were greatly dismayed that the Board chose to ignore this suggestion altogether – the fact that such a suggestion was made did not even merit a mention in the Board's discussion of the Proposed Rule - and we would ask that the Board (or the Consumer Financial Protection Bureau), when adopting the final rule, incorporate the concept of a ceiling within its provisions.

Whether $500 is an appropriate amount for such a ceiling, we would be hard pressed to say. While it is our sense that $500 would be at the high end of the range for what are typically thought to be remittance transfers, we would understand it if the bar is set higher, perhaps at $1,000, to build in a cushion to assure that consumers who send remittance transfers are afforded needed protections.

Having a ceiling cut-off for remittance transfers is, in our view, an essential ingredient to a fair and balanced final rule. Subjecting cross-border payments in excess of the amount proposed above to the remittance transfer requirements prescribed by the Proposed Rule is unnecessary to protect consumers who send traditional remittance transfers and would create onerous compliance burdens and legal uncertainties that far outweigh any benefits that would be achieved. Limiting the coverage of the final rule in this manner would still accomplish the legislative objective of protecting consumers while preserving the established legal principles that have long been in place for the governance of wire transfers and ACH payments. Inclusion of a ceiling amount in the definition of "remittance transfer" would mitigate the enhanced risks that would otherwise confront banks in a funds transfer environment lacking a UCC 4A rulebook, and, further, would help limit the disruption of services that would otherwise result if the Proposed Rule is adopted in final form.

We recognize that section 1073 of the Dodd-Frank Act neither establishes a ceiling amount for remittance transfers nor authorizes the Board to establish such a ceiling amount. Nevertheless, we would submit that the Board is possessed of such authority by virtue of the EFTA. More specifically, section 904 (c) of the EFTA, as amended by the Dodd-Frank Act, provides that the regulations the Board issues under the EFTA may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of electronic fund transfers or remittance transfers, as in the judgment of the Board are necessary or proper to effectuate the purposes of the EFTA. Accordingly, we ask that the Board use this discretionary authority to carve out from the definition of "remittance transfer" those classifications of funds transfers identified above.

Even assuming the final rule includes the exemptions stated above, the Proposed Rule is still in need of a major overhaul with respect to the compliance standards applicable to remittance transfers conducted in open-end payment networks, because, as noted, the existing compliance standards in the Proposed Rule were developed in disregard of the operational realities associated with such transactions. While we believe that services like wire transfers and ACH payments should be excluded from coverage under the final rule altogether (because they are not traditional remittance transfer services), at the very least, the Proposed Rule requires significant revision to tailor separate sets of rules for closed-end and open-end remittance transfers.

In our view, there is a need to go back to the drawing board to fix the following aspects of the Proposed Rule as they relate to remittance transfers performed in open-end payment networks:

- The disclosure responsibilities of remittance service providers provided for in the Proposed Rule proceed from the faulty assumption that the information required to be disclosed is easily obtainable. Providing disclosures in the currency to be received by a designated recipient, even when estimates are allowed, is impractical, if not impossible, since remittance transfer providers would not know the currency denomination of the designated recipient's account into which the funds from the transfer will be deposited. An account held in a foreign country is not necessarily held in the currency of that country.

- It is unrealistic to expect remittance transfer providers to be able to accurately disclose information about transactions when such information relates to matters beyond their actual knowledge or control, such as exchange rates, applicable fees and taxes (other than fees and taxes imposed by remittance transfer providers) and the amount to be received by the designated recipient. Since, in a an open-end payment network, a remittance transfer provider does not directly transmit funds to the receiving institution (i.e., the designated recipient's bank) and does not control the transaction from start to finish, the remittance transfer provider often will not know, and will not be able to find out, the exact amounts of taxes, fees, exchange rates and other charges imposed by intermediary banks and foreign governments. Additionally, even when a remittance transfer provider has a relationship with the receiving institution, it would not know the amount of fees that the receiving bank will charge its own customer (i.e., the designated recipient) in connection with the incoming transfer because those fees arise from the relationship between the customer and the receiving institution.

- Even in cases where estimated disclosures are permissible for remittance transfer providers that qualify for either the temporary or permanent exception, the prescribed bases for providing estimates are far too restrictive, with the result that, in many cases, remittance transfer providers will not be able to disclose the information called for in the Proposed Rule. There is a need for allowing remittance transfer providers considerably more leeway in how they go about determining disclosed estimates, and, also, to allow for situations when, even with best efforts, a remittance transfer provider may not be able to furnish particular information or even provide a good faith estimate of that information.

- The requirement that receipts disclose the date of availability of the transferred funds to the designated recipient is a further unrealistic expectation. Most often, a remittance transfer provider will be unable to know with certainty when remitted funds will arrive at the receiving institution, and, even in circumstances where that date may be determinable, the remittance transfer provider will have no way of knowing when the receiving institution will make the funds received from the remittance transfer available to its customer. Even with the ability to disclose an outside date when the transferred funds will be made available, the Proposed Rule falls short because funds availability to a designated recipient cannot be known or controlled in an open-end payment network environment.

- The exclusion of international wire transfers from the permanent exception (which allows remittance transfer providers to provide estimates of certain amounts required to be disclosed to senders) is short sighted and defies logic, notwithstanding that certain remittance transfer providers that wire funds on behalf of senders may qualify for the temporary exception. Pursuant to section 1073 of the Dodd-Frank Act, the Board is authorized to grant an exception when the method by which transactions are made in a recipient country does not allow the remittance transfer provider to know the amount of currency that will be received by the designated recipient. Open-end network wire transfer and ACH payment systems, which involve the use of intermediary institutions to complete a funds transfer, are transmission methods that make it particularly difficult, if not impossible, to know the exact amounts of taxes, fees, exchange rates and other charges imposed by intermediary institutions and foreign governments, because there is no direct transmission of funds to the receiving institution. Accordingly, the inclusion of remittance transfers made through wire and ACH payments under the umbrella of the permanent exception would appear to be in line with Congressional intent as evidenced by the stated provisions in the Dodd-Frank Act.

- As a general proposition, a remittance transfer provider's liability for errors should be tied to the fault of the remittance transfer provider, and no liability should be assigned to a remittance transfer provider that has executed a remittance transfer in accordance with instructions provided by the sender. That is to say, that a remittance transfer provider should not be made accountable to the sender for the mishandling of remittance transfers by non-agent intermediaries or receiving institutions. The Proposed Rule is deficient in this regard in that it inexplicably shifts liability risk to remittance transfer providers in situations where they have neither erred nor are otherwise at fault and are in no position to control the outcome of remittance transfers gone awry.

The failing of the Proposed Rule is particularly evident in the definition of "error," and, more specifically, the inclusion in the definition of the remittance transfer provider's failure to make transferred funds available to the designated recipient by the date of availability stated on the receipt or combined disclosure. According to the proposed commentary that accompanies the Proposed Rule, remittance transfer providers would be deemed to have failed to make funds available by the stated date of delivery in the event of (i) late or non-delivery of a remittance transfer; (ii) delivery of funds to the wrong account; (iii) the fraudulent pick-up of a remittance transfer in a foreign country by a person other than the designated recipient; and (iv) the recipient agent or institution's retention of funds in connection with a remittance transfer, instead of making the funds available to the designated recipient. As noted, none of these situations should constitute an error for which a remittance transfer provider is held accountable unless the failure was caused by the fault of the remittance transfer provider.

While we acknowledge that the Proposed Rule does exonerate a remittance transfer provider from liability when a failure to deliver funds by the date stated in the receipt or combined disclosure results from circumstances beyond its control, the proposed commentary indicates that this exception is intended to apply only to circumstances that are generally referred to under contract law as "force majeure" (e.g., war, civil unrest or a natural disaster). This exception is far too narrow in its application and needs to be broadened so that a remittance transfer provider's failure to timely deliver funds would be excused due to any set of circumstances outside of the remittance transfer provider's control.

We note that a failure to deliver funds by the date stated in the receipt or combine disclosure would also not be an "error" if the failure resulted from the sender providing incorrect information to the remittance transfer provider, subject, however, to the caveat that the remittance transfer provider afford the sender an opportunity to correct the information at no additional cost to the sender. It makes no sense to us that in cases where a late delivery or non-delivery of transferred funds is attributable to the sender's error, the remittance transfer provider should be asked to pay for the sender's mistake in any way. Moreover, even assuming there is some rationale for requiring a remittance transfer provider to waive its own fees with respect to the sender's second chance opportunity – we submit that there is no justification for such a requirement – the remittance transfer provider should not have to absorb any out-of-pocket costs, including, but not limited to, the fees of other parties handling the second transfer, any taxes imposed on the transfer, fluctuations in the exchange rate and the loss of funds sent in the first transfer.

- A sender's right to cancel a remittance transfer should not extend past the time when there has been finality of payment in the eyes of the law, which occurs when a remittance transfer provider executes the sender's payment instructions. The sender's right of cancellation that is provided for in the Proposed Rule – a remittance transfer provider must comply with the sender's oral or written request to cancel as long as the request is received no later than one business day from when the sender made payment for the remittance transfer subject to the cancellation request – would inevitably cause remittance transfer providers, acting out of prudence, to delay their execution of senders' payment instructions until the cancellation period has lapsed (because remittance transfers conducted by ACH or wire transfer generally cannot be cancelled once the remittance transfer provider has executed the sender's payment instructions). This, in turn, almost assuredly will create a tension between remittance transfer providers and their consumer customers who will be seriously inconvenienced by such delays, especially when time is of the essence to send funds abroad. The likely result of all of this is that ACH and wire transfer services will lose their appeal to many consumers because those services will no longer offer the advantage of a speedy transaction time. As mentioned, we think the final rule should pare back the cancellation period so that a sender's right to cancel expires once the remittance transfer provider executes the sender's payment instructions and the transferred funds are literally out-the-door. If this concept is not incorporated in the final rule and a sender's right of cancellation extends beyond finality of payment, the final rule should enable senders to waive their right to cancel a remittance transfer in any instance where they place a higher value on the prompt transfer of their funds.

In addition to curing the myriad problems with the Proposed Rule as described above, we would also ask the Board or the Bureau, as applicable, to weigh in with clarification with respect to the following matters when issuing the final rule:

- The Board, in its discussion of the Proposed Rule's definition of the term "sender," explains that since a sender is a consumer, the Proposed Rule does not apply to business –to-consumer or business-to-business transfers of funds. We would ask that the final rule provide confirmation that funds transfers sent from business accounts established at banks will not be considered remittance transfers in any case, regardless of the sender's purpose in sending the transfer.

- The proposed commentary, in addressing the definition "remittance transfer," says that inherent in the definition is a requirement that there be a specific sender request that a remittance transfer provider send a remittance transfer. To illustrate this point, the proposed commentary goes on to explain that a deposit by a consumer into a checking account or a savings account does not itself constitute such a request (and, therefore, the deposit is not a remittance transfer), even if a person in a foreign country is an authorized user of that account, where the consumer retains the ability to withdraw funds in the account. We submit that a deposit into a domestic account does not qualify as a remittance transfer under any circumstances, even where a person in a foreign country has exclusive access to the account, and we would ask that the final rule specifically indicate that this is so. The final rule, in so doing, should also make it clear that for a transaction to qualify as a remittance transfer, the remittance transfer provider must be actively and knowingly engaged by the sender to execute the sender's explicit payment instructions to send money to someone outside the United States.

- We seek the Board's (or the Bureau's) concurrence that unauthorized funds transfers are not covered by the error resolution procedures, and, moreover, are not remittance transfers. We note that the Proposed Rule's definition of the term "error" does not include an unauthorized transfer of funds, which, given the fact that, in the context of the rules that apply to electronic fund transfers, the term "error" does include unauthorized fund transfers, is an indication to us that the omission in the remittance transfer rules was intentional and not an oversight. Moreover, in addressing the relationship between the Proposed Rule and other laws with respect to unauthorized fund transfers, the preamble to the Proposed Rule states that where a person makes an unauthorized electronic fund transfer or unauthorized use of a credit card to send a remittance transfer (such as when a stolen debit card or credit card is used to send funds to a foreign country), the consumer holding the asset account or the credit card account is not the sender of the remittance transfer, and thus, the error resolution provisions prescribed by the Proposed Rule do not apply. In the same vein, we ask that the final rule make it clear that if an unauthorized wire transfer is made from a consumer's account, the consumer who owns the account is not the sender, and, similarly, the error resolution procedures would have no application. Additionally, since an unauthorized wire transfer of funds does not involve a sender, such a transaction is not a remittance transfer (because the existence of a sender is an essential ingredient to the definition of a remittance transfer) and falls outside the scope of the EFTA and Regulation E. As a consequence, the provisions of UCC 4A would continue to apply to that unauthorized wire transfer and govern the respective rights and obligations of the financial institution sending the transfer and its consumer customer. We ask that the final rule confirm that our understanding of this matter, as we have explained it, is correct.

Thank you for allowing us the opportunity to share our thoughts on the Proposed Rule. If you have any questions, please feel free to contact me.

Very truly yours,

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