October 17, 2012

Richard Cordray, Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Implementation of Remittance Transfer Rules under Section 1073 of the Dodd-Frank Act

Dear Director Cordray:

In response to your recent request for ways to prevent disruptions to the consumer international transfer market, The Clearing House Association, L.L.C., the American Bankers Association, the Consumer Bankers Association, the Independent Community Bankers of America and NACHA – The Electronic Payments Association (collectively, the "Associations") respectfully submit this letter. We have previously discussed with you our concerns related to liability for sender error, foreign taxes, beneficiary account fees and effective date. Although you have indicated that you do not think these issues merit relief, we continue to hear from our members that these issues remain critical.

As you have heard us say many times now, we firmly believe that, despite the best efforts of the industry, if these concerns are not addressed, there will be significant negative consequences for consumers.[1] Therefore, the Associations respectfully ask that you consider the issues explained herein and the suggestions we offer to mitigate the unintended consequences of the rule. We note that all our suggestions are within the Consumer Financial Protection Bureau's (the "Bureau") powers to carry out.

[1] For a detailed discussion of negative consumer impact that will result from the final rule, please see the Associations' joint comment letter and our individual comment letters responding to the proposed remittance transfer rule, submitted in July, 2011; the Associations' joint comment letter and individual comment letters responding to the proposed rules for a safe harbor exemption and preauthorized transfers, submitted in April 2012; and The Clearing House's letter to you suggesting certain modifications to the final rule, dated April 27, 2012. Our concerns regarding consumer impact were also discussed with you in an in-person meeting on August 10, 2012 attended by The Clearing House, the American Bankers Association, the Consumer Bankers Association, and the Independent Community Bankers of America.

I. Liability for Sender Error

Under the final rule an "error" occurs when funds have not arrived to the designated recipient due to the sender's incorrect identification of the recipient's account. The rule mandates remedies for all "errors." In the case of funds being sent to an incorrect account, the rule mandates that the provider either refund or resend the principal amount of the transfer, at the sender's election at no additional cost to the sender. Hence, if a provider is unable to retrieve the funds from the incorrect account, which will be the case in almost all instances, the provider must fund the principal for the refund or resend.

We emphasize that, contrary to your testimony to the House Financial Services Committee (the "HFSC") on September 20, 2012, a provider cannot "work this out" with the sender. The rule mandates the refund or resend remedy and puts providers at risk for the principal amount of the transfer, ***despite the fact that the provider has properly executed the sender's instructions***. To be clear, and again, contrary to your statement before the HFSC, a sender does not have to "sue" a provider if the funds go into the wrong account. Rather, the sender only has to claim an error and, if it is true that funds went into the account that the sender instructed, the rule's error resolution requirement is triggered.

We note that for a number of technical and legal reasons there is no realistic means for a provider to confirm with a foreign bank that a name and account number match.[2] In fact, it is unclear whether under the Bureau's Regulation P, this could even be done domestically without the recipient's bank first validating with the recipient that he or she is expecting a payment from the sender, a step which may take many days to complete or which the recipient bank may be unwilling to do at all.[3] For international transfers a provider may have no means of even contacting the recipient bank or, if the provider can contact the bank, there is no certainty that the provider can convince the bank to validate that a name and account number match. Hence, the rule imposes strict liability on providers for information that they cannot validate.

We note that financial institutions in the U.S. and abroad rely on account numbers as opposed to names for a variety of reasons, including that

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[2] We do not recount the reasons in this letter as your staff have been informed of the reasons why account numbers cannot be validated in their conversations with individual depository institutions. If you would like more detail on this point, we would be happy to arrange a call for you with industry experts.

[3] Under Regulation P a consumer's account relationship with a depository institution is nonpublic personal information as is the consumer's account number. While Regulation P does permit the sharing of nonpublic personal information with unaffiliated third parties when it is necessary to effect or administer a transaction that a consumer has "authorized," in the case of a wire or ACH credit sent to a consumer, a depository institution has no means of knowing whether the consumer in fact authorized payment or whether the person calling is attempting to get the consumer's account number for fraudulent reasons. Hence, at a minimum the depository institution could not automatically share this information but would need to first confirm with its customer that he or she is expecting a credit payment from the sender.

- in many countries, _*including all European Union countries*_, account numbers _*are the legal identifier for a transfer*_,[4]
- there may be variations in the way an individual spells his or her name (for example, Jenny Taylor as opposed to Gennifer Taylor) and such spelling variation may not correspond with the recipient's account number,
- there may be issues relating to language translation (for example, translations from Latin languages to languages with different characters, such as Cantonese)
- there may be limitations in the length of the beneficiary name field that prevent a person's full name from being entered, and
- reliance on account numbers enables the very important objective of automated processing.[5]

It is also critical that you understand that the imposition of liability on a provider for a sender's erroneous instruction is ***unprecedented in and counter to all other U.S. payments law***. A consumer's erroneous identification of a payee's account would not be an "error" for a domestic EFT or wire.[6] Hence, we disagree with your statement to the HFSC that the new rule provides "similar protections to international transfers that customers enjoy for domestic transfers."

We are aware that Bureau staff have justified the remittance transfer rule's imposition of liability on the provider for the sender's incorrect account instruction by stating that Regulation E imposes liability on banks for unauthorized EFTs, even when consumers have been careless with their PIN. We find this to be an unsound rationale. Unauthorized transfers are an entirely different kind of error than an authorized but incorrect payment instruction and have different policy underpinnings. Further, unlike incorrectly instructed remittance transfers, *consumers do share liability with banks for unauthorized EFTs and have a responsibility to mitigate loss by reporting lost or stolen access devices*.

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[4] Article 74 of the EU's Payment Service Directive provides that if a payment order is executed in accordance with the transfer's "unique identifier," the payment order shall be deemed to have been executed correctly with regard to the payee specified by the unique identifier. It also provides that if the payment service user provides information additional to the unique identifier (i.e., recipient name), the payment service provider shall be liable only for the execution of payment transactions in accordance with the unique identifier provided by the payment service user. These unique identifiers are more commonly known as International Bank Account Numbers ("IBANs"), which are internationally agreed formats for identifying bank accounts based on the ISO 13616:2007 standard. SWIFT is the registrar for IBANs.

[5] Most payment orders issued to a beneficiary's bank by another bank are processed by automated means using machines capable of reading payment orders on standard formats that identify the beneficiary by an identifying number or the number of a bank account. The processing of the payment order by the beneficiary's bank and the crediting of the beneficiary's account are accomplished by use of the identifying or bank account number without human intervention (i.e., without any person's read of the payment order itself).

[6] Likewise, if a consumer wrote a check intending to pay one person but putting another person's name on the instrument, the consumer's bank would not be held liable for paying the check.

While incorrect account instructions do not happen frequently today, we believe that bad actors will not hesitate to misuse this error resolution for fraudulent purposes. As explained above, a sender can freely admit that he or she gave an incorrect account instruction and the provider will still be mandated by the rule to refund or resend the principal amount of the transfer. Hence, fraud is made very easy.

We expect that the fraud will happen as follows. A sender will collude with another person who has an account in a foreign country. The sender will request a transfer to one person, the "designated recipient," but give the account number of the person with whom he is in collusion. The funds will go to the colluding party's account. The fraudster will wait a period of time so that the funds can be removed from the "incorrect" account and then simply inform the provider that he made a mistake with the account number, the designated recipient has not received the funds, and he would like a refund. With slight variations fraudsters will be able to repeat this pattern again and again with a number of institutions.

While the rule says there is no error if funds do not arrive due to a sender's fraudulent behavior, as a practical matter, it will be exceedingly difficult for providers to prove fraud for an international transfer.

On the basis of the rule's imposition of liability on providers for sender error some financial institutions will determine that they cannot offer international transfers for consumers any longer. Providers that remain in the market will be forced to mitigate their risk by limiting consumer access to their services to customers they deem "safe," capping the amount of transfers that can be sent, and prohibiting transfers to high fraud risk countries such as Nigeria and eastern European nations, and by taking other necessary steps that will reduce services currently available to customers.

In summary, when a sender incorrectly identifies a recipient's account number the rule–

- mandates refund or resend of the principal amount of the transfer (there is no ability to "work things out"),
- imposes liability that is inconsistent with all other U.S. payment laws,
- irrationally penalizes providers for following the sender's instructions even though there is no practical means of validating those instructions,
- is inconsistent with international laws and banking practices, and
- paves the way for fraud.

Hence, we urge you to eliminate the rule's imposition of liability on providers for a sender's incorrect account number instruction. We were grateful to hear your acknowledgement at the opening of the Bureau's webinar on October 16, 2012 that the Bureau shares concern about this issue and will address it shortly. We hope the Bureau will move quickly, before the effective date, to make this important change. In particular we suggest that the Bureau

- Add a new comment to the definition of "designated recipient" which provides that for purposes of transfers to an account, the designated recipient is the person associated with the account number provided by the sender;
- Revise comment 33(a) – 5 (examples of "delay" errors) to state that delivery of funds to the wrong account does not include delivery of funds to the account instructed by the sender (i.e., the designated recipient's account); and
- Delete comment 33(c) – 2 (incorrect or insufficient information).

II. <u>Foreign Taxes</u>

Beginning February 7, 2013, providers must know all the taxes (national, provincial, and local) applicable to remittance transfers in all the countries to which they enable consumers to send funds. This is true even for taxes that the Bureau claims can be "estimated" under the temporary and permanent estimate provisions.[7] What's more, providers must also know all of the exemptions, exclusions, and other variables that may impact the rate or applicability of a tax to a particular transfer.

It is important that you understand that a database of all worldwide taxes and their related exemptions and exclusions that are applicable to international transfers and available in real time simply does not exist today. It must be created and constantly updated and maintained. The effort that it will take to collect and maintain this data will be tremendous. Furthermore, assuming such a database is built, providers will be unable to integrate the information into their front end retail systems by February 2013.

Additionally, we have learned from our discussions with international tax experts that knowing the "black letter" tax laws does not necessarily equate to knowing the actual taxes that will be applied to a transfer. Foreign banks may have differing interpretations or practices regarding when or how taxes are collected. For instance, in the Philippines different banks interpret the requirement to collect the documentary stamp tax differently. Hence, without knowing and contacting each Filipino bank that will handle a transfer, a provider cannot disclose with certainty the amount of documentary stamp tax that will be collected on a transfer.

Section 1073 of the Dodd-Frank Act does not require that foreign taxes (or even domestic taxes) be disclosed to a sender. As we have said before, the cost of providing the foreign tax disclosure is grossly disproportional to the minimal informational benefit the

[7] The "tax estimates" that are often referred to by the Bureau provide no meaningful relief to providers. Taxes can only be estimated *when the taxes are a percentage of another amount that is permissibly estimated*. For example, if a provider is permitted to estimate the foreign exchange rate for a transfer and tax is imposed on the amount of the transfer, the provider may use an estimated transfer amount (calculated by multiplying the transfer amount in funding currency by the estimated exchange rate) and apply the tax rate to that estimated transfer amount. But the tax rate must be correct and any variance caused by an incorrect rate would be grounds for an error.

disclosure provides to senders. Thus, we have suggested on several occasions that the Bureau eliminate this disclosure. We continue to believe that elimination of the disclosure would be the best outcome for consumers, given that the prices for remittance transfers must absorb the cost of this extraordinary data collection and maintenance exercise.

Discussions with Bureau staff lead us to believe that the Bureau is unlikely, however, to eliminate the foreign tax disclosure. Thus, we alternatively suggest that the Bureau reduce the burden and strict liability nature of the disclosure in its current form by –

- Requiring the disclosure of national level taxes only without regard to exemptions, exclusions, or other special exceptions that may apply to a particular transfer;
- Excusing variances between disclosed foreign taxes and actual foreign taxes deducted from a transfer based on
    - Application of exclusions, exemptions, or other tax exceptions to the transfer;
    - Application of provincial or local level taxes to the transfer; and
    - Interpretations or practices by foreign correspondents or intermediaries that are inconsistent with a country's tax laws or regulation; and
- Providing further guidance regarding the kinds of taxes that the Bureau deems to be "imposed on" a transfer.

III. <u>Beneficiary Account Fees</u>

Fees that a recipient bank charges its customer for receipt of an electronic transfer under an account agreement ("beneficiary account fees") are far more problematic to disclose than fees that banks charge one another for the handling of a transfer. There are two reasons why this is so. First, the fees are highly variable in nature and often specific to a recipient rather than a standard fee that applies to all customers of a foreign bank.

For example,

- A recipient's bank may permit a recipient to receive some number of free wire transfers per month and only impose a charge once the recipient has received more than that number. Or vice versa, a recipient may be charged for some number of transfers and then once that amount is reached, the additional wires are free.

- Fees may vary based on the status of the recipient with the bank. For example, banks may waive fees or reduce standard fees for customers who hold balances at certain levels or who hold loans or use other services. There are numerous possible variations.

- Account fees may not be actually paid by the recipient but instead count against earnings credits that the recipient has with the bank. Or account fees may be initially charged but later rebated.

Hence, in many cases even the recipient bank may not know in advance what the fee will be on the day that the funds arrive, if, for example, the fee is dependent upon a future account balance or the number of other transfers that are received before the transfer in question arrives.

Second, beneficiary account fees are exceedingly difficult to disclose because foreign banks consider the fees to be private arrangements between them and their customers, which the foreign banks

- cannot disclose due to their local laws or market practice,[8] or
- will not disclose due to overriding terms in their account agreements with their customers or for competitive reasons.

Although under the temporary exemption insured depository institutions can estimate fees charged by banks with which they do not have a correspondent relationship, some large banks have correspondent relationships with *thousands* of foreign banks. This puts transfers to those banks at risk if a provider can neither estimate the beneficiary account fees nor receive the fee information from their foreign correspondents. It should be further noted that even if a bank has a SWIFT relationship with a foreign bank and sends a transfer with an "OUR" charging instruction (i.e., charge the sending bank rather than reduce principal) in many countries banks do not treat their account fees as being subject to this instruction and, thus, will charge the recipient the fee despite the instruction. Our members tell us this is true in most of Latin America, India, the Philippines, and other countries to which the US has significant payment flow.

Given that beneficiary account fees

- are not required to be disclosed under section 1073,
- serve no comparison shopping purpose,
- are highly variable, and
- are considered by foreign banks to be legally or competitively non-disclosable

we believe these fees should not have to be disclosed. We suggest that the Bureau add a new comment or issue written guidance related to section 1005.31 (b)(1)(vi) ("other fees and taxes") that provides that charges imposed by the receiving institution in an account relationship with the designated recipient for the receipt of or access to funds sent via electronic transfers are not considered fees or charges imposed on the remittance transfer and do not need to be disclosed.

[8] Again, it is likely that under Regulation P a bank in the U.S. would also be unable to share a non-standard fee for a particular customer with an unaffiliated third party without its customer's consent.

IV. Phased Implementation

We continue to believe that consumers would be better served if the industry is given more time to comply with the rule. As previously explained in industry comment letters as well The Clearing House's April letter to you, the rule is fundamentally misaligned with open network payment systems. These systems, which enable account to account transfers, are a vital channel for consumer international payments of all sizes. While the industry is doing all it can to meet the requirements of the rule, as we have also previously explained, U.S. institutions cannot unilaterally alter the international transfer market. Thus, the February 2013 effective date will come at a price to consumers: their access to open network channels will be restricted and they will no longer be able to reach all the people and places they can reach today in an account to account manner.

As we first suggested to you in April, we suggest a phased implementation of the rule. Specifically, we suggest that beginning next February providers would disclose the information they know or control: the "transfer amount" (in the currency in which the transfer is funded), "transfer fees" and "transfer taxes" (fees imposed and taxes collected on the transfer by the provider), the "total" (the total amount of the transaction, which is the sum of the transfer amount and the transfer fees or taxes), and, if the provider performs the foreign exchange, the "exchange rate" (the exchange rate applied to the transfer). We also recommend that the error resolution procedures only apply to the extent that the associated disclosure requirements have been phased in. (For example, senders should not be able to assert errors relating to the "total to recipient" or the "date available" until those items are required to be disclosed.)

Furthermore, we request that financial institutions that use open networks be afforded additional time to build the compliance structure that will be required to disclose information that an institution does not currently control and/or have access to, including the exchange rate if a person other than the provider performs the exchange, "other fees" and "other taxes" (any fees and taxes imposed on the transfer by a person other than the provider), "total to recipient" (the amount that will be received by the designated recipient, which must reflect the imposition of other fees and taxes), and the "date available" (the date in the foreign country on which funds will be available to the designated recipient). Thus, we suggest that the Bureau make the requirements regarding the disclosure of such information effective February 7, 2014. Employing a phased-in approach that reflects a reasonable, measured progression to full implementation will be critical to preserving the intentions of Congress in enacting Section 1073 while minimizing negative impacts to remittance transfer customers, and the industry at large.

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In closing, please know that we share the Bureau's goal of ensuring that consumers have access to an international transfer market that is safe, transparent, and competitive. We continue to raise the issues discussed in this letter because, if left unresolved, they jeopardize consumer access to and choice within this important market. We welcome the opportunity to work with you to resolve these issues. Please do not hesitate to contact any of the undersigned if we can be of assistance to you in this matter.

Yours very truly,

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