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June 26, 2012

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Consumer Financial Protection Bureau
1700 G Street NW.,
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Re: Electronic Fund Transfers (Regulation E); Docket No. CFPB–2011–0009, RIN 3170–AA15

Dear David,

The Financial Information Forum (FIF)[1] would like to take this opportunity to request guidance regarding the impact of the final Electronic Fund Transfers (Regulation E) Rule (the "Rule") with respect to broker-dealers. The FIF Regulation E Working Group is comprised of broker-dealers which offer remittance transfer services and may be impacted by the Rule.

Our efforts to date have included approaching staff at the Consumer Financial Protection Bureau (CFPB) to determine the applicability of the Rule to broker-dealers in light of Section 1027(i) of the Dodd-Frank Act. This section generally provides an exclusion from CFPB authority for Persons regulated by the SEC. Based on discussions with CFPB staff, it is our understanding that the CFPB believes that Dodd-Frank Section 1027(i) does not prohibit the CFPB from rule-making that impacts broker-dealers and, specifically, that the Rule applies to broker-dealers that offer remittance transfer services as defined by the Rule.

There remains some confusion in our industry regarding whether CFPB rulemaking applies to broker-dealers in light of Section 1027(i). Another source of confusion is the fact that the Securities and Exchange Commission (SEC) is not listed as one of the prudential regulators that the CFPB consulted during the comment process for the Rule[2]. It is unclear whether the SEC had an opportunity to consult with the CFPB on the potential impact of the Rule on broker-dealers.

We believe that a definitive statement by the CFPB regarding the applicability of the Rule to broker-dealers would help address this confusion and increase awareness among the broker-dealer industry of their obligations under the Rule.

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[1] FIF (www.fif.com) was formed in 1996 to provide a centralized source of information on the implementation issues that impact the securities industry across the order lifecycle. Our participants include trading and back office service bureaus, broker-dealers, market data vendors and exchanges. Through topic-oriented working groups, FIF participants focus on critical issues and productive solutions to technology developments, regulatory initiatives, and other industry changes.

[2] *See* Fn 103 of Electronic Funds Transfers (Regulation E) 77 F.R. 6194 (February 7, 2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-02-07/pdf/2012-1728.pdf.

Remittance Transfer Services Offered by Broker-Dealers

It is important to recognize that while broker-dealers hold accounts for clients that can be used to hold, purchase and sell securities, commodities and other financial products, clients also use brokerage accounts to meet their cash management needs. It is common for brokerage accounts to have automated sweeps of un-invested cash to deposit accounts, to give the clients the ability to write checks, pay bills, send and receive electronic funds transfers and send and receive domestic and international wires.

It is not the case that all -- or nearly all -- remittance transfers effectuated by broker-dealers are for the primary purpose of a securities transaction. Broker-dealer clients send wires for many of the same reasons a client might send wires from a bank account. Common examples include: paying for real estate closings or other significant purchases of goods or services; paying tuition; sending money to themselves or relatives travelling abroad; non-resident aliens transferring assets to themselves at their bank accounts in the country where they reside; and converting dollars to another currency and holding in a non-US account (whether for hedging, speculative purposes or just to have funds in local currency to meet obligations that arise in that currency). Broker-dealers receive innumerable requests for remittance transfers of a free credit balance or foreign currency position out of a brokerage account to a foreign retail bank account.

It may not be feasible operationally for a broker-dealer to divide its daily batch of remittance transfer requests between those that are for the "primary purposes" of a securities transaction and those that are not. The value of this exemption may be limited, since for some firms it may not be cost effective to build or acquire the technology to automate this process.

Applicability of Exemptions to Broker-Dealers

The CFPB responded to concerns raised by a commenter regarding the exclusion of broker-dealers from the temporary exemption allowing "insured institutions" to estimate fees by stating that for the purposes of the Rule, "fund transfers in connection with securities transactions are not remittance transfers. Therefore, the Bureau believes further clarification in the Rule with respect to this comment is not necessary. [3]" As described in the prior section, the scope of broker-dealer services extends beyond fund transfers in connection with securities transactions.

Assuming the CFPB intended the Rule to apply to broker-dealers, it should nevertheless consider that it has placed the greatest disclosure burden on broker-dealers by excluding them from the category of institutions permitted to temporarily estimate fees and rates when the precise amount cannot be determined "for reasons beyond their control." (Section 1005.32).

The CFPB's reasons for granting the temporary exception to "insured institutions" apply equally to broker-dealers. (See CFPB's Comments to Section 1005.32(a)(1)). Specifically, broker-dealers and their clearing firms are only aware of the fees and rates charged by the initiating broker-dealer and any fees and rates charged by the correspondent institution to which the remittance transfer is directly routed. A broker-dealer has no visibility beyond this stage of the transmittal route, and there are at least one (and very often two) additional financial institutions involved in the route. Information relating to these institutions' fees and rates is not readily available because there is no set route that a remittance transfer will follow, and there are countless worldwide banking organizations with varying fees and rates that could potentially handle a remittance transfer. In addition, broker-dealers may be sending U.S.

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[3] See 77 FR 6244

dollar remittance transfers without knowledge as to whether instructions exist at the foreign financial institution to convert the funds into local currency upon receipt. Therefore, they will not know that it is necessary to disclose an exchange rate.

The CFPB should consider that broker-dealers are even less equipped than “insured institutions” to determine and disclose all applicable fees and rates that may be assessed in route to the final destination of a remittance transfer. Indeed, it is the very financial institutions that fit within the safe-harbor that may possess this information, but may not disclose it to broker-dealers for proprietary reasons, or because there is no contractual relationship between the broker-dealer and the financial institution.

Even when there is a contractual relationship between the broker-dealer and bank, banks may not provide the exact disclosures that broker-dealers need under the rule. Banks often act as a service provider to broker-dealers to help broker-dealers process international wire transfers for their brokerage clients. In these cases, broker-dealers offer international wire transfers services to their brokerage clients and those international wire transfers are ultimately processed by the bank, i.e. the bank sends the wire to the designated non-US account. Broker-dealers cannot rely on these service provider banks to provide remittance transfer disclosures, because, as permitted by the rule, banks will only provide estimated disclosure, and estimated disclosure is not available to broker-dealers under the final rule. Additionally, foreign financial institutions that are involved in the remittance transfer sequence will have little incentive to cooperate in providing disclosure-related information as they are not subject to the Rule.

For the foregoing reasons, we respectfully request that broker-dealers be deemed “insured institutions” for purposes of the Section 1005.32 safe-harbor, or that similar relief be granted to permit broker-dealers to make estimates until the sunset date consistent with the requirements of that Section. If broker-dealers are placed on the same schedule as “insured institutions,” this would allow a much broader range of remittance transfer providers to move in lock-step with their compliance schedules. It would also promote greater cooperation between the correspondent banks facilitating the wires and the broker-dealers they serve. Otherwise, financial institutions will have little incentive to disclose the precise fees and rates to broker-dealers because they will not be subject to the same disclosure requirements for at least another two years.

Additional Operational Challenges Faced by Broker-Dealers

We are concerned that the new error framework introduces new risks and liabilities for broker-dealers, especially clearing firms who process remittance transfers on behalf of their introducing broker-dealer clients. Managing these risks introduces unprecedented operational challenges for firms.

The burden of the Reg. E amendments on broker-dealers operating as clearing firms is even more acute. Clearing firms are not similarly situated to Western Union or similar money transmitters, or even brick and mortar financial institutions that directly service remittance transfer customers. Those institutions can much more easily comply with the disclosure requirements of the Reg. E amendment because they directly interface with their customers. A clearing firm, on the other hand, does not directly interface with the end client requesting the remittance transfer; this role belongs to a clearing firm’s introducing broker-dealers. Accordingly, while a clearing firm ultimately effectuates the remittance transfer on behalf of an end client, the request is first submitted to the introducing broker-dealer which then passes it on to a clearing firm. This added layer creates significant operational challenges for a clearing firm to

communicate the required disclosures at the required time and to ensure that cancellation requests within the set time period are honored

The attached appendix highlights a number of additional areas where specific guidance is required in order to ensure an efficient implementation of the Rule.

Conclusion

We respectfully request a meeting with representatives of the CFPB to discuss the implementation issues we have raised. Without sufficient guidance, we are concerned about our ability to successfully implement changes in compliance with the Rule. Based on the outcome of our meeting, we would seek written guidance on the items discussed.

Sincerely,

Manisha Kimmel
Executive Director
Financial Information Forum

cc: Eric Goldberg, Counsel, Office of Regulations, Consumer Financial Protection Bureau
Rebecca Smullins, Program Manager, Money Services, Consumer Financial Protection Bureau
Mark Attar, Branch Chief, Division of Trading and Markets, Securities and Exchange Commission
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Lindsay Kidwell, Attorney-Advisor, Division of Trading and Markets, Securities and Exchange Commission

Appendix - FIF Request for Clarification

<u>"Sender"/"Consumer" Natural Person Definition</u>

With the promulgation of the final Remittance Transfer Rule (the "Rule"), the current Regulation E is now referred to as "subpart A of Regulation E" and the Rule is referred to as "subpart B of Regulation E." Under the Rule, "Sender" means a consumer in a State who primarily for personal, family or household purposes requests a Remittance Transfer Provider to send a Remittance Transfer to a Designated Recipient. In the official staff commentary to §1005.30(g) of the Rule (Remittance Transfer definitions), the CFPB notes that "except as modified or limited by subpart B of Regulation E (which modifications or limitations apply only to subpart B), the definitions in §1005.2 (subpart A of Regulation E) apply to all of Regulation E, including subpart B." The term "consumer" is not defined in subpart B of the Final Rule. In §1005.2 (subpart A), "consumer" is defined as "a natural person."

We request that the CFPB affirm in guidance that the term "Sender" under the Rule is defined as a natural person in a State, who primarily for personal, family or household purposes, requests a Remittance Transfer Provider to send a Remittance Transfer to a Designated Recipient. We further request that the CFPB affirm in guidance that the term "Sender" under the Rule does not include accounts owned by non-natural persons, such as Trust, Business or Estate accounts.

<u>Individual Retirement Accounts (IRAs), Profit Sharing and Pension Accounts</u>

IRAs are less likely to transfer funds internationally but there are some occasions where international transfers are made. Under subpart A of Regulation E, an account held under a custodial agreement that qualifies as a trust under the Internal Revenue Code, such as an IRA, is considered to be held under a trust agreement for purposes of Regulation E. We believe that for purposes of the Rule, an account held under a custodial agreement that qualifies as a trust under the Internal Revenue Code, such as an individual retirement account, should similarly be considered to be held under a trust agreement for purposes of Regulation E and excluded from the Rule.

Similarly, profit-sharing and pension accounts established under a trust agreement are exempt from subpart A of Regulation E. We believe that this same exemption should extend to the Rule.

We request that the CFPB affirm in guidance that IRA, profit sharing and pension accounts are excluded from the Rule.

<u>Employee Benefit & Compensation Plans</u>

Section 1027(g)(3)(A) of the Dodd Frank Act ("DFA"), states that the Bureau may not exercise any rulemaking or enforcement authority with respect to products or services that relate to any employee benefit and compensation plan ("Plan") and certain other arrangements under the Internal Revenue Code of 1986.

Employee benefit and compensation plans are generally established as Trusts and Plan participants are the beneficiaries of the Trust. The terms of the Plan prescribe when distributions from the Plan can be made to participants and/or their beneficiaries. In some cases, these participants and beneficiaries live overseas and distributions are often made via electronic funds transfer. Plan providers are guided by the terms of the Plan, as well as direction from the Plan Sponsor, in administering Plan distributions.

Based on the non-consumer, employment nature of the Plan/Plan participant relationship, the plan provider's direct relationship with the Plan Sponsor in initiating distributions, and the guidance provided by the Plan in making distributions, we believe that a reasoned argument exists that the Plan should be considered the Sender of distributions made from the Plan. Treating the Plan as the Sender of the distribution is similar to the analysis that the FTC and SEC used in their implementing regulations to the Gramm-Leach-Bliley Act ("GLB Act"). While noting that the definition of "consumer" in the GLB Act does not squarely resolve whether the beneficiary of a trust is a consumer, the FTC excluded a Plan participant of an employee benefit Plan from the definition of "consumer" and "customer" under their implementing regulations. The FTC reasoned that in the case of an employee benefit Plan, the retirement trust itself is the ''customer'' and therefore, the GLB Act does not apply because the trust is not an individual. The SEC took a similar approach in implementing regulations of the GLB Act. Excluding a Trust from the obligations of the Rule is similar to how these entities are treated under subpart A of Reg. E. In subpart A of Reg. E, the definition of "Account" does not include an account held by a financial institution under a bona fide trust agreement, including profit-sharing and pension accounts established under a trust agreement.

We request that the CFPB affirm in guidance that distributions from employee benefit and compensation Plans and certain other arrangements under the Internal Revenue Code of 1986 are either exempt from the Rule based on Section 1027(g)(3)(A) of Dodd-Frank or in the alternative, that the Sender of such distributions should be considered the Plan or Trust, which is not a natural person; and because the Sender is not a natural person, the distributions are not subject to the Rule.

<u>"Deposited into an Account of the Designated Recipient"</u>

Section 1005.34(a)(2) of Reg. E provides that a provider of remittance transfers must comply with cancellation requests so long as the "transferred funds have not been picked up by the designated recipient or deposited into an account of the designated recipient."

We request clarification as to when funds are deemed "deposited into an account of the designated recipient.

<u>Location of Sender</u>

Brokers very often have non-resident alien clients who hold accounts for the purpose of purchasing securities on the US markets. As written, the Rule states that a sender who has an account with a financial institution is located in a State if the account is located in a State. When applied to non-resident alien accounts, this may lead to unintended consequences. For example, a broker-dealer could have a non-resident alien client with a U.S. brokerage account who lives in Mexico and chooses to convert US dollars to pesos and transfer them to a local bank account in Mexico for his personal needs using an account that is in his own name. The Rule will give the protection of US law to someone who is not living in the US, who might be extremely wealthy (as nonresident alien clients who have accounts in the U.S. often are), and who is just moving money to another account in his own name.

While we are appreciative of the CFPB's effort to simplify firms' ability to comply with the Rule by creating a bright line test, we request that the CFPB give firms the flexibility to determine a Sender's location for purposes of the Rule based on the facts and circumstances of the situation.

<u>Electronic Receipt of Remittance Transfer</u>

In the Release accompanying the Rule, the CFPB stated at comment 31(a)(2)-1 that "if a sender electronically requests the provider to send a remittance transfer, the receipt may be provided to the

sender in electronic form, subject to compliance with the consumer consent and other applicable provisions of the E-Sign Act."

We believe this is inconsistent with the E-SIGN Act, which permits disclosures that are required to be given in writing to be delivered electronically so long as the requirements of the E-SIGN Act are met, and it should make no difference whether the request for the remittance transfer was made electronically or not.

The requirement that the request for the remittance transfer be made electronically in order to deliver the pre-payment disclosure electronically is justifiable. Because compliance with E-SIGN is not required in that case, it is the fact that the Sender made the request electronically that gives the Remittance Transfer Provider reason to expect that the Sender will actually receive the disclosures if sent electronically. Where a Sender has given an informed consent, however, there is no reason to make the ability to use electronic delivery of the receipt contingent on the request being made electronically. Not allowing broker-dealers to do so would be inconsistent with the E-SIGN Act as well as with guidance from our primary regulator, the SEC, as established in their 1995, 1996, and 2000 Use of Electronic Media releases.[4]

The CFPB should also consider the impact of this provision on broker-dealers' clients. A client would not understand why every other document is delivered to them electronically, except for remittance transfer receipts for transactions done in person or over the phone. Many clients, especially those located abroad, insist on electronic delivery of all communications out of concern for their personal safety. Requiring hard-copy delivery of remittance transfer receipts, which may show bank account information and reflect transfers of large amounts money, are exactly the sort of documents non-resident alien clients would be most concerned about receiving in paper form. As written, the comment would cause a great disruption to these relationships with no corresponding benefit.

We request that the CFPB amend comment 31(a)(2)-1 *to state that Remittance Transfer Providers may deliver receipts electronically subject to compliance with the E-SIGN Act, or other applicable guidance established by their primary regulators, regardless of the method by which the Sender requests the transfer.*

List of Exempted Countries

New Section 1005.32(b)(2) provides a safe harbor and states that a remittance transfer provider may rely on the list of countries published by the Bureau to determine whether estimates may be provided under the permanent exemption, unless the provider has information that a country's laws or the method by which transactions are conducted in that country permits a determination of the exact disclosure amount.

We request that the CFPB publish their list of exempt countries as soon as possible, in order to allow firms to properly modify their systems.

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[4] Securities Act Release No. 7233 (Oct. 6, 1995) [60 FR 53458] (the 1995 Release); Securities Act Release No. 7288 (May 9, 1996) [61 FR 24644] (the 1996 Release); Use of Electronic Media, Release No. 33–7856 (Apr. 28, 2000) [65 FR 25843] (the 2000 Release).