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# DODD-FRANK ACT AND REMITTANCES TO POST-CONFLICT COUNTRIES: THE LAW OF UNINTENDED CONSEQUENCES STRIKES AGAIN

*Raymond Natter\**

## I. INTRODUCTION

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) was enacted 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,<sup>1</sup> and, in response, the Dodd-Frank Act (“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 over 800 pages of text. Many of

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<sup>1</sup> 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://online.wsj.com/public/resources/documents/crisisqa0210.pdf>.

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.<sup>2</sup>

Among them is the power to implement and enforce most sections of the Electronic Funds Transfer Act (“EFTA”).<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

This note 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 note concludes that the proposed regulatory treatment may have the unintended consequence of impeding the use of regulated remittance transfer providers for sending funds to these countries.

## II. THE IMPORTANCE OF REMITTANCES FOR POST-CONFLICT COUNTRIES

### A. *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.<sup>6</sup> 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.<sup>7</sup> The main goals of post-conflict transition and

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<sup>2</sup> 12 U.S.C. §§ 5581-5583.

<sup>3</sup> Dodd-Frank Act § 1084.

<sup>4</sup> 15 U.S.C. § 1693o-1.

<sup>5</sup> *Id.*

<sup>6</sup> PETER WALLENSTEEN, UNDERSTANDING CONFLICT RESOLUTION: WAR, PEACE AND THE GLOBAL SYSTEM (SAGE Publications, 2nd ed. 2007).

<sup>7</sup> Paul Collier, *Doing Well out of War* 14-16 (The World Bank 1999), *available at*: <http://siteresources.worldbank.org/intknowledgeforchange/Resources/491519->

recovery are achieving peace, sustaining economic growth, and reducing poverty.<sup>8</sup> The establishment of sustainable institutions is often the most important step in achieving security and growth in post-conflict situations.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> The instability common in post-conflict countries constrains investment.<sup>12</sup> The collapse in law and order is disruptive to political and economic governance, thereby increasing uncertainty and making contract enforcement difficult.<sup>13</sup> 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 leadership. Formal payments systems and financial intermediation may function poorly or not at all.<sup>14</sup>

### *B. 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,

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1199818447826/28137.pdf.

<sup>8</sup> U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID), UNDERSTANDING THE POST-CONFLICT COUNTRY ANALYTICAL TEMPLATE 3 (2009).

<sup>9</sup> Lakhdar Brahimi, *State Building in Crisis and Post-Conflict Countries* 3-4, Seventh Global Forum on Reinventing Government (June 2007).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

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

<sup>13</sup> *Id.*

<sup>14</sup> Rob Mills & Qimiao Fan, *Investment Climate in Post Conflict Situations* 11-12 (World Bank Pol'y Research, Working Paper No. 4055, 2006).

post-conflict nations rely heavily on these remittances.<sup>15</sup> The funds are widely distributed and flow to many areas that are neglected by other forms of aid.<sup>16</sup> 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.<sup>17</sup> Remittances help the national balance of payments, boost economic development, and improve the general standard of living.<sup>18</sup>

There is no question that remittances have become a critical source of foreign currency for many post-conflict nations. Countries in conflict generate a significant diaspora, a portion of which prefers its new life to repatriation after the conflict but seeks to support relatives who remained behind.<sup>19</sup> As a result, in post-conflict areas, remittances have become a critical source of capital for development and stability.<sup>20</sup> In many post-conflict nations remittances exceed the total amount of official development assistance, and in about one-third of all developing countries, remittances exceed all capital flows.<sup>21</sup> 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.”<sup>22</sup>

In addition, remittances tend to be markedly more stable

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<sup>15</sup> ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, CONFLICT AND FRAGILITY, FRAGILE STATES RESOURCE FLOWS AND TRENDS 42 (2013).

<sup>16</sup> Russell King and Julie Vullnetari, *Remittances, Return, Diaspora: Framing the Debate in the Context of Albania and Kosovo*, 9 SE. EUR. AND BLACK SEA STUD. 385, 390 (2009).

<sup>17</sup> *Id.* at 391.

<sup>18</sup> K. M. Abdul Azeez and M. Begum, *International Remittances: A Source of Development Finance*, 4 INT’L NGO J. 299, 301-04 (2009).

<sup>19</sup> See U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, *supra* note 8, at 34.

<sup>20</sup> 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 268 (2nd Ed. 2011).

<sup>21</sup> *Id.* at 17.

<sup>22</sup> THE WORLD BANK, REMITTANCES: DEVELOPMENT IMPACT AND FUTURE PROSPECTS 13 (Samuel Munzele Maimbo & Dilip Ratha eds., 2005).

than other private capital flows, such as portfolio investments and bank credits.<sup>23</sup> 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.<sup>24</sup>

### *C. Impact of Regulation*

Studies indicate that a significant portion of remittance transfers flow through unregulated channels and the use of such informal channels hamper efforts to prevent funds from flowing to entities that engage in criminal or terrorist activities.<sup>25</sup> The

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<sup>23</sup> 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 129 (2011), available at [http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Towards%20Human%20Resilience/Towards\\_Sustaining\\_MDGProgress\\_Ch4.pdf](http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Towards%20Human%20Resilience/Towards_Sustaining_MDGProgress_Ch4.pdf).

<sup>24</sup> 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 (2005) [hereinafter Fagen & Bump].

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

preference among remitters for informal transfer mechanisms partly reflects low financial literacy, as well as widespread distrust of government and financial institutions.<sup>26</sup> 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.<sup>27</sup>

Studies have indicated that the remittances most adversely affected by regulatory control are those transferring funds to countries with weak governments, whose institutions are not reliable, and whose criminal activity is high<sup>28</sup> 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.<sup>29</sup> 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

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<sup>26</sup> Stuart Brown, *Can Remittances Spur Development? A Critical Survey*, 8 INT’L STUD. REV. 55, 56 (2006).

<sup>27</sup> *Id.*; CATALINA AMUEDO-DURANTES ET AL., FEDERAL RESERVE BANK OF ATLANTA, ON THE REMITTING PATTERNS OF IMMIGRANTS: EVIDENCE FROM MEXICAN SURVEY DATA, ECONOMIC REVIEW (First Quarter 2005).

<sup>28</sup> See Fagen & Bump, *supra* note 24, 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, *supra* note 22, at 71.

<sup>29</sup> See Fagen & Bump, *supra* note 24, at 10.

elements has resulted instead in a system where the small operations most likely to serve particularly difficult areas are at a decided disadvantage.<sup>30</sup>

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

### III. THE DODD-FRANK ACT

#### *A. 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.<sup>31</sup>

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.<sup>32</sup> 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.<sup>33</sup> Appleseed recommended that the Federal Reserve Board should be granted

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<sup>30</sup> See Fagen & Bump, *supra* note 24, at 11.

<sup>31</sup> 15 U.S.C. § 1693o-1(2012).

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

<sup>33</sup> *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).



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.<sup>34</sup> 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 pick up; and a sample of the remittance cost.<sup>35</sup> Appleseed also recommended that disclosure should occur visually before the transaction; that there should be a mechanism for error resolution; and that disclosures should be both in English and in the foreign language used in the three markets that the provider sends most of the remittances.<sup>36</sup>

### *B. 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.<sup>37</sup> 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

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<sup>34</sup> *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).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> 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 [www.iadb.org/news/docs/internationalflows.pdf](http://www.iadb.org/news/docs/internationalflows.pdf) (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 C.F.R. pt 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 between 2003 and 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).

countries.”<sup>38</sup> 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.”<sup>39</sup>

Pursuant to section 1073 of the Dodd-Frank Act, before making a remittance transfer to a foreign country, a remittance transfer provider<sup>40</sup> 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.<sup>41</sup>

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.<sup>42</sup>

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.<sup>43</sup> 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 five-year period, ending on July 21, 2015, unless further extended by regulations.<sup>44</sup> With respect to errors, the statute provides that if a remittance transfer provider receives oral or written notice from the sender within 180 days of the promised date of delivery that an error occurred, the provider

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<sup>38</sup> S. REP. NO. 111-176, at 176(2010).

<sup>39</sup> *Id.*

<sup>40</sup> 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.

<sup>41</sup> 15 U.S.C. § 1693o-1(a)(2).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* § 1693o-1(b).

<sup>44</sup> *Id.* § 1693o-1(a)(4).

must investigate and resolve the dispute within 90 days.<sup>45</sup> In addition, the statute further provides that a remittance transfer provider shall be liable for the acts of agents and authorized delegates.<sup>46</sup>

#### IV. REGULATORY IMPLEMENTATION

##### *A. Final Rule and Delay*

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.<sup>47</sup> On July 21, 2011, regulatory authority was transferred to the CFPB.<sup>48</sup> This agency issued a final regulation and a series of interpretations implementing section 1073 of Dodd-Frank Act on February 7, 2012 (“February Final Rule”).<sup>49</sup> Prior to the rule going into effect, the Bureau issued a new proposed regulation December 31, 2012 that would make several significant changes in its original rule,<sup>50</sup> and at the same time announced that it was going to delay the effective date of the February Final Rule until after it considered the proposed amendments.<sup>51</sup>

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<sup>45</sup> *Id.* § 1693o-1(d).

<sup>46</sup> *Id.* § 1693o-1(f).

<sup>47</sup> Electronic Fund Transfers, 76 Fed. Reg. 29902 (proposed May 23, 2011) (to be codified at 12 C.F.R. pt 205).

<sup>48</sup> Dodd-Frank Act, 12 U.S.C. § 5582 (authorizing 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).

<sup>49</sup> 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 C.F.R. pt 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).

<sup>50</sup> Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 77188 (proposed Dec. 31, 2012) (to be codified at 12 C.F.R. pt 1005).

<sup>51</sup> Electronic Fund Transfers (Regulation E) Temporary Delay of Effective Date, 78 Fed. Reg. 6025 (Jan. 29, 2012) (to be codified at 12 C.F.R. pt 1005).

The regulatory implementation to date 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.<sup>52</sup> 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.<sup>53</sup> 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 disclosed prior to initiating a remittance transaction.<sup>54</sup> Recently, the Federal Home Loan Bank of New York announced that in

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<sup>52</sup> See, e.g., Joint Trade Association Comment Letter on the Proposed Amendments to Regulation E to Implement Section 1073 of the Dodd-Frank Act, Fed. Reserve Bd., Docket 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. See generally *Electronic Fund Transfers (Regulation E)*, 77 Fed. Reg. 6194, 6201-02, 6208, 6218, 6220, 6224, 6279-82. (Feb. 7, 2012) (to be codified at 12 C.F.R. pt 1005).

<sup>53</sup> 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 \$100) 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 (2012).

<sup>54</sup> 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.

response to the new regulatory environment, it would no longer be providing remittance transfer services for its member institutions.<sup>55</sup>

With respect to remittance transfers to post-conflict nations, disclosures relating to third party fees, exchange rates, and foreign taxes 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.

### *B. Disclosure of Third Party Fees*

#### 1. Disclosure Required Under the Final Rule

Pursuant to the final 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 or taxes.<sup>56</sup> The February Final Rule provides that *insured depository institutions* may make good faith estimates of these fees if they lack actual knowledge,<sup>57</sup> but the agency chose not to exercise its discretion to afford similar treatment to other remittance providers.<sup>58</sup> Thus, under the final regulation, 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.

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<sup>55</sup> Press Release, Federal Home Loan Bank of New York, *FHLBNY to Stop Processing International Wire Transfers at Year-End* (Nov. 30, 2012) available at [www.fhlbny.com/news-events/press-releases/prior-releases/2012/press112012.aspx](http://www.fhlbny.com/news-events/press-releases/prior-releases/2012/press112012.aspx).

<sup>56</sup> 12 C.F.R. § 1005.31 (2011).

<sup>57</sup> See 15 U.S.C. § 1693o-1(a)(4) (2010) (specifically authorizes the CFPB to allow insured depository institutions to use estimates for certain disclosures).

<sup>58</sup> The regulation tracks the statute in this case, since 15 U.S.C. § 1693o-1(a)(4) allows the CFPB to authorize estimates for insured depository institutions until July 21, 2015, unless further extended by the agency.

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 “closed network,” in which all of the intermediaries are agents of the remittance provider, or through an “open network,” such as through wire transfers.<sup>59</sup> An open network is composed of intermediary financial institutions.<sup>60</sup> The funds are transmitted from one financial institution to another as it winds its way to the recipient. Its transaction may be routed differently, depending upon a number of factors. 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.<sup>61</sup> When funds are transmitted to a post-conflict region, the remittance provider is much less likely to have control over the intermediaries, and very unlikely to have an office or other presence in the region. As a result, the open network framework will be predominate, and the remittance provider will not be able to determine in advance the exact route that the funds will transverse nor the fees that will be imposed by third party intermediaries.

The problem is also made worse in post-conflict nations where the transparency and sufficiency of the financial regulatory

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<sup>59</sup> 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, 6194-98 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt 1005) (in depth discussion of open networks and wire transfers).

<sup>60</sup> *Id.* at 6197.

<sup>61</sup> 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.*

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 parts of the post-conflict world, and the regulatory language does not take that into account.<sup>62</sup>

## 2. Proposed Regulatory Fix

The preamble to the December 31, 2012 proposed amendment acknowledged the practical difficulties of requiring disclosures of third-party fees, especially when open networks are utilized, as would be the case in many post-conflict areas.<sup>63</sup> Nevertheless, the proposal does *not* address the problem of fee disclosures for open network transmittals, but instead provides a narrow and cumbersome exception for the requirement to disclose the exact amount of fees charged by third-parties. Surprisingly, this proposal does not deal with the fees that are charged by intermediary institutions in an open network transmittal.

As an alternative to disclosing the exact amount of the fee that a third-party receiving institution may charge, the December

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<sup>62</sup> See, e.g., Bedman Narteh, *Challenges of Marketing E-Banking Services in a Developing Country: The Case of Ghana*, 17 J. of Internet Banking and Comm., August 2012, at 10; Laura Brix & Katharine McKee, *Consumer Protection Regulation in Low-Access Environments: Opportunities to Promote Responsible Finance*, CGAP Focus Note No. 60, February 2010.

<sup>63</sup> Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 77188, 77190 (proposed Dec. 31, 2012) (to be codified at 12 C.F.R. pt 1005) (“originating providers . . . using open networks or other systems that deposit transfers into accounts generally cannot, under current practice, determine fees for receiving transfers imposed by institutions that provide accounts and assess fees pursuant to an agreement between the recipient institution and the recipient. The magnitude of the concern may be greater for providers that allow senders to send remittances to a broad range of geographic areas, which traditionally have included open network providers.”).

proposal would allow a non-bank<sup>64</sup> remittance transfer provider to disclose the *highest possible* fee that the receiving entity may charge, but only if the remittance service provider “does not have specific knowledge regarding variables that affect the amount of fees imposed by a designated recipient’s institution for receiving a transfer in an account.”<sup>65</sup> This proposed regulatory language is convoluted. For example, section (4) of the December proposal, titled “Permanent exception where variables affect recipient institution fees,” states:

(i) . . . if a remittance transfer provider does not have specific knowledge regarding variables that affect the amount of fees imposed by a designated recipient’s institution for receiving a transfer in an account, the provider may disclose the highest possible recipient institution fees that could be imposed on the remittance transfer with respect to any unknown variable, as determined based on either fee schedules made available by the recipient institution or information ascertained from prior transfers to the same recipient institution.

(ii) If the provider cannot obtain such fee schedules or does not have such information, a provider may rely on other reasonable sources of information, if the provider discloses the highest fees identified through the relied-upon source.<sup>66</sup>

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<sup>64</sup> Insured depository institutions would continue (at least until July 21, 2015) to be authorized to provide good faith estimates of fees. 12 CFR § 1005.32(a).

<sup>65</sup> Electronic Fund Transfers (Regulation E) 77 Fed. Reg. at 77211 (the phrase “specific knowledge regarding variables that affect the amount of fees imposed by a designated recipient’s institution for receiving a transfer in an account” raises significant issues. It is possible that under this language the information that a particular agent or authorized representative has concerning a local fee will be imputed to the parent company. Thus, if an agent or authorized representative in Mali knows of a specific fee charged by a village bank, and fails to convey that information to the remittance provider in the U.S., the U.S. remittance provider may nevertheless be deemed to have “specific knowledge” of the fee. This would make use of the alternative disclosure of the “highest possible fee” impossible).

<sup>66</sup> *Id.*



The proposed regulation falls short for a number of reasons. First, for non-bank remittance providers, the proposal does not provide any relief for remittances carried over open networks, such as wire transfers or the Automated Clearinghouse System (“ACH”).<sup>67</sup> 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 rely more heavily 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.

Another significant drawback to the proposed remedy is that it only applies to receiving entities that are “institutions,” and the transfer must be made into an “account.”<sup>68</sup> Thus, the proposed rule does not apply to transfers in which the receiving

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<sup>67</sup> 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 Banks’ FedACH or The Clearing House’s Electronic Payments Network—for processing. *BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO CONGRESS ON THE USE OF AUTOMATED CLEARING SYSTEMS FOR REMITTANCE TRANSFERS TO FOREIGN COUNTRIES* (July 4 2011).

<sup>68</sup> *Electronic Fund Transfers (Regulation E)*, 77 Fed. Reg. at 77196. *See also Electronic Fund Transfers (Regulation E)*, 77 Fed. Reg. at 77188 (explaining that: “the proposal would provide additional flexibility regarding the disclosure of foreign taxes, as well as fees imposed by a designated recipient’s institution for receiving a remittance transfer in an account”).

entity is not an institution that is holding consumer accounts. For example, the proposed rule would not apply when the receiving entity is a grocery store, church or mosque, post office, or a facility of a non-governmental organization providing technical or financial assistance to the local community.<sup>69</sup> Once again, post-conflict areas that are not likely to have a widely dispersed system of local functioning or trusted financial institutions will be placed at a disadvantage.

Even if the receiving entity is an institution that is holding the customer's account, the amount of fees charged for the transfer may depend upon a multitude of factors. For example, the ability of a remittance company located in Chicago to know on any particular day the fees that a village bank in a post-conflict country, like South Sudan, is charging its customers to receive a remittance is essentially nil. The fees can change on a day-to-day or customer-to-customer basis, fee schedules can be modified with little notice, and communication about such changes outside of the village may never occur.

The proposed rule allows a remittance provider to rely on other reasonable sources of information to estimate the receiving institution's highest possible fee, including representations made by the sender. This provides some benefit for remittances sent to an *institution* holding a consumer's *account*, but provides no flexibility for remittances sent to other entities. However, it still may be difficult to comply with the notice requirement. It is not easy or inexpensive for a remittance company to obtain and keep current the various fee schedules that thousands of institutions throughout the world use when setting fees, but it becomes a near impossible task to obtain this information and to keep it current for all possible receiving institutions located in post-conflict areas.

In an additional attempt to ease the regulatory burden of complying with the disclosure rules, the proposed regulation allows the remittance provider to rely on representations made by the sender as to the fees that will be charged by the receiving

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<sup>69</sup> Under the FedGlobal's Latin American ACH service the receiver does not need a deposit account at a depository institution. The international ACH transfer must be originated from a deposit account in the United States, but the funds may be sent to a specifically approved depository institution or a trusted third-party provider in the foreign country where the receiver may pick up the funds in cash without a deposit account at the receiving institution. See BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 67, at 10.

institution.<sup>70</sup> But, in many cases, the sender, living in the United States, will not know the potential fees and the variables that may affect the cost to the ultimate recipient.<sup>71</sup> The proposed regulation simply does not take into account the characteristics of post-conflict areas that do not have robust regulatory oversight over financial companies, and that may not even have advance notice requirements for changes in service fees and charges.

### *C. Foreign Taxes*

#### 1. Disclosure Required Under the Final Rule

Under the February Final Rule, remittance providers must disclose *all* taxes imposed on a remittance transfer, including taxes assessed by a local, state, provincial or regional foreign government.<sup>72</sup> Insured depository institution may provide good faith estimates of the amount of such taxes (at least until July 21, 2015), but all other remittance transfer providers must provide exact amounts. In many areas of the world compliance with this requirement would be difficult. In post-conflict countries, there is a much higher likelihood that local taxes will be unknown and subject to frequent change. The taxes imposed by local governmental units, including towns and small villages, will vary depending on changing circumstances, local economic conditions and political disruption. There is no central body that tracks these fees and taxes, and even if such a registry existed, it is unlikely that it would include local villages or small towns in post-conflict regions. Thus, this will be a problem for transfers to many areas and is a particularly significant problem for post-conflict areas.

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<sup>70</sup> Electronic Fund Transfers (Regulation E), 77 Fed. Reg. at 77213 (Proposed Official Interpretation of 31(b)(1)(vi) and 31(d)).

<sup>71</sup> For example, the receiving institution may vary fees based on the total balance held by its customers, or on the existence of loans, or on the number of transactions. It is unlikely that the remittance customer who has been residing in the U.S. for a number of years would have the requisite knowledge to state the maximum fees that could be charged to any particular recipient.

<sup>72</sup> 12 C.F.R. § 1005.31.

## 2. Proposed Changes

The CFPB recognized the impracticality of requiring disclosure of local taxes, and in December 2012, it proposed to eliminate the requirement for remittance providers to disclose taxes that are not imposed by a foreign country's "central government."<sup>73</sup> The December proposal then went on to state that if a non-bank<sup>74</sup> remittance provider does not have "specific knowledge" of the "variables" that affect the amount of the foreign country's central government tax on the remittance, it may disclose instead the "highest possible tax that could be imposed on the remittance transfer with respect to any unknown variable."<sup>75</sup> Remittance providers would be able to rely on representations made by the sender regarding foreign taxes.

There are a number of problems with this proposed regulation. The term "central government" is not defined, and in many areas of the world, it may not be clear which, if any, body constitutes the "central government." In the United Kingdom, for example, Northern Ireland, Scotland, and Wales have various degrees of autonomy. Countries torn by civil war, such as Mali and Syria, may have more than one entity that claims to be the "central government." Kurdistan is an autonomous region in Iraq, and it is not clear if that region is under the authority of Baghdad. Another problem with the use of the term "central government" is whether it includes taxes or fees imposed by independent governmental entities. For example, taxes can be imposed by the treasury or finance ministry, but could also be imposed by another unit of the government, such as a central bank, reconstruction and development authority, or regulatory body. The regulation should clarify which of these possible taxes are to be considered taxes imposed by the central government.

Another troubling problem with the proposal is that it requires remittance providers to disclose an unknown variable.

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<sup>73</sup> Electronic Fund Transfers (Regulation E), *supra* note 63, at 77211 (proposing an amendment to 12 CFR § 1005.31(b)(vi)).

<sup>74</sup> Insured depository institutions have more flexibility to estimate taxes, at least until July 21, 2015. 12 C.F.R. § 1005.32(a).

<sup>75</sup> Electronic Fund Transfers (Regulation E), *supra* note 63, at 77211 (proposing an amendment to 12 CFR § 1005.32(b)(3)). The use of the phrase "specific knowledge" in connection with the tax disclosure also raises the same interpretative problem when that term is used in the fee disclosure section. *Id.*

The proposal states that if the remittance transfer provider does not have specific knowledge “regarding variables that affect the amount of taxes” imposed by a foreign central government, the provider may disclose instead the “highest possible tax that could be imposed on the remittance transfer with respect to any *unknown* variable.”<sup>76</sup> If a variable is unknown, it would seem logical to dictate that it would be impossible to determine the highest possible tax. As the CFPB acknowledges, the amount of taxes may depend upon any number of factors that each particular foreign central government may choose to use.<sup>77</sup> For example, if the central bank decides to impose an additional tax on a remittance transfer to a resident non-citizen, but this fact is unknown to the remittance transfer company, it would be impossible to comply with the regulatory requirement to disclose the highest possible tax with respect to the citizenship variable.

Perhaps due to the practical difficulty of determining the highest possible tax that may be imposed, the proposal also allows, in certain cases, for a remittance transfer company to rely on the representations of its customer regarding the amount of tax that will be imposed by the foreign central government.<sup>78</sup> It is possible that some senders may be very willing to provide the remittance provider with statements regarding the foreign central government’s taxes and the applicability of those taxes to the particular person receiving the funds transfer. However, when funds are sent to post-conflict areas, it becomes much more likely that the sender will not be willing to provide such information, assuming that the sender even knows the type and amount of taxes that will be levied. As discussed above, in post-conflict nations there is often a distrust of the government authorities and agencies, a significant amount of corruption, and a lack of strong supervisory oversight and controls. In this environment, tax levies may change overnight, and the enforcement of the tax laws may be arbitrary. There may be widespread concern that discussing tax issues with a remittance provider could lead to difficulties with the tax authorities in the foreign country.

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<sup>76</sup> Electronic Fund Transfers (Regulation E), *supra* note 63, at 77211.

<sup>77</sup> *Id.* at 77213 (“The amount of taxes . . . may depend on the tax status of the sender or recipient, the type of accounts or financial institutions involved in the transfer, or other variables.”).

<sup>78</sup> *Id.* (proposed comment 31(b)(1)(vi)(2)).

Moreover, it could result in consumer confusion that the remittance transfer provider may somehow be connected to the taxing authority of the foreign country. In short, requiring the sender to make assertions about the foreign country's taxes easily could inhibit the use of regulated remittance providers and encourage the use of unregulated informal methods of transferring funds across national borders. Clearly, this is not in the public interest.

#### *D. Exchange Rates*

The final 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.<sup>79</sup>

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.<sup>80</sup>

Other issues are created when the transfers are conducted through open networks. As noted previously, remittance transfers to post-conflict nations are more likely to rely on open network systems than transfers to other areas. Determining the exchange rate in advance in open network transactions is not always possible.<sup>81</sup> 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.<sup>82</sup> In other cases, the

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<sup>79</sup> 12 C.F.R. § 1005.31(b)(1)(iv).

<sup>80</sup> Electronic Fund Transfers (Regulation E), *supra* note 37, at 6196 (so called "floating rate" transfers are described).

<sup>81</sup> *See generally* Electronic Fund Transfers (Regulation E), *supra* note 37, at 6196-97.

<sup>82</sup> *Id.* at 6197 (discussion of the mechanics of setting foreign exchange rates).

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 well 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.<sup>83</sup> 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.

#### *E. 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.<sup>84</sup> Due to the instability in post-conflict countries, remittance providers may not be able to provide a firm date by which the funds 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

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<sup>83</sup> *Id.* 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).

<sup>84</sup> 12 C.F.R. § 1005.31(b)(2).

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.<sup>85</sup>

There are two problems with this provision. First, 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.<sup>86</sup>

Second, the exception for governmental actions requires that the actions could not have been reasonably anticipated by the remittance provider.<sup>87</sup> With respect to post-conflict areas, it may be difficult to establish that a particular governmental action that results in a delay in availability could not have been “reasonably anticipated.”

#### *F. Foreign Laws Prohibiting Compliance*

In its August 20, 2012 rule, the CFPB addressed the problem that the laws of certain foreign countries effectively prohibit compliance with its disclosure requirements.<sup>88</sup> 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.<sup>89</sup> However, since

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<sup>85</sup> 12 C.F.R. § 1005.33.

<sup>86</sup> Electronic Fund Transfers (Regulation E), *supra* note 37, at 6227.

<sup>87</sup> 12 C.F.R. § 1005.33.

<sup>88</sup> Electronic Fund Transfers (Regulation E) 77 Fed. Reg. 50244 (Aug. 20, 2012) (to be codified at 12 C.F.R. pt 1005).

<sup>89</sup> 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://files.consumerfinance.gov/f/201209\\_CFPB\\_Remittance-Rule-Safe-Harbor-Countries-List.pdf](http://files.consumerfinance.gov/f/201209_CFPB_Remittance-Rule-Safe-Harbor-Countries-List.pdf).



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.

### *G. CFPB Can Do More*

In its February rulemaking, the CFPB rejected calls to allow remittance providers to use estimates when disclosing third party fees, even when the transmittal is made through open networks.<sup>90</sup> The agency acknowledged that open networks created “compliance challenges,” but nevertheless concluded that the disclosures were required by section 1073 of the Dodd-Frank Act:

The Bureau acknowledges the compliance challenges raised by the inclusion of open network transactions. Nevertheless, the Bureau believes the unambiguous language of the statute requires coverage of these transactions, such as wire transfers. The Bureau finds no statutory language to support excluding open network transactions—indeed, quite the contrary: the statute includes a temporary exception for certain insured institutions permitting estimates to be used in providing disclosures under specified circumstances. . . . There would be no need for such an exception if open network transactions were not covered by the statute.<sup>91</sup>

The CFPB also rejected proposals to allow remittance providers to use estimated exchange rates when the precise exchange rate cannot be determined. The agency noted the concerns raised by a Federal Reserve Bank as well as other commenters that the requirement could lead to the imposition of a less favorable rate for senders and reduced availability of services.<sup>92</sup> However, the CFPB concluded that the Dodd-Frank Act requires non-bank remittance providers to disclose the exact exchange rate, accurate to one-hundredth of one percent, both at

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<sup>90</sup> Electronic Fund Transfers (Regulation E), *supra* note 37, at 6208.

<sup>91</sup> *Id.*

<sup>92</sup> Electronic Fund Transfers (Regulation E), *supra* note 63, at 77213.

the time the sender first requests the remittance transfer and again when the sender pays for the transfer.<sup>93</sup> As explained by the CFPB:

The Bureau interprets the statute to require a remittance transfer provider to disclose to the sender the exchange rate to be used for the remittance transfer to the sender, both at the time the sender requests the remittance transfer and when the sender pays for the transfer. This interpretation is based on several factors. First, the fact that the exchange rate may be set by another institution involved in the remittance transfer does not change the fact that it will be used by the remittance transfer provider in effectuating the sender's request. Second, the statute specifically requires disclosure of the amount to be received by the designated recipient, using the values of the currency into which the funds will be exchanged. This disclosure requires a provider to determine the exchange rate to be used to effectuate the transfer, whether that rate is set by the remittance transfer provider or a third party.<sup>94</sup>

The CFPB also rejected requests to a remittance provider to disclose a good faith estimate of the date that funds will be available for pick up by the recipient. Again, the agency based its decision on its reading of the statutory language. The agency determined that the statute requires the disclosure of a "single promised date of delivery of the funds," and that the statute precludes the use of an estimate of the promised date.<sup>95</sup> The agency also found that because the statute requires a remittance transfer provider to provide a disclosure of the promised date of delivery to the *designated recipient*, a remittance provider could not use the date on which the funds would be available to the recipient institution, but must instead use the date that the funds will be made available to the recipient.<sup>96</sup>

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<sup>93</sup> Electronic Fund Transfers (Regulation E), *supra* note 37, at 6221.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 6227.

<sup>96</sup> *Id.* The CFPB, however, allows a remittance provider to provide a date further out than the actual expected delivery date, accompanied by a notice that the funds may be available sooner. For example, if funds may be available

*H. The CFPB Has Considerable Discretion to Modify Statutory Requirements*

As discussed above, the CFPB is basing its decision not to provide meaningful relief for acknowledged practical difficulties with the disclosure mandates, primarily based on its determination that the statute requires such disclosures. Although one may reach a different conclusion as to the proper construction of the statutory provisions, the law is clear that in the case of any ambiguity of statutory language, the reasonable views of the agency charged with administering the statute will prevail.<sup>97</sup> However, the issue here is not what the statute mandates, but rather why the CFPB has not used its clear power to modify the statutory requirements to provide more flexibility in order to take into account special situations, such as the conditions that exist in post-conflict nations that make strict compliance with disclosure mandates difficult, if not impossible.

The fact that the CFPB has broad authority to create exceptions and limitations to the statutory disclosure mandates is clear. To that end, section 904 of the EFTA governs all of the CFPB's rulemakings under the EFTA.<sup>98</sup> This section specifically states that the EFTA regulations may contain "such classifications, differentiations, or other provisions, and may provide for such adjustments and 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

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on January 3, but are not certain to be available until January 10, then a provider complies with rule if it discloses January 10 as the date funds will be available, and includes a note that the funds may be available sooner. 12 C.F.R. § 1005.31(b)(2)(ii).

<sup>97</sup> See, e.g., *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), holding that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.

<sup>98</sup> 15 U.S.C. § 1693b.

any rule.<sup>99</sup> 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, 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. The absence of any explanation for why the CFPB has declined to exercise its authority to address the acknowledged difficulties in complying with the remittance regulation in certain cases (such as providing remittances to post-conflict countries) raises significant legal and public policy issues.

## V. 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.

The CFPB position appears to be that it is following the statutory requirements, and has chosen not to provide exceptions for many of the most problematic disclosure requirements.

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<sup>99</sup> 12 U.S.C. § 5512 (b)(3).

However, the statute clearly states that the CFPB may make such classifications, differentiations, or other provisions, and may provide for such adjustments and exemptions for any class of remittance transfers, as in the judgment of the CFPB, that are necessary and proper to effectuate the statute. The unexplained failure of the CFPB to use its authority to adjust the required disclosures raises significant legal and public policy issues. At the very least, the CFPB should make adjustments necessary to ensure that remittance transfers to post-conflict countries are not unnecessarily impeded by its rules.