YALE LAW & POLICY REVIEW INTER ALIA

Regulation E's Remittance Definition Clarified: Bringing Mobile Payments Into the Third-Party Payment Services Exclusion

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A discrepancy in the guidance accompanying the Consumer Financial Protection Bureau's ("CFPB") new "remittance transfer" rule may unnecessarily apply regulatory provisions to certain mobile payments, potentially raising the barrier to adoption of this new technology. The CFPB recently issued a final rule to implement section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The rule and its accompanying guidance exclude in-person payment card transactions, but fail to exclude functionally-equivalent mobile payments. A simple regulatory solution could both reduce obstacles to the development of an efficient payment system and preserve necessary consumer protections.

Remittances are small-sum international transfers sent to family or friends. The World Bank defines these transfers as "cross-border person-to-person payments of relatively low value."[1] In an endeavor to regulate the U.S.-originated remittance transfer market, the CFPB has defined a "remittance transfer" as "the electronic transfer of funds requested by a sender to a designated recipient that is sent by a remittance transfer provider."[2] This definition, which the CFPB's rule adds to Regulation E,[3] is intended to capture the traditional concept of a remittance, so as to guarantee consumer protections for the U.S. market.

Mobile payments are a separate, broader category of transfer, more analogous to debit card usage than to a remittance. But the CFPB's "remittance transfer" definition would likely include certain mobile payments, subjecting providers to heightened disclosure, error resolution, cancellation, and agent liability requirements. The CFPB's guidance identifies an exclusion from the remittance definition when the consumer pays using a physical payment card –

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1. COMM. ON PAYMENT & SETTLEMENT SYS., THE WORLD BANK, GENERAL PRINCIPLES FOR INTERNATIONAL REMITTANCE SERVICES 6 (2007), http://siteresources.worldbank.org/INTPAYMENTREMMITTANCE/Resources/New_Remittance_Report.pdf.

2. Electronic Fund Transfers (Regulation E), 12 C.F.R. 1005.30(e)(1) (2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-02-07/pdf/2012-172 8.pdf.

3. 12 C.F.R. § 205 (2006), *available at* http://www.gpo.gov/fdsys/pkg/CFR-2012-title12-vol2/pdf/CFR-2012-title12-vol2-part205.pdf.

but this exclusion does not encompass mobile payments. As mobile devices replace cards, the uncertainty inherent in the existing CFPB guidance could become a systemic obstacle to the establishment of efficient payment systems. By drawing careful distinctions between the traditional remittance transfer and the in-person mobile payment made abroad, this article suggests that the guidance should be amended to explicitly exclude functionally-similar mobile payments.

I. THE CFPB'S NEW "REMITTANCE TRANSFER" DEFINITION

The CFPB's "remittance transfer" definition, set to become effective October 28, 2013,[4] requires four elements: (i) an "electronic transfer of funds" (ii) "requested by a sender" (iii) "to a designated recipient" that is (iv) "sent by a remittance transfer provider."[5] The cross-border element of the "remittance transfer" definition is found in the definitions of its component terms.

(A) An "Electronic Transfer of Funds." First, a remittance transfer must be an "electronic transfer of funds,"[6] that is, the transfer must be made by a method "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."[7] A bill payment made via computer or mobile device would be an electronic transfer; providing funds to a courier for delivery would not.[8]

(B) "Requested by a Sender." Second, the location and intent of the transaction's initiator determines whether the transfer was "requested by a sender." The rule defines a "sender" as "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."[9] The Dodd-Frank Act defines a "State" as "any State, commonwealth, territory, or possession of the

4. Electronic Fund Transfers (Regulation E), 78 Fed. Reg. 30,662 (May 22, 2013) (to be codified at 12 C.F.R. pt. 1005), *available at* http://www.gpo.gov /fdsys/pkg/FR-2013-05-22/pdf/2013-10604.pdf.

5. *Id.*

6. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, § 1073(a)(4), 124 Stat. 1376, 2060 (2010) (to be codified in scattered sections of the U.S. Code).

7. 15 U.S.C. § 7006(2) (2012).

8. 12 C.F.R. § 1005.30, cmt. 30(e)-1, *available at* http://www.gpo.gov/fdsys/pk g/FR-2012-02-07/pdf/2012-1728.pdf ("The definition of 'remittance transfer' requires an electronic transfer of funds. The term electronic has the meaning given in section 106(2) of the Electronic Signatures in Global and National Commerce Act [Pub. L. No. 106-229, 114 Stat. 464, 472 (2000) (codified in scattered sections of 15 U.S.C. (2012)]. There may be an electronic transfer of funds if a provider makes an electronic book entry between different settlement accounts to effectuate the transfer. However, where a sender mails funds directly to a recipient, or provides funds to a courier for delivery to a foreign country, there is not an electronic transfer of funds.").

9. *Id.* § 1005.30(g).

United States."[10] If the transfer originates from the consumer's account and that account is registered in a State, the consumer is located in a "State" for the purpose of this definition[11] – meaning that for account-based transfers, the consumer's physical location at the time of the transaction is not considered.

(C) "To a Designated Recipient." Third, the location of the recipient and intent of the sender determine whether the transfer was sent "to a designated recipient." The CFPB's rule defines a "designated recipient" as "any person specified by the sender as the authorized recipient of a remittance transfer to be received at a location in a foreign country."[12] The recipient may either be a natural person or a business.[13] For a transfer to the recipient's account, if the account is not registered in a "State," then the receipt occurs "at a location in a foreign country."[14]

(D) That is "Sent by a Remittance Transfer Provider." Finally, an evaluation of the transfer provider's normal business practices is necessary to determine if a transfer is "sent by a remittance transfer provider." The rule defines a "[r]emittance transfer provider" as "any person that provides remittance transfers for a consumer in the normal course of its business, regardless of whether the consumer holds an account with such person."[15] The guidance clarifies that "[t]his means that there must be an intermediary that is directly engaged with the sender" to send the transfer.[16] Whether such services are offered "in the normal course" of the provider's business "depends on the facts and circumstances, including the total number and frequency of remittance transfers sent by the provider."[17] If international transfers are "generally available" to consumers, either by agreement or practice, then the provider will likely be considered to offer remittance transfers in the normal course of its business.[18]

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10. Dodd-Frank Act, § 2(16), *available at* http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

11. 12 C.F.R. § 1005.30, cmt. 30(g)-1, *available at* http://www.gpo.gov/fdsys/pk g/FR-2012-02-07/pdf/2012-1728.pdf ("For transfers from an account, whether a consumer is located in a State depends on where the consumer's account is located.").

12. *Id.* § 1005.30(c).

13. *Id.* § 1005.30, cmt. 30(c)-1.

14. *See id.* § 1005.30(c), cmt. 30(c)-2(ii) ("For transfers to a designated recipi-ent's account, whether funds are to be received at a location physically outside of any State depends on where the recipient's account is located. If the account is located in a State, the funds will not be received at a location in a foreign country.").

15. 12 C.F.R. § 1005.30(g) (2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-02-07/pdf/2012-1728.pdf.

16. *Id.* § 1005.30, cmt. 30(e)-2(i).

17. *Id.* cmt. 30(f)-2.

18. *See id.* ("If a financial institution makes international consumer wire transfers generally available to customers (whether described in the institution's deposit account agreement, or in practice) and makes transfers multiple times per month, the institution provides remittance transfers in the normal course of business.").

II. THE DEFINITION CREATES UNCERTAINTY FOR MOBILE PAYMENTS

As the CFPB emphasized in Congressional testimony about mobile payments four months after issuing the remittance transfer rule, "[e]xisting rules may not have anticipated new developments enabled by modern technology and may prove inadequate for addressing emerging concerns."[19] While the CFPB has prepared for mobile transfers in certain of the rule's provisions, this issue in the rule's guidance appears to have been overlooked.[20] Certain mobile payments are correctly included under the "remittance transfer" definition[21], as in the case of a mobile-initiated transfer from a sender located in the U.S. to a recipient located abroad. However, such payments are the exception to the rule.

Mobile payments generally would not and should not be regulated under the CFPB's "remittance transfer" provisions. Mobile payments in the U.S. market currently take a number of forms[22]; the form that appears most likely to displace cards as the non-cash payment method of choice is a consumer pre-loaded or linked account – a "mobile wallet" – that will be used to make payments via near-field communication to personal and merchant accounts.[23]

19. *The Future of Money: Where Do Mobile Payments Fit in the Current Regulatory Structure?: Hearing Before the Subcomm. on Fin. Insts. and Consumer Credit of the H. Comm. on Fin. Servs.*, 112th Cong. 46 (2012) (statement of Marla Blow, Assistant Director, Card and Payment Markets, Consumer Financial Protection Bureau), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg76113/pdf/CHRG-112hhrg76113.pdf.

20. *See, e.g.*, Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6202, 6282 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005) (revising the Federal Reserve's proposed remittance transfer rule to anticipate remittances sent by mobile phone), *available at* http://www.gpo.gov/fdsys/ pkg/FR-2012-02-07/pdf/2012-1728.pdf; CONSUMER FINANCIAL PROTECTION BUREAU, REPORT ON REMITTANCE TRANSFERS 9 (2011) (failing to mention that mobile transfers are often initiated while in-person), *available at* http://files.consumerfinance.gov/f/2011/07/Report_20110720_RemittanceTransfers.pdf.

21. *See, e.g.*, *The Future of Money* Hearings, *supra* note 19, at 38 (2012) (statement of Stephanie Martin, Associate General Counsel, Board of Governors of the Federal Reserve System) ("For international [mobile] payments, both bank and nonbank service providers may also be subject to the remittance provisions in the [Electronic Funds Transfer Act], as implemented by the CFPB."), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg76113/pdf/CHRG-112hhrg76113.pdf.

22. For additional information regarding consumer use of mobile payments, see, for example, Darrell Etherington, *Forrester: U.S. Mobile Payments Market Predicted To Reach $90B by 2017, up From $12.8B in 2012*, TECHCRUNCH (Jan. 16, 2013), http://techcrunch.com/2013/01/16/forrester-u-s-mobile-payments-market-predicted-to-reach-90b-by-2017-up-from-12-8b-in-2012/. For additional information regarding retailer acceptance of mobile payments, see, for example, Adolfo Flores, *Mobile Payment Systems Are Ringing Up More Competition*, LOS ANGELES TIMES (June 13, 2013), www.latimes.com/business/la-fi-paypal-mobile-20130613,0,3075553.story, which notes that "[t]he shift is happening as mobile devices permeate many facets of consumers' lives, including the way they shop and pay for everyday items."

23. As the Federal Reserve Banks of Boston and Atlanta identify in a recent report,

For example, a U.S. consumer can set up a mobile wallet registered to the consumer's home address, which then draws from a linked account or is pre-loaded with funds as needed, and the mobile device is presented to retailers to make purchases.

A consumer's in-person mobile payment while traveling abroad may be considered a "remittance transfer" under that same definition. Such payments fulfill each of the four parts of the "remittance transfer" definition outlined in Part I: First, the transaction is made by a method involving digital technology, and is therefore an "electronic transfer of funds." Second, if a consumer has registered the account to an address in the U.S., all transactions from this account will be from a "consumer in a State," despite the consumer's physical presence abroad. If the consumer made a mobile payment for a "personal" (i.e., non-commercial) purpose, then the mobile payment would be "requested by a sender." Third, when the consumer initiates the transaction, he does so with a specific merchant from whom he is purchasing a good or service. If the foreign merchant's account is registered outside the U.S., this transaction would be made "to a designated recipient." Finally, if the mobile payment network allows the consumer to make mobile purchases while traveling abroad, the provider offers such a service in "the normal course of business," and the transaction would be considered "sent by a remittance transfer provider."

The CFPB attempts to avoid problems of this sort by requiring that to qualify as a remittance transfer provider, "there must be an intermediary that is directly engaged with the sender."[24] The CFPB does not define "directly engaged," but explains that a "payment card network or other third party payment service that is functionally similar to a payment card network" is not directly engaged with the sender when the sender "provides a *debit, credit or prepaid card* directly to a foreign merchant as payment."[25] The CFPB explains that in such a case, the payment network is "merely providing contemporaneous third-party payment processing and settlement services on behalf of the merchant or the card issuer."[26]

> dynamic changes have created a market that offers digital and mobile wallets, near field communication (NFC) and cloud-based point-of-sale (POS) solutions, mobile apps, and Quick Response (QR) bar codes. The merging of these technologies with platforms (POS, online, other remote), uses (consumer-to-business (C2B), person-to-person (P2P)), new payment methods (virtual prepaid, direct carrier billing (DCB)), and many cross-industry players further changes the market for mobile payments.

MARIANNE CROWE ET AL., U.S. MOBILE PAYMENTS LANDSCAPE – TWO YEARS LATER 3-4 (May 2013), http://www.bos.frb.org/bankinfo/payment-strategies/publications/2013/mobile-payments-landscape-two-years-later.pdf.

24. 12 C.F.R. § 1005.30, cmt. 30(e)-2(i) (2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-02-07/pdf/2012-1728.pdf.

25. *Id.* cmt. 30(e)-2(ii) (emphasis added); *see id.* cmt. 30(e)-2(iii) (contrasting a situation where the intermediary is "directly engaged").

26. *Id.* cmt. 30(e)-2(ii). The CFPB notes that a similar, though distinctly different, scenario could constitute a remittance transfer: if the payment network offered "a service to a sender where the card issuer or a payment network is an intermediary

Following this logic, mobile payments in these circumstances should also be excluded from the definition because they are functionally similar to card networks.[27] Mobile payments are generally electronic transfers from a consumer's account to a merchant's account, and the mobile payment network is functionally similar to a payment card network. While the guidance acknowledges both card networks and "other third party payment service[s] that [are] functionally similar," suggesting that analogous payment services should be excluded as well, it does not parallel the language in the CFPB's guidance's preceding clause by explicitly acknowledging that mobile payments are the functional equivalent to cards. Instead, it only explicitly excludes instances in which a payment card is used and fails to identify any other payment instruments like mobile wallets. This disparity threatens to create unnecessary uncertainty as mobile devices replace cards. Because this uncertainty suggests inclusion, mobile payment providers are likely to err on the side of compliance, needlessly adding preemptive costs that can raise the barrier to adoption of this new technology.

III. A Proposed Solution

In order to promote regulatory certainty, which will allow firms to make more informed business planning decisions about service offerings, the CFPB should revise its guidance to prevent the application of the remittance rule to in-person mobile payments. Any proposed solutions should be considered in light of the objective of the statutory and regulatory provisions: "the protection of individual consumers engaging in electronic fund transfers and remittance transfers."[28]

One option would be to revise the "requested by a sender" definition in the statute or regulation to specifically reference the sender's physical location. This approach is inadequate because it would create complicating concerns regarding compliance and enforcement, obscure some of the existing regulatory distinctions, and could expand the incorrect application of the rule instead of help to narrow this range. Adding a reference to physical location, instead of including exemptions for specific technologies in appropriate situations, may be too broad of a change and one which may have unintended consequences.

Similarly, including exemptions for mobile payments in the statute or regulation's definition itself is likely not the optimal answer either. There is little need for the statutory or regulatory definition to refer to specific transfer methods and technologies, for the same reason that payment cards are not currently referenced there: technologies and the marketplace evolve, and the regulator is better positioned to address these changes.

Any changes should focus on the concepts of "third party payment service" and "functionally similar," which only appear in the CFPB's guidance.

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that is directly engaged with the sender *to obtain funds* using the sender's debit, prepaid or credit card *and to send those funds* to a recipient's checking account located in a foreign country." *Id.* cmt. 30(e)-2(iii) (emphasis added).

27. *See id.* cmt. 30(e)-2(ii).

28. 12 C.F.R. § 1005.1, *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-02-07/pdf/2012-1728.pdf.

Moreover, because the present issue arises from statements made in the CFPB's guidance, the appropriate solution should focus on fixing the problem at its source. Amending the guidance permits an answer that is targeted, narrow, and does not interfere with the broader statutory and regulatory definitions. The most effective solution would be for the CFPB to amend Comments 30(e)-2(ii) and 30(e)-3(ii)(A) of the rule's guidance, to specifically identify mobile payment networks in the payment service exclusion:

> 2.ii. A payment card network***, a mobile payment network,*** or other third party payment service that is functionally similar to a payment card network ***or mobile payment network*** does not send a remittance transfer when a consumer provides a debit, credit, or prepaid card ***or a mobile device*** directly to a foreign merchant as the payment method to purchase goods or services.
>
> …
>
> 3.ii.A. A consumer's provision of a debit, credit or prepaid card, ***or a mobile device,*** directly to a foreign merchant as payment for goods or services because the issuer is not directly engaged with the sender to send an electronic transfer of funds to the foreign merchant when the issuer provides payment to the merchant. *See* comment 30(e)-2.

These changes preserve the existing definition structure, and ensure that the CFPB's same, carefully crafted tests continue to operate. As a result, traditional remittances would continue to be recognized under the CFPB's definition. Remittances to merchants would also still be included. More importantly, mobile remittances – traditional remittance transfers sent via mobile device from a sender located in the U.S. to a recipient located abroad – would not be excluded from coverage on account of the changes proposed here. This preserves the consumer protections for remittance senders introduced in the Dodd-Frank Act, while allowing the freedom needed for anticipated technological developments in the payments industry.[29]

29. *See, e.g.*, Electronic Fund Transfers, 76 Fed. Reg. 29903, 29904 (May 23, 2011) (stating that "[r]emittance transfer providers are also exploring the use of mobile applications to send remittances."), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-05-23/pdf/2011-12019.pdf; CONSUMER FINANCIAL PROTECTION BUREAU, REPORT ON REMITTANCE TRANSFERS 9 (2011) ("[A]s [remittance transfer providers] expand beyond cash and account-based transfer products, some are also allowing consumers to initiate transactions by phone."), http://files.consumerfinance.gov/f/2011/07/Report_20110720 _RemittanceTransfers.pdf.