

July 22, 2011

VIA ELECTRONIC & REGULAR MAIL

The Honorable Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
E-Mail: regs.comments@federalreserve.gov

Re: Regulation E; Docket R-1419 Electronic Fund Transfers

Dear Secretary Johnson:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment on the Board of Governors of the Federal Reserve System's (hereinafter, "the Board") proposed rulemaking on *Regulation E; Docket No R-1419 Electronic Fund Transfers*.¹ This proposal will be transferred to the Consumer Financial Protection Bureau (CFPB) for finalization. Advocacy is concerned about the lack of information on potential costs of the proposal for small entities and the Board's failure to consider less burdensome alternatives. Advocacy recommends that the CFPB perform industry outreach on the workability of the proposal and prepare a supplemental initial regulatory flexibility analysis (IRFA) before going forward with the final rule.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement

¹ 76 Federal Register 29902.

² 5 U.S.C. § 601 et seq.

Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

Requirements of the RFA

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Pursuant to the RFA, the federal agency is required to prepare an IRFA to assess the economic impact of a proposed action on small entities. The IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities.⁶ In preparing the IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.⁷ The RFA requires the agency to publish the IRFA or a summary of the IRFA in the Federal Register at the time of the publication of a general notice of proposed rulemaking for the rule.⁸

The Proposed Rule

On May 23, 2011, the Board published a proposed rule on Regulation E: Electronic Fund Transfers.⁹ The proposal implements the Dodd-Frank Wall Street Reform and Consumer Protection Act remittance transfer provisions. The proposal contains new protections for

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁵ Id.

⁶ 5 USC § 603.

⁷ 5 USC § 607.

⁸ 5 USC § 603.

⁹ 76 Fed. Reg. 29902.

consumers who send remittance transfers to designated recipients in a foreign country by providing consumers with disclosures and error resolution rights.¹⁰

The proposed rule requires money transmitters to provide the sender with a written pre-payment disclosure containing information about the specific remittance transfer such as the exchange rate, applicable fees and taxes, and the amount to be received by the designated recipient. The provider must also provide information on the date of availability and the recipient's contact information. In the alternative, the proposal permits remittance transfer providers to provide the sender a single written prepayment disclosure on the receipt containing all of the information required. In addition, the provider must provide the disclosures in English and in each of the foreign languages principally used by the remittance provider to solicit, advertise, or market transfer services at a particular office. If there is an error in the transmission, providers must investigate the claim and correct the error within 90 days of receiving notice of the error.

The Board's IRFA Does Not Comply with the Requirements of the RFA

The proposed rule will impact money transmitters and financial institutions. In the RFA section, the Board treated the industries differently. The Board prepared an IRFA for the proposed rule as it applies to money transmitters. Although the Board did take some steps to reduce the regulatory burden on providers in general,¹¹ Advocacy is concerned about the lack of information about the costs that small entities may incur to comply with the rule and the Board's failure to discuss less burdensome alternatives in the IRFA.

The Board did not prepare an IRFA for the financial institutions. Instead, the Board certified that the proposed rule would not have a significant economic impact on a substantial number of small financial institutions.¹² Advocacy is also concerned with the confusing nature of the certification and questions whether a certification is appropriate for this proposal.

The Board Vastly Underestimates the Size of the Industry in Its IRFA

As noted above, an agency is required to provide information about the number of small entities affected by the rule. The Board states that the number of small entities that will be impacted by the proposal is unknown but indicates that there are approximately 19,000 registered money transmitters, 95 percent of which are small. According to the National Money Transmitters Association (NMTA), the Board has vastly underestimated the size of the industry. NMTA estimates that there are 200,000 to 300,000 money transmitters in the United States.¹³ Although they are mostly agents, they will need to comply with

¹⁰ 76 Fed. Reg. 29905.

¹¹ The Electronic Funds Transfer Act provides the Board with exemption authority. The Board states that it is exercising its exemption authority to permit the provider to provide the sender with a single written pre-payment disclosure rather than both a pre-payment disclosure and receipt disclosures. The Board also allows for oral pre-payment disclosures when the transaction is conducted by telephone. *Id.* at 29937.

¹² 76 Fed. Reg. 29936-29937.

¹³ Telephone conversation with David Landsman, Executive Director, NMTA, July 20, 2011.

this proposal. Advocacy encourages the CFPB to reexamine the Board's determination of the number of small entities that are impacted by this proposal.

The Board Fails to Provide Information about the Economic Impact of the Proposal

Advocacy has also learned from NMTA that this proposal will be extremely burdensome to small entities.¹⁴ The Board acknowledges that the money transmitters will incur costs to implement this proposal.¹⁵

There is no discussion about what those costs may be. There is no discussion about the costs that the industry may incur to obtain legal assistance in complying with the requirements, the changes that the industry may need to make to its computer systems, the costs associated with making sure that the exchange information is correct, the cost of translating the documents into different languages, or the man hour costs associated with the error investigation. In some instances, small money transmitters may need to purchase new equipment to comply with the proposal. Advocacy encourages the CFPB to perform outreach to determine the economic burden of this proposal on small entities.

The Board Fails to Consider Less Burdensome Alternatives

In addition to failing to provide information about the potential costs, the Board fails to consider alternatives that would reduce the burden on small entities. Instead of providing alternatives, the Board solicits suggestions for significant economic alternatives that would reduce the economic burden on small entities. This does not meet the requirements of the RFA.

The purpose of the consideration of alternatives under the RFA is to find less burdensome alternatives for small entities that meet the agency's goals. Although the Board discusses some alternative approaches in the preamble, there is no indication that the Board considered alternatives that are specifically meant to reduce the economic impact on small entities as required by the RFA. As noted in the IRFA, 95 percent of the money transmitters are small.¹⁶ As such, it is imperative that the Board provide an analysis of the economic impact of the various alternatives on these small entities. Such an analysis would have provided the public with the necessary information that it needed to provide meaningful comments.

The Board's Certification Is Inappropriate

As noted above, the Board certified the proposal as it pertains to financial institutions. The certification is confusing and contradictory. The first line of the certification states that the proposed rule could have a significant economic impact on small financial institutions that are remittance transfer providers for consumer international wire

¹⁴ Id.

¹⁵ 76 Fed. Reg. 29936.

¹⁶ 76 Fed. Reg. 29936.

transfers.¹⁷ However, the Board goes on conclude that small financial institutions are not likely to be significantly impacted by the proposal.¹⁸ The basis of the conclusion is that consumers are less likely to send remittances by wire transfer and unless an institution performs a high number of wire transfer remittance, a decision to discontinue service to customers would not have a significant economic impact.¹⁹

This certification is inappropriate and is improperly written. If there is a significant economic impact on a substantial number of small entities, then the agency should have prepared an IRFA. If there is no significant economic impact on small entities that the Board should have performed a threshold analysis so that it could have provided a factual basis describing how many small financial institutions provide the service, how much it will cost for them to comply with the proposal and how much will they lose in revenue if they choose not to continue to offer the service.

Advocacy spoke with representatives from the Independent Community Bankers Association (ICBA)²⁰, the American Bankers Association (ABA),²¹ and the Credit Union National Association (CUNA).²² According to those organizations, it will be costly and difficult, if not impossible, for small financial institutions to comply with the proposal. The proposal makes small financial institutions responsible for things over which they have no control. With an international wire transfer, the transfer is handled by banks in different countries that comply with different laws. Whether or not the transfer is successful may be decided by an international bank or the banking laws of a foreign country. In addition, international banks can levy additional fees and determine the currency and exchange rate after the transfer occurs. As such, it is difficult, if not impossible for the U.S. bank to provide the disclosures that are required by this proposal.

Moreover, the investigation may be expensive, time-consuming and potentially dubious for small banks. The small banks will have to contend with international bureaucracies and laws to obtain the information from the foreign countries. The small banks are required to complete the investigation within 90 days even though the foreign country or financial entity may or may not provide the information to them in timely manner.

The small financial institutions provide this service to consumers. In some extremely rural areas, the small financial institution may be the only way for people to transmit money overseas. The way the proposal is currently drafted, the financial institutions may be unable to continue to provide the service. That would be a revenue loss for the institutions and a loss of services for the consumer.

¹⁷ Id. at 29937.

¹⁸ Id.

¹⁹ Id.

²⁰ Telephone conversation with Corey Whaley, ICBA, July 14, 2011.

²¹ Telephone conversation with Ginny O'Neill and Rob Rowe, ABA, July 19, 2011.

²² Telephone conversation with Michael Edwards, CUNA, July 19, 2011.

The Board Should Have Prepared an IRFA for Financial Institutions

Given the potential economic burden of this regulation on small financial institutions, the Board should have prepared an IRFA to examine the proposals impact on small financial institutions and consider less burdensome alternatives. According to the ABA, a viable alternative may be to create a de minimus exemption for small banks.²³ Such an exemption would allow the banks to continue to offer the service to their customers while assuring that the small banks are not being burdened by regulations that are meant to correct problems that they did not create. Advocacy encourages the CFPB to work with small banks to develop an analysis as required by Section 603 of the RFA, including viable alternatives to reduce the economic burden of this proposal.

A Supplemental IRFA Should Be Published Prior to Going Forward with the Final Rule

The failure to prepare an IRFA to consider the impact of the proposal on financial institutions and the failure to consider the economic burden and less costly alternatives for the money transmitters are major flaws in the agency's compliance with the RFA. Without proper compliance with the RFA at the proposed rule stage, an agency cannot go forward with a final regulatory flexibility analysis (FRFA). This matter is similar to Southern Offshore Fisheries v. Daley, 995 F. Supp. 1411 (M.D. Fl. 1998). In that case, the court stated that Section 604 requires that any final regulatory flexibility analysis (FRFA) contain "a summary of the significant issues raised by public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues and a statement of any changes made in the proposed rule as a result of such comments." 5 USC § 604 (a) (2). The court went on to state that the National Marine Fisheries Service (NMFS) could not possibly have complied with § 604 by summarizing and considering comments on an IRFA that NMFS never prepared. Here, the agency has failed to provide an IRFA to consider the economic impact on financial institutions and prepared an "IRFA" that lacks key elements for the money transmitters. As in Southern Offshore Fisheries, the agency cannot provide a summary of significant issues raised by the industry on alternatives when none were considered.

This proposal will be transferred to the Consumer Financial Protection Agency (CFPB) for finalization. Advocacy encourages the CFPB to perform small entity outreach to obtain information so that it can publish a meaningful supplemental IRFA on the economic impact on all entities that are impacted by the proposal and viable alternatives prior to going forward with the final rule.

Conclusion

The RFA requires agencies to consider the economic impact on small entities prior to proposing a rule, to provide the information on those impacts to the public for comment, and to consider less burdensome alternatives. The certification that the Board provided for the financial institutions is inappropriate and lacks a factual basis. The IRFA

²³ Telephone conversation with Ginny O'Neill and Rob Rowe, ABA, July 19, 2011.

provided for the money transmitters lacks key information and is devoid of any analysis of meaningful alternatives that may reduce the burden on small entities. Advocacy encourages the CFPB to perform small entity outreach and take the necessary steps to comply with the requirements of the RFA before moving forward with this proposal.

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. Advocacy is available to assist the CFPB in its RFA compliance. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact Jennifer Smith at (202) 205-6943.

Sincerely,

/s/

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/

Jennifer A. Smith
Assistant Chief Counsel
For Economic Regulation & Banking

Cc: The Honorable Cass Sunstein, OMB/OIRA