Appleseed
Sowing the Seeds of Justice

Comments to the Federal Reserve Board
12 C.F.R. Part 205
Regulation E; Docket No. R-1419 RIN 7100-AD76
Electronic Fund Transfers

I. Introduction

Appleseed appreciates the opportunity to respond to the request of the Board of Governors of the Federal Reserve System (Board) for comments regarding the proposed regulations implementing Section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act").[1]

Appleseed, a nonprofit network of 16 public interest justice centers in the United States and Mexico, uncovers and corrects social injustices through legal, legislative, and market-based structural reform. To that end, Appleseed has taken a leading role in advocating for consumer protections and transparency in the remittance transfer industry. Appleseed began working on the issue of remittances in Texas and helped pass a state law mandating cost disclosure in 2003.[2] Since then, Appleseed has performed empirical studies on the utility of disclosures for remitting consumers and published reports on the importance of transparency in the remittance market.[3] Following Appleseed's testimony to the House of Representatives Subcommittee on Financial Institutions and Consumer Credit on June 3, 2009, and at the direction of the Subcommittee, Appleseed conducted negotiations with the remittance industry to produce the remittance consumer protection section of the House version of the Dodd-Frank Act.

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 Pub. L. No. 111-203, § 1073, 124 Stat. 1376; 15 U.S.C.A. 1693o-1 (2010).
[2] *See*, Tex. Fin. Code Ann. § 278.051.
[3] Appleseed's studies and reports related to remittances can be viewed at http://www.appleseednetwork.org/bPublicationsb/FullArchive/FinancialAccess/tabid/525/Default.aspx

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Appleseed is joined in its comments by these Appleseed Centers: Alabama Appleseed, Chicago Appleseed Fund for Justice, Connecticut Appleseed, Georgia Appleseed, Hawaii Lawyers for Equal Justice, Kansas Appleseed, Louisiana Appleseed, Massachusetts Appleseed, Nebraska Appleseed, New York Appleseed, New Jersey Appleseed, New Mexico Appleseed, South Carolina Appleseed Legal Justice Center, and Texas Appleseed.

In Appleseed's opinion, the proposed regulations are largely consistent with Congress' intent of promoting transparency and meaningful consumer protection but do not impose undue burdens on remittance transfer providers. Appleseed generally supports the proposed regulations as written, but would like to use this letter to suggest a few improvements as well as highlight several particularly important provisions.

More specifically, Appleseed wishes to:

II.a. - Emphasize the importance of total price disclosure.

II.b. - Commend the Board for recognizing that Dodd-Frank prohibits floating exchange rates.

II.c. - Suggest the final rules clarify how disclosure requirements will affect prepaid cards.

II.d. - Propose that the final rules not permit combined disclosures.

II.e. - Recommend that the final rules require fees and taxes to be itemized rather than be presented as a single sum.

II.f. - Suggest the Consumer Financial Protection Bureau (Bureau) maintain a resource that lists all relevant taxes that remittance providers may need to know for calculating total cost.

II.g. - Propose guidelines for disclosures made with mobile phones.

II.h. - Praise the "facts and circumstances" approach to disclosures and foreign languages.

II.i. - Propose the final rules emphasize readability for disclosures with multiple foreign languages.

II.j. - Emphasize the importance of requiring the Bureau's contact information to appear on all

disclosures.

II.k. - Recommend all disclosures provide a more specific description of consumer rights.

III.a. - Remind the Bureau that Congress intended that insured institutions alter their business practices to comply with the Act's disclosure requirements and emphasize the importance of avoiding undue extension of the temporary exception to providing accurate disclosures.

III.b. - Commend the Board's decision to limit the permanent exception to ACH transactions.

III.c. - Suggest the final rules require all estimates of exchange rates be based on Federal government sources.

IV.a. - Commend the inclusion of fraudulent pick ups under the definition of error.

IV.b. - Recommend an approach for the final rules with respect to a default remedy.

IV.c. - Emphasize the importance of limiting the timely delivery of funds exception to instances of force majeure.

V.a. - Suggest the Bureau consider shortening the cancellation period if it is infrequently used by consumers.

VI.a. - Recommend that the final rules to include Alternative A, strict liability, for the acts of agents.

VII.a. - Urge the Bureau to conduct an education and outreach campaign to inform consumers about their new rights and providers about their new obligations once the rules are finalized.

II. 205.31 – Disclosures

The proposed rule is a reasonable interpretation of the power Congress delegated to the Board. Appleseed applauds the Board's faithful implementation of the statutorily-mandated sections of the Act.

Historically, consumers have faced difficulties when evaluating the total costs of remittance

transfers because of a lack of transparency in the remittance marketplace.[4] In particular, consumers may lack information about the exchange rate used for their transfer, the fees charged by the provider, and the timing of funds arrival at their destination (which relates to total cost, as consumers may be willing to pay more for immediate availability).[5]

Microeconomic theory teaches that the core elements of free, efficient markets are several conditions, including multiple sellers and free flow of information. Withholding total cost information is particularly problematic because the costs associated with sending money can vary substantially.[6] By giving consumers total cost information in advance, the Dodd-Frank Act and proposed regulations promote greater transparency and thereby enable consumers to make informed choices that will promote greater competition and market efficiency.

α. Appleseed commends the Board for implementing the statutorily-required total cost disclosure.

The Dodd-Frank Act requires a remittance transfer provider to supply a disclosure "describing the amount of currency that will be received by the designated recipient, using the value of currency into which the funds will be exchanged."[7] The Board has proposed rules that will require providers to disclose to the sender the amount that the designated recipient will receive, in the currency in which the funds will be received.[8]

i. Discussion

Pre-transaction disclosure of the total funds to be transferred to the recipient is the centerpiece

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[4] World Bank, *General Principles for International Remittance Services*, January 2007 at 11.
[5] *Id.* at 11 – 12.
[6] *See e.g.*, Appleseed, *Creating a Fair Playing Field: The Need for Transparency in the U.S.-Mexico Remittance Market*, Dec. 2005 (finding a consumer could spend as little as $3.88 or as much as $21.90 at the same provider on the same day to send $300 to Mexico from Georgia).
[7] 15 U.S.C.A. § 1693o-1(a)(2)(A)
[8] Electronic Funds Transfers, 70 Fed. Reg. 29902, 29911 (May 23, 2011) (to be codified at 12 C.F.R. § 205.31(b)(1)(vii)).

of Section 1073 of the Dodd-Frank Act. The amount to be received is ultimately the most important figure for a consumer and its disclosure is critical for meaningful transparency in the remittance marketplace. There are many factors that affect the costs of sending money - the time of day, remittance provider's practices, and geography - giving consumers access to total cost in advance is important because it can help consumers understand how these factors affect the cost of sending money.[9] Further, total cost disclosure prevents providers from adding "hidden costs" in the form of non-disclosed exchange rates or other fees. The Board has properly required this total to include all cost elements, including all taxes and fees, when disclosing the required total.

ii. Recommendation

Appleseed wishes to commend the Board on creating a rule that implements the statutorily required disclosure of total cost.

b. Appleseed wishes to emphasize the importance of prohibiting "unknown" or "floating" exchange rates.

A remittance transfer uses a floating exchange rate when the rate for the transaction is determined at the time the recipient picks up the funds. Because exchange rates will fluctuate between the time in which the funds are sent and when they are received, a provider that uses a floating exchange rate cannot accurately disclose the rate before the transaction occurs. The Dodd-Frank Act requires providers to disclose "any exchange rate to be used by the remittance transfer provider for the remittance transfer" when the sender first requests initiation of the remittance transfer.[10]

[9] Appleseed, *Creating a Fair Playing Field*, at 9.
[10] 1693o-1(a)(2)(A).

i. Discussion

Congress has required pre-payment disclosure (with certain limited exceptions) of any exchange rates involved in a remittance transaction.[11] In effect, this means that providers must determine the exchange rate used for the transaction before the funds are sent rather than at the time the recipient receives the money. The Dodd-Frank Act therefore prevents a remittance transfer provider from utilizing floating remittance exchange rates.

ii. Recommendation

Appleseed supports the Board's decision to include proposed comment 31(b)(1)(iv) which explicitly prohibits listing "floating" or "unknown" in place of the statutorily mandated accurate disclosure of exchange rate.[12] While this may require some providers to alter their business practices, allowing providers to supply terms like "unknown" or "to be determined" would be contrary to the statutorily mandated pre-transaction disclosure of exchange rate.[13]

c. Appleseed recommends the Board clarify how the disclosure requirements will affect remittances made through prepaid cards.

An increasingly popular method of remitting is through prepaid cards.[14] A transaction conducted through prepaid cards typically involves loading a card with funds and sending it to the recipient, where it can be used like a debit card at an ATM or to make purchases at point of sale terminals.[15] Normally, the exchange rate for prepaid cards is determined at the time the card is used.[16]

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[11] 1693o-1(a)(2)(A)(iii).
[12] *Id.*
[13] 15 U.S.C.A. 1693o-1(a)(2)(A)(iii).
[14] *See*, Manuel Orozco, *Card-Based Remittances: A Closer Look at Supply and Demand*, February, 2007 ([p]repaid cards are emerging as a promising product to serve unbanked consumers).
[15] Electronic Funds Transfers, 70 Fed. Reg. at 29,904.
[16] *Id.*

i. Discussion

Typically, prepaid cards use exchange rates that are determined when the recipient uses the card. However, Dodd-Frank mandates pre-transaction disclosure of the exchange rate the provider will use before the customer pays the provider.[17] Because the statute requires pre-transaction disclosure of the exchange rate and the new law applies to certain transactions involving prepaid cards[18], the practice of setting the exchange rate when the recipient uses the card is seemingly no longer permissible.

ii. Recommendation

Appleseed recommends that the final rules add guidance that clarifies how the disclosure requirements should function for the pre-paid card segment of the remittance industry. That guidance should clarify whether providers will need to alter business practices and set the exchange rate for pre-paid cards when the customer purchases the card. If not, how will providers supply the statutorily required pre-transaction disclosure of exchange rate?

d. Appleseed recommends the Board not allow the use of combined disclosures.

The Board has proposed to use its exemption authority to allow providers to satisfy disclosure requirements in one combined disclosure rather than separate pre- and post- transaction disclosures.[19] Appleseed recommends the Board not permit combined disclosures.

[17] 15 U.S.C.A. 1693o-1(a)(2)(A)(iii).
[18] Electronic Funds Transfers, 70 Fed. Reg. at 29,908.
[19] 15 U.S.C.A. 1693o-1(a)(5)(C).

i. Discussion

The Board has proposed to allow a provider to satisfy the statutory disclosure requirements with one combined, pre-transaction disclosure.[20] Some participants in the Board's consumer study expressed unease with solely receiving combined disclosures without a corresponding proof of payment.[21] As the provider would need to give the consumer the combined disclosure before payment, it would not reflect whether the consumer had actually completed the transaction. Irrespective of whether the Board allows the combined disclosure are permitted, providers will likely need to supply some printed proof of purchase after the transaction is completed. This means the provider will likely give the consumer multiple pieces of paper and therefore the combined disclosure will not likely ease any burdens on the provider. Moreover, regardless of what the regulations require, state law may mandate that a post-transaction receipt be provided, so allowing combined disclosures could conflict with state law and confuse providers.[22]

Combined disclosures will likely provide little practical value to providers but could potentially threaten the "shopping" value of the disclosures. Having two disclosures will allow consumers to compare the figures in the disclosure with the amount paid as disclosed by the receipt, in effect auditing their own transaction to compare the promised fees and exchange rates against the final fees and exchange rate charges. Providing two representations of the costs associated with the transfer will help both senders and recipients guard against imposition of any hidden fees.[23]

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[20] Electronic Funds Transfers, 70 Fed. Reg. at 29,911.
[21] *Id.* at 29,915.
[22] *See e.g.*, Tex. Fin. Code Ann. § 278.051
[23] Appleseed, *Creating a Fair Playing Field: The Need for Transparency in the U.S.-Mexico Remittance Market*, Dec. 2005 ("[t]here is significant anecdotal evidence that recipient of remittances from the U.S. are required to pay additional, undisclosed fees...")

ii. Recommendation

Appleseed recommends not adopting a combined disclosure and requiring the provider to provide a pre-transaction disclosure as well as the post transaction receipt containing all information required in proposed § 205.31(b)(2).[24]

e. Appleseed recommends that fees and taxes be listed separately on the disclosures.

The proposed § 205.31(b)(1)(ii) requires disclosure of taxes and any fees imposed by the provider and disclosure of any fees and taxes imposed by any party other than the provider in proposed section 205(b)(1)(vi).[25] The Board has solicited comment on whether it should require providers to differentiate between fees and taxes or allow disclosure of this information with a combined term such as "Fees and Taxes." Appleseed recommends the Board require all taxes and fees be supplied in an itemized list rather than a single sum.

i. Discussion

Listing fees and taxes as a single sum will make it more difficult for consumers to understand which fees are unique to the provider and which fees are universally imposed and thus frustrate the consumer's ability to shop around for lower fees. Specific itemized disclosures will help consumers understand what costs will always apply (e.g. taxes imposed by local governments) rather than costs that will vary based on providers (e.g. transfer fees charged by the provider). Consumers having a choice may elect to send remittances from a non-taxing jurisdiction.

[24] Electronic Funds Transfers, 70 Fed. Reg. at 29,911.
[25] *Id.* at 29,912.

ii. Recommendation

Appleseed strongly recommends that the Board require disclosures to itemize fees and taxes rather than allowing disclosure of the information on taxes and fees to be included in a single, aggregate sum.

f. Appleseed recommends the Bureau maintain a resource that provides the relevant tax rates on remittances in foreign countries and make this available to both consumers and providers.

Proposed 205.31(b)(1)(iv) will require a provider to disclose all taxes imposed on the remittance transfer by a person other than the provider.[26] A provider will therefore need to disclose all taxes imposed on the remittance transfer in a foreign country.[27]

i. Discussion

Disclosure of all costs that will affect the remittance transfer is critical to ensuring transparency and an accurate representation of the amount of funds a recipient will receive as required by Dodd-Frank. However, smaller providers may have difficulty keeping track of tax laws in other states, countries, or local taxing authorities. The burden of keeping track of tax laws around the world might discourage some providers from fully complying with the proposed regulations. The Bureau should consider ways it can ease this burden on providers while still ensuring providers disclose the proper information.

ii. Recommendation

Appleseed recommends that the Bureau, through its research function, maintain an updated

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26 Electronic Funds Transfers, 70 Fed. Reg. at 29,913.
27 *Id.*

and easily accessible list or database of all taxes and fees imposed by foreign, state, or local governments on remittance transfers. A regularly updated list will ease the burden of compliance for smaller providers and ensure accurate disclosure of tax rates and fees.

g. Appleseed recommends that the regulations disallow disclosures solely through texts on mobile phones, pending technological developments that allow for retention of pre-transaction disclosures.

While many remittance transfers continue to occur at physical storefronts, technological developments have introduced new means of remitting into the marketplace, including mobile phone transmission.[28] Transactions conducted through mobile phones have the potential to transform the remittance industry by replacing traditional fixed location agents with a remitter's mobile phone – a development that has the potential to alleviate the marketplace's current cost and access problems.[29] The Board has solicited comment on how disclosure requirements should apply to remittances conducted purely through mobile phones. While Appleseed wishes to encourage the development of new, less-costly mechanisms for remitting, disclosures for remittances made through emerging technologies must meet the requirements of the statute.

i. Discussion

Disclosures that appear directly on a consumer's may not be "in a form the sender may keep" or comply with the formatting requirements in the proposed regulations. Dodd-Frank requires that disclosures be in a form the sender can keep.[30] However, a disclosure sent via text message to the sender is not likely "in a form the sender may keep" because cell phone carriers regularly delete text message data and messages stored locally on a consumer's phone are subject to

[28] Manuel Orozco, *Is there a match among migrants, remittances, and technology?* Sept 30 2010 at 11.
[29] Colin C. Richard, *Dodd-Frank, International Remittances and Mobile Banking: The Federal Reserve's Role in Enabling International Economic Development*, 105 NU L Rev. Colloquy, 248, 255 (2011).
[30] 15 U.S.C.A. 1693o-1(a)(2).

memory limitations.[31] A further difficulty is that providers that offer remittance services through text messages or mobile phone applications may have difficulty complying with the grouping and proximity requirements in §§ 205.31(c)(1) and (2). All mobile phones that use SMS can only receive text messages of 160 characters or less. This means that the disclosures will need to be sent in multiple, discrete messages to the user's mobile phone. This creates a danger that the messages may arrive or be displayed in an improper order or that the way the disclosure is partitioned into multiple text messages could be confusing (e.g. if the provider is not careful, the message could be split mid-sentence). Considering the size of most mobile phone screens and the length of disclosures (in particular those that include foreign languages), a disclosure made on a cell phone could be tedious to read.

ii. Recommendation

Appleseed recommends the Board not allow a provision of disclosures solely via text message or mobile phone application. Dodd-Frank allows two exceptions for providing written, pre-transaction disclosures: instances when the transaction is initiated electronically or conducted entirely by phone.[32] Appleseed recommends that the Board allow providers to supply post-transaction disclosures for mobile phone transactions by providing disclosures in electronic form or through written mailed receipts. If the mobile phone remitters have Internet access, then providing disclosures electronically would most accurately replicate the instant provision of a written disclosure that occurs at brick and mortar stores. However, not all senders will have Internet access and in those cases the provider could comply by sending a written disclosure in the mail. This approach would provide the consumer with a disclosure in a retainable form consistent with the statute while still allowing flexibility for the provider.

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[31] Jacob Leibenluft, *Do Text Messages Live Forever?*, Slate (May 1, 2008) (accessed at http://www.slate.com/id/2190382/).
[32] 15 U.S.C.A. § 1693o-1(a)(5).

The pre-transaction disclosure presents a greater difficulty. Allowing providers of mobile phone remittances to send the initial disclosure solely through a text message is likely inconsistent with the statute because the disclosure would not be in a "form the sender can keep." However, because the consumer is not speaking with another person (in contrast to transactions conducted entirely by telephone), the consumer cannot be given the disclosure orally. The Board should consider solutions that would allow providers to communicate the pre-transaction disclosure as quickly as possible, but not permit pre-transaction disclosures to be sent via text message unless those text messages are in a form the consumer may keep and the text messages meet all formatting requirements.

Because mobile phone technology is rapidly advancing, the requirements related to disclosures and mobile phones should be regularly evaluated – if a means of providing disclosures in a retainable form while preserving the regulations' formatting requirements directly via mobile phone is developed, providers should be allowed to use that means.

h. Appleseed agrees that a "facts and circumstances" approach should govern which foreign languages are used for the required disclosures.

The Dodd-Frank Act requires providers to supply disclosures in English and in each of the foreign languages "principally" used by the provider to advertise, solicit, or market remittances.[33] The Board has proposed a rule that will require providers to supply disclosures in all languages principally used in advertising for remittance transfer services based on an evaluation of the "facts and circumstances" surrounding each location where services are performed. This means that providers that use a foreign language frequently in one location will be required to provide disclosures in that language at that location while providers that use the language in few instances at that location will not need to provide disclosures.

[33] 15 U.S.C.A. § 1693o-1(b).

i. Discussion

The Board's proposed approach balances the interests of consumers and business. The approach looks at the circumstances of the provider at a particular location and requires disclosures in the languages principally used at that location to advertise remittance services. This approach will likely encompass most of the foreign languages used by customers of any given location but will not require providers to take on the burden of providing disclosures for infrequently used languages.

The statute requires that disclosures be made available in "each" of the foreign languages principally used by the provider. The Board's decision to require disclosures in *all* foreign languages "principally used" rather than the *one* language principally used properly gives meaning to the word "each."[34]

ii. Recommendation

Appleseed recommends that the Board maintain the facts and circumstances approach and require disclosures in all foreign languages principally used in advertising remittance transfer services.

i. Appleseed recommends that the Board create guidelines regarding the use of multiple foreign languages appearing on a disclosure in order to ensure clarity of those disclosures to consumers.

The Board has solicited comment on how many foreign languages should appear on each disclosure.[35]

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[34] Electronic Funds Transfers, 70 Fed. Reg. at 29,905 – 06.
[35] *Id.* at 29,920.

i. Discussion

Appleseed shares the Board's concern that disclosures could become unnecessarily confusing if they contain too many foreign languages. However, a disclosure with many foreign languages may be readily understandable if the information is presented properly, while a disclosure with only two languages could be confusing depending on how the information is presented. Ultimately the most important factor is the consumer's ability to understand the disclosure

ii. Recommendation.

Appleseed recommends that rather than adopting a ceiling on the number of languages that may appear on a disclosure, the Board instead create guidelines that ensure disclosures with multiple foreign languages are easy to understand. So long as the disclosure presents information clearly, a provider should have the flexibility to provide multiple languages on the same disclosure.

j. Appleseed recommends that the disclosures provide contact information for the Consumer Financial Protection Bureau.

The Board has solicited commentary on whether post-transaction disclosure should include the telephone number of the Bureau in cases in which it is not the primary regulator of the remittance transfer provider (e.g., in cases in which the provider is a financial institution).

i. Discussion

While states may require providers to list the regulator and regulator contact information on the money transmitters that they license, there still are some states that provide no oversight over money transmitters, seemingly leaving a sender in such a state with no regulator with which to

lodge a complaint. In addition, an agency at the federal level promulgating federal regulations should disclose its contact information to the public.

ii. Recommendation

Appleseed recommends that the disclosures provide contact information for the Bureau. Even though it may not have the power or resources to investigate all claims, the Bureau is responsible for the regulations after the transfer of functions occurs in July 2011 and a consumer should be informed of an outlet with which to file a complaint if concerned that the regulations have been violated by a particular provider. Again, even if it does not investigate every claim, the Bureau should establish a complaint tabulation system so that it can launch an investigation if pattern or practice evidence warrants it.[36] Consumers should be given a number identifying their complaint and be able to call back to find out if the Bureau is acting on the complaint.

k. Appleseed recommends the Board require disclosures to provide more information regarding consumers' error resolution rights.

The statute requires the post-transaction receipt to contain "a statement containing information about the rights of the sender under this section regarding the resolution of errors."[37] The Board has proposed to allow providers to meet the error resolution rights disclosure requirements in Dodd-Frank by providing an abbreviated statement of rights on the post-transaction receipt and by making a longer statement of rights available on request by the consumer.

i. Discussion

The Board has attempted to balance accurate disclosure of consumer rights while displaying those rights in a concise format. Model Form A-37, the model short form disclosure of rights

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36 12 U.S.C.A. § 5534

37 15 U.S.C.A. 1693o-1(a)(2)(B)(ii)(I)

that will appear on receipts states, "[y]ou can contact us for a written explanation of your rights." While this disclosure is concise, it is not necessarily a "statement containing information about the rights of the sender." The proposed short model form seems to be merely a statement declaring that those rights exist.

ii. Recommendation

Appleseed recommends that the Board require the post-transaction receipts to contain a more comprehensive statement of a consumer's error resolution rights. Congress explicitly provided both procedural and substantive rights to consumers when transactions go awry. Senders may notify providers within 180 days of the promised delivery date, orally or in writing, if errors occurred. Remittance providers must resolve the error and investigate reasons for the error within 90 days of being notified of the alleged error, or provide written notice to the sender that there was no error. The statute does not preclude senders from going to court, exercising remedies under state law, or filing complaints with the Bureau. Appleseed believes the statute may require information regarding a consumer's rights to be made available in the receipt rather than informing a consumer that they may be given information about their full rights. While succinctness in the post-transaction disclosure is important, the statute may require that the consumer's rights be disclosed in greater detail. Appleseed recommends that consumers be given a more extensive description of their rights, perhaps similar to those required by California state law, which contain a three-paragraph description of error resolution procedures on each receipt.[38]

III. 205.32 – Estimates

The statue allows the Board to create rules that will deem estimates accurate for the purposes

[38] CA FIN § 1842.

of the statute in certain cases. The Board has opted to use this authority and has proposed a temporary exception for certain insured institutions as well as a permanent exception for ACH transfers and for transfers to countries with laws that would make the provider unable to provide an accurate exchange rate.[39]

a. Appleseed urges no extension of the temporary, five-year exception for insured institutions.

Dodd-Frank gives the Board authority to provide a temporary, five year safe harbor period in which federally insured banks and credit unions can satisfy disclosure requirements by providing reasonably accurate estimates.[40] The Board has opted to utilize this authority by providing a temporary, five-year exception.

i. Discussion

Appleseed understands the Board's concerns about the unique difficulties that some banks and credit unions may face with respect to the disclosure requirements. Historically, international fund transfers have involved transactions through multiple institutions before reaching the beneficiary. These intermediary institutions may impose fees that are debited against the amount being transferred to the recipient. Because the originating institution may lack a relationship with these institutions, it may not know what fees will be charged against the amount being transferred. Thus in order to comply with the proposed regulations, these institutions will need to alter their business practices and develop relationships with intermediary institutions or develop technology that can determine fees in advance.

Appleseed believes banks and credit unions can make the necessary changes in less than five

[39] Electronic Funds Transfers, 70 Fed. Reg. at 29921.
[40] 15 U.S.C.A. § 1693o-1(a)(4).

years and the regulations should encourage these institutions to adopt new practices with alacrity. Congress enacted a strong "total cost" disclosure law because it *intended* to change business practices that hid surprise costs, permitted undisclosed exchange rates with high margins, and other additional fees. Banks and credit unions can build a single, fixed fee into their pricing that covers all fees and add-ons and make that number known to both consumers and their correspondent foreign entities. Should additional costs emerge, the banks and credit unions, not consumers, are in the best position to absorb unexpected costs. Business practices that permit unknown pass-along costs subvert the value of transparency and disclosure of total cost that is at the heart of Section 1073 and should end quickly. The statute, while authorizing a five-year grace period from time of enactment, also says "subject to the rules prescribed by the Board."[41] The Board could thus rule that banks and credit unions should immediately begin negotiating agreements with correspondent entities or otherwise take steps to achieve full compliance with the "total cost" norms of Section 1073.

ii. Recommendation

Appleseed recommends that the Board clearly state that the five-year exception for insured depository institutions and credit unions will not be extended beyond five years at the absolute latest and that such exempted entities must begin immediately taking affirmative steps to come into compliance with the transparency norms of the bill. The Board should also seriously consider the feasibility of cutting the grace period shorter in order to encourage expeditious negotiations and prompt changes in business practices.

b. Appleseed recommends the Board use its permanent exception authority sparingly.

The Board also has authority to create a permanent exception for instances in which a provider

[41] *Id.*

cannot determine the information that must be disclosed because of the laws of the country to which funds will be sent or because of the method by which transactions are made in the recipient country.[42]

i. Discussion

The Board has opted to propose regulations implementing the permanent exception for instances in which laws of the recipient country preclude accurate disclosures.[43] This exception seems necessary because the laws described in proposed comment 32(b)(1)-1 make accurate pre-transaction disclosure impossible.[44] However, relatively few countries have these types of laws and the exception should be limited only to those instances that meet a standard of proof established by the Bureau. We salute the Board for distinguishing between legal impossibility and the ordinary costs of complying with a new law. The Board has also proposed to limit the "method by which transactions are made" exception to apply to transactions conducted through international ACH because the exchange rate is set after the transaction is sent during those transactions.

ii. Recommendation

In implementing these regulations, Appleseed suggests that the Board and eventually the Bureau, through its research function, provide guidance in the form of a list, updated at least annually, of countries to which the permanent "laws of the country" exception applies along with justification for its determination about why the exception applies to each country. Having a list of countries where precise pre-transactions disclosures is impossible listed on the agency's website would ensure that the permanent exception is not used as a loophole enabling

[42] 15 U.S.C.A. § 1693o-1(c).
[43] Electronic Funds Transfers, 70 Fed. Reg. at 29,923.
[44] *Id.*

providers to use estimates when they could in fact take uncertainty into account through pricing. Providers would also likely find a list useful as it would provide a quick and easy means of determining when the exception applies.

With respect to the "method by which transactions are made," Appleseed believes this exception should be strictly limited to instances in which the amount of currency received by the recipient is truly "unknowable" in ACH transactions. Appleseed's position is that while providing an accurate receipt might require alteration of business practices for international wire transfers, that information is knowable and any allowance for estimates should be limited to the five year temporary exception only. Even with ACH transactions, the estimate must tell the sender *how* the rate will be fixed and where it will be published, so that the sender and recipient can be sure that the exception for ACH was applied properly.

c. Appleseed recommends that Federal government sources be used as a basis for an estimate of an exchange rate, unless there is no Federal government source for a particular currency.

The Board has proposed to allow providers estimating exchange rates (besides ACH transfers) to base those estimates on a publicly available wholesale exchange rate.[45] The proposed commentary cites sources such as *The Wall Street Journal* as publicly available sources from which providers can find an exchange rate.

i. Discussion

Allowing sources such as newspapers may be more convenient for providers, but may provide less consistency overall. Exchange rates disclosed in different newspapers may be based on different data and therefore could create confusion and inconsistency.

[45] *Id.* at 29924.

ii. Recommendation

Appleseed recommends that the Board require use of specified Federal government sources for its estimates, such as the one available on the Board's own website, to the greatest extent possible.[46] Appleseed believes that requiring the source of the estimate to come from within the Federal government is a more objective standard and should result in more conformity among providers with respect to such estimate. Only if the particular currency is not tracked by the specified Federal government sources should the provider be able to rely on other publicly available sources.

IV. 205.33 – Error Resolution

Ensuring that consumers have adequate consumer protections and access to error resolution procedures is another critical component of a competitive and accessible remittance market.[47] While individual providers may currently have their own procedures for resolving errors, and states that regulate money transmitters may also have error resolution requirements, the Dodd-Frank Act and its regulations provide consistency across the industry.[48]

Appleseed believes the proposed regulations as written implement the statute in way that properly guards consumer interests. Appleseed does wish to comment on the importance of the Board's decision to include fraudulent pickups in the definition of error and to recommend the Board provide greater guidance on how a provider should proceed if it cannot contact a sender.

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[46] http://www.federalreserve.gov/releases/h10/.
[47] World Bank, *General Principles for International Remittance Services*, at 21.
[48] *See generally, Id.*, at 16 (the remittance industry is likely to flourish best when the general legal framework in which it operates is sound and predictable).

a. Appleseed agrees that the error resolution requirements should include fraudulent pick-ups.

The Dodd-Frank Act directs the Board to establish "clear and appropriate standards for remittance transfer providers with respect to error resolution."[49] Consistent with that authority, the Board has determined that the definition of "error" includes instances of fraudulent pick-ups.[50]

i. Discussion

The remittance provider in the U.S. would be in a better position to contact the receiving institution than the consumer. In addition, perhaps for direct transmitting relationships between a U.S. provider and a non-U.S. receiving institution, the U.S. remitter could require certain procedures by contract. In the U.S., the agent could require a pin number to be used by the recipient before being provided the funds. The sender could then specify the funds could only be picked up when the pin number is provided, or other security measures along these lines could be developed. Additionally, the provider can better bear the losses that occur if funds are picked up fraudulently because it can better insure against those losses or distribute the costs of refunding those losses among all consumers, rather than the alternative, which would place the costs of fraud on the sender.

ii. Recommendation

Appleseed recommends the Board maintain the proposed definition and not revert to a narrower definition that would exclude fraud. The provider is in the best position to prevent fraudulent pickups and therefore should be held responsible if they occur.

b. Appleseed recommends the Board set a default remedy of refunding funds to the sender and provide guidance on how a provider should handle cases in which

[49] 15 U.S.C.A. 1693o-1(d)(2).
[50] Electronic Funds Transfers, 70 Fed. Reg. at 29,928.

the sender cannot be contacted after an error is discovered by the provider, sender, or recipient.

The Board has solicited comment on whether it should allow providers to choose a default remedy for correcting errors. While a default remedy may be useful, the proposed regulations should provide additional guidance that address what a provider should do if it cannot contact the sender.

i. Discussion

A default remedy may be a useful tool to help ease burdens on providers and to decrease uncertainty for consumers. However, allowing providers to choose any remedy could be problematic. For example, if the recipient receives $500 but should have received $550 according to the pre-transaction disclosure, then the provider should be required to provide $50 to correct the error. In that instance, certain default remedies, for example choosing to send the $50 to the recipient, could be sub-optimal from the consumer's point of view. If the recipient needed the money for an emergency, then the money will have arrived too late and the sender may have preferred to keep the refund. If the recipient lives far away from the distribution point, it may be unduly burdensome for her to travel to pick up $50. Refunding the money directly to the sender would avoid these problems while providing a default remedy for a consumer.

Even if the default remedy is refunding the money to the sender, problems could arise if the provider cannot contact the sender. Currently, the regulations require a provider to "correct an error in accordance with the sender's instructions within one business day of receiving the instructions."[51] However, the guidance does not address what steps a provider should take if the sender cannot be contacted.

[51] *Id.* at 29930.

ii. Recommendation

Appleseed recommends that the Board only allow providers to issue a refund directly to the sender if it elects to permit default remedies. In addition, the provider should be required to issue the refund in the same form in which payment was made (e.g., if the sender paid in cash, she should receive cash or if she paid with a debit card, the refund should be credited to her account). The remedy should not be in credits for money available to be sent later from the same institution. In addition, Appleseed suggests the Board consider drafting guidance on what a provider should do if a sender cannot be contacted. For example, it may be useful for the Board to provide guidance on how many times the provider needs to contact the sender after it has resolved an error. We suggest three phone calls or emails as an appropriate, good faith effort to try to contact the sender.

The Board should also consider requiring larger providers to keep records of any uncollected error resolutions funds so that the sender can be given the funds if she transfers money through that provider at a different location but before the money escheats to the state. Appleseed also suggests the Board consider emphasizing that providers should comply with applicable state escheat laws if the sender cannot be contacted and should be prepared to advise recipients about general rights to claim funds that have escheated to a state that has such a law.

c. Appleseed recommends the Board strictly limit the "circumstances beyond the provider's control" exception.

Under the proposed regulations, a provider commits an error if funds are not delivered to the recipient by the date stated in the post-transaction receipt. The Board has proposed to create an exception to that requirement for certain circumstances "beyond the provider's control."

i. Discussion

The Board has proposed to add comment 33(a)-5, which provides that the exception is limited to instances of force majeure. Limiting this exception to natural disasters, civil war, and government action is critical because recipients often rely on remittances for emergencies. Requiring disclosure of a date on which the funds will be made available is an important consumer protection because many recipients may need to travel long distances to pick up funds. However, providers may not always have a correspondent relationship with banks that handle remittance transfers. This exception must not include the mishandling of the funds by a recipient institution.

ii. Recommendation

Appleseed recommends the Board add proposed commentary that illustrates that mistakes by a recipient institution do not fall under the proposed exception. Limiting this exception to instances of force majeure is a reasonable limitation, but any further expansion will endanger important consumer protections.

V. 205.34 – Cancellation

a. Appleseed supports the proposed one-day cancellation period, but suggests the Bureau consider shortening the period if it is rarely utilized by consumers.

The statute requires that the Board propose regulations to implement "appropriate remittance . . . cancellation policies . . ." The proposed regulations will give consumers a one day window to contact the provider and cancel a transaction so long as the funds have not been picked up by the recipient.[52]

[52] *Id.* at 29933.

i. Discussion

Providing a meaningful cancellation period is a critical consumer protection. Texas Appleseed helped pass a state law requiring providers to supply disclosures similar to those required by the Dodd-Frank Act.[53] The Texas law provides thirty minutes for consumers to cancel the transaction so long as they have not left the premises. The proposed regulations will allow consumers a full business day to cancel the transaction, which provides greater flexibility than the Texas law. Providing a full day rather than a mere thirty minutes will benefit consumers by providing more flexibility when conducting transactions. Because no cancellation is possible if the funds have been picked up, the possibilities for arbitrage are limited.

However, the longer cancellation periods also come with additional costs. Remittance providers that use wire transactions to transmit funds will likely need to wait the full day before sending money. The cancellation period may impose increased costs on providers, which may require passing those costs to consumers through the fees charged by providers. And some consumers may need the money immediately for emergencies and other purposes.

While providing additional consumer protections is important, they are only useful if utilized by consumers. Consumers may only infrequently cancel transactions between the period thirty minutes after the transaction occurs but less than one business day after the transaction.

ii. Recommendation

Appleseed believes the proper timeframe for cancellation should depend on how frequently consumers utilize the cancellation period. Providing a full business day is a useful consumer

[53] Tex. Fin. Code Ann. § 278.052.

protection if consumers take advantage of that time to cancel transactions. However, consumers might decide to cancel immediately (i.e. within 30 minutes) or after a change in circumstances that occurs much later than one business day. Because remitting customers often place a premium on prompt transfers of funds, the costs of delaying some transfers by a day or the added costs that are passed to consumers may outweigh the value of a longer period of cancellation for consumers. Appleseed recommends the Board maintain the one business day time limit, but that the Bureau study when cancellations occur. If the Bureau determines that consumers rarely cancel after the period immediately following the transaction but before the elapse of one full business day, decreasing the time allotted for cancellation to something closer to thirty minutes might adequately protect consumers while imposing fewer burdens on providers.

VI. 205.35 – Acts of Agents

a. Appleseed recommends adoption of the strict liability standard for a provider's liability with respect to its agents.

The Dodd-Frank Act directs the Board to prescribe the appropriate standard of a remittance transfer provider's liability with respect to its agents.[54] The Board has provided two alternatives: strict liability or strict liability with a defense if the provider adopts written policies and remedies the asserted error.[55]

i. Discussion

The purpose of strict liability is to shift incentives onto the party in the best position to control costs. The provider is the party training, hiring, and setting procedures for its agents and therefore has the best ability to prevent errors. Strict liability will give the provider greater

[54] 15 U.S.C.A. § 1693o-1(f).
[55] Electronic Funds Transfers, 70 Fed. at 29,934 (May 23, 2011).

incentives to take an active role in ensuring its agents carefully follow all parts of the proposed regulations. Strict liability may also promote innovation and experimentation—holding the provider liable for the mistakes of its agents will motivate it to develop novel procedures that might better avoid errors.

Alternative B is likely to be less effective because it relies on providers to enforce their own policies. Those that send remittances in the United States are often recently arrived and may lack formal education or familiarity with the banking system.[56] This segment of the population is likely one of the *least* willing to assert its rights or otherwise "rock the boat." For example, in recent lawsuit, the Federal Trade Commission estimated that only 25% of consumers who sent fraudulently induced money transfers reported the fraud.[57] Adopting Alternative A will encourage providers to take greater care in hiring, overseeing, and auditing its agents.

ii. Recommendation

Appleseed recommends the Board adopt alternative A and impose strict liability on providers for the acts of their agents. Strict liability and the resulting administrative and civil liability would provide the greatest incentives to avoid errors in the first instance.

VII. Education and Outreach

a. The Bureau, through its Office of Financial Education, should initiate a campaign to educate consumers about the new regulations and the protections they provide.

Again, Appleseed wishes to emphasize the importance of § 1073 of the Dodd-Frank Act and the proposed regulations – they are a critical step forward in ensuring transparency and meaningful consumer protection in the remittance marketplace. Once the new regulations are

[56] Congressional Budget Office, *Remittances: International Payments by Migrants*, May, 2005 at 5.
[57] Complaint at 16, *Fed. Trade Comm. v. MoneyGram Int'l, Inc.*, No. 09CV06576 (N.D. Ill Oct. 19, 2009).

finalized, the next step is ensuring consumers understand the their new rights.

i. Discussion

Many remitters, whether for socioeconomic reasons, cultural norms, or legal status, are hesitant to challenge authority. A study cited in a 2005 report by the Congressional Budged Office found that remitters "tend to be recently arrived, young, married men with little education, low earnings, and little familiarity with formal banking systems.[58] The remitting population likely has less access to the Internet or other formal sources in which to educate themselves about laws or their rights. Further, the new law requires active assertion of errors on the part of the consumer. Considering that many immigrants are hesitant to challenge authority for fear of formal reprisal, education is extremely important to ensure the remitting population actively asserts their rights.[59]

Educating consumers about their new rights is a crucial step in ensuring consumers actively assert their rights and engage in the error resolution process. One of the Bureau's primary functions is to conduct financial education programs[60] and it is directed to establish an Office of Financial Education.[61] Ensuring that consumers understand the disclosures and the error resolution process is a critical step in empowering remitters to "make better informed financial decisions."[62]

[58] Congressional Budget Office, *Remittances: International Payments by Migrants*, May, 2005 at 5.
[59] *See e.g.* Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 Duke L.J. 891, 913-14 (2008) (undocumented immigrants are loathe to challenge mistreatment because of their precarious legal status).
[60] 12 U.S.C.A. § 5511.
[61] 12 U.S.C.A. § 5493.
[62] *Cf id.* (the Office of Financial Education's purpose is to educate and empower consumers to make better informed financial decisions).

ii. Recommendation

Appleseed recommends that the Bureau, through its Office of Financial Education, conduct a publicity and education campaign targeted at remitting consumers and designed to inform them about the new protections provided by Dodd-Frank and the final rules. Educating consumers about their new rights will help them make more informed financial decisions and is therefore consistent with the goals of the Office of Financial Education. The Board should also consider reaching out to remittance providers to ensure they understand what the new laws require.

VIII. Conclusion

The proposed regulations are an admirable step towards protecting consumers that send remittances. These new rules will encourage development of a more efficient marketplace by ensuring consumers have access to the information necessary to make informed choices when sending remittances. A more efficient marketplace will increase consumer confidence in legitimate remittance businesses and drive them away from informal, dangerous channels of transferring money. Finally, once the proposed regulations go into effect, many consumers will be unaware of their new rights and the Bureau should initiate a consumer education campaign designed to inform consumers about their new rights and providers about the new standards they must follow.

Appleseed
Sowing the Seeds of Justice

Thank you for your consideration of our views. If you have any questions concerning these comments or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact Betsy Cavendish, Executive Director, Appleseed, at 202.347.7960 bcavendish@appleseednetwork.org, or Annette LoVoi, Director of Financial Access and Asset Building, at 512.542.0082, alovoi@appleseednetwork.org.

Sincerely,

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