L'Embarras du Choix: A Year of Developments in the Laws Affecting Remittance Transfers, Credit Cards, and Certain Prepaid Cards

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L’Embarras du Choix: A Year of Developments in the Laws Affecting Remittance Transfers, Credit Cards, and Certain Prepaid Cards

By Sarah Jane Hughes*

I. INTRODUCTION

Following Richard Cordray’s appointment as the first Director of the Bureau of Consumer Financial Protection (“CFPB”), the CFPB began to exercise the authority given to it by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”). Its recent final and proposed rules and additional notices of proposed rulemaking affecting e-payments and credit services are among the most significant e-payments developments since June 2011. However, they were not the only significant e-payments developments in the past year. Accordingly, this survey also covers selected developments from two other federal agencies, the Department of Treasury’s Financial Crimes Enforcement Network (“FinCEN”) and the Board of Governors of the Federal Reserve System (“the Board”), state-law developments related to remittance payments, and decisions from courts in the United States and the European Union since last year’s survey. 3

Part II of this survey covers the CFPB’s February 2012 final “remittance transfer” amendments to Regulation E, which implement the Electronic Fund

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Transfer Act ("EFTA"), and several subsequent actions to close a regulatory gap those amendments created for consumers and certain remittance providers taken or to be taken by the Board to amend Regulation J, the American Law Institute ("ALI") and Uniform Law Commission, and New York State.

Part III focuses on credit card fee regulations in the United States and the European Union, particularly a 2011 preliminary injunction granted to First Premier Bank against implementation of the Federal Reserve Board 2010 Credit CARD Act first-year fee regulations, and the May 24, 2012 decision by the General Court in MasterCard, Inc. v. European Commission.

Part IV focuses on three of many developments in the laws affecting "gift cards" and other "stored-value" or "prepaid" products. These include FinCEN's July 2011 amendments to Bank Secrecy Act ("BSA") regulations to reach "prepaid" cards, the January 5, 2012 decision by the United States Court of Appeals for the Third Circuit in New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff, and the CFPB's May 2012 notice of proposed rulemaking on reloadable prepaid cards.

II. THE CFPB ADOPTS REMITTANCE TRANSFER REGULATIONS AND EXPOSES A REGULATORY GAP AFFECTING CERTAIN FUND TRANSFERS

The federal EFTA and its implementing regulation (Electronic Fund Transfers, commonly known as Regulation E) apply to electronic fund transfers if the

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9. First Premier Bank v. CFPB, 819 F. Supp. 2d 906, 923 (D.S.D. 2011) (enjoining implementation of the Board’s expanded 2011 version of 12 C.F.R. § 1026.52(a) on the ground that the Board’s interpretation of the Credit CARD Act was not entitled to deference).
12. 669 F.3d 374 (3d Cir. 2012).
medium of communication is electronic, the person initiating the instruction is a consumer, and the instruction is to debit or credit an account the consumer holds with the financial institution receiving the instruction.\textsuperscript{15} Section 1073 of the Dodd-Frank Act mandated amendments to Regulation E to provide consumer protection rules for remittance transfers sent by consumers in the United States to beneficiaries in other countries.\textsuperscript{16} The consumer protection rules added time-limited transfer-cancellation rights, requirements for the investigation by providers of alleged errors, and remedies for errors.\textsuperscript{17}

Dodd-Frank Act section 1073's additions of "remittance transfer" provisions to the EFTA and the CFPB's Final Regulation E Remittance Transfer Amendments will create, as of their effective date in 2013, a regulatory gap among the EFTA, Article 4A of the Uniform Commercial Code, Regulation J, and Article 4A's incorporation in system rules and contracts such as those governing CHIPS.\textsuperscript{18} This gap, as well as steps to close the gap already underway, are described below.

A. THE CFPB'S REGULATION E AMENDMENTS WILL GOVERN CROSS-BORDER REMITTANCE TRANSFERS IN 2013

Both the Board and the CFPB participated in the Regulation E amendments to implement the Dodd-Frank Act's section 1073. The Board issued the pertinent Notice of Proposed Rulemaking in 2011,\textsuperscript{19} and the CFPB, which assumed enforcement and rulemaking authority for the EFTA on July 21, 2011,\textsuperscript{20} issued the Final Regulation E Remittance Transfer Amendments.\textsuperscript{21}

The CFPB's Final Regulation E Remittance Transfer Amendments will apply Regulation E's subpart A to any person, not only financial institutions, and subpart B only to remittance transfer providers.\textsuperscript{22} Regulation E will govern all cross-border "remittance transfers," which are defined as the "electronic transfer of funds," if the remittance transfer is made in the normal course of the provider's business.\textsuperscript{23} A transfer is characterized as a "remittance transfer" even when the consumer sender does not own an account with the remittance transfer provider.\textsuperscript{24} For purposes of defining "remittance transfer," it is irrelevant whether

\textsuperscript{15} 12 C.F.R. § 1005.3(a) (2012).
\textsuperscript{17} Id.
\textsuperscript{18} See Reg. J Final Amendments, supra note 6, at 21856.
\textsuperscript{20} Designated Transfer Date, 75 Fed. Reg. 57252, 57252 (Sept. 20, 2010); Dodd-Frank Act §§ 1025(b), 1061, 1100A, 12 U.S.C. §§ 5515(b), 5581, 1604(b) (Supp. IV 2010).
\textsuperscript{21} Final Regulation E Remittance Transfer Amendments, supra note 4. Together with the Final Regulation E Remittance Transfer Amendments, the CFPB issued a separate proposed rule to obtain additional comments on the Final Amendments' coverage and preauthorized remittance transfers. Electronic Fund Transfers, 77 Fed. Reg. 6310 (proposed Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005). This survey does not discuss the 2012 proposal.
\textsuperscript{22} Final Regulation E Remittance Transfer Amendments, supra note 4, at 6285.
\textsuperscript{23} 12 C.F.R. § 1005.30(e), (f) (2012).
\textsuperscript{24} Id.
the transaction is also classified as an "electronic fund transfer," as defined in 12 C.F.R. § 1005.3(b), which is a transfer where the consumer's instruction was by electronic means. The new rules will not govern transactions of $15 or less, but will govern "preauthorized" transfers that "recur at substantially regular intervals." The Final Regulation E Remittance Transfer Amendments require both pre-payment, pre-transfer disclosures and post-payment receipt disclosures. The pre-payment, pre-transfer disclosures include basic terms of the transfer, specifically a disclosure that shows the rate of currency exchange, transfer fees and taxes to be collected from the sender, the amount of currency to be delivered to the recipient at the local exchange rate, the total cost of the remittance transfer, and the total the recipient will receive. Reasonably accurate estimates may be substituted if the provider is a bank or credit union or if the remittance is to be sent to certain countries.

The payment receipt must include the recipient's (beneficiary's) name and telephone number (if the sender has provided it), the date that funds will be available to the recipient, a statement about the sender's error resolution and cancellation rights using Model Form A-37 in Appendix A, the provider's name, telephone number(s), and website, and full contact information for the state agency that regulates license remittance providers and the CFPB. It also must explain both the sender's error resolution rights, including any procedures to be followed, and the provider's liability for sending the wrong sum of money to the designated recipient or delivering the funds to the wrong recipient. Remedies for transfer errors include disbursing the proper amount of funds available to the designated recipient, making a sum appropriate to resolving the error available to the sender, or refunding any fees or taxes, if not prohibited by domestic or foreign law, to the sender.

The scope of the sender's error resolution rights depends on the totality of the transfer. For example, if an alleged error involves an extension of credit, Regulation Z's error resolution procedures will govern regardless of the identity of the remittance transfer provider. Alleged unauthorized transfers are to be resolved pursuant to Regulation E's basic rules, which are now codified in §§ 1005.6 and 1005.11, with respect to the account-holding institution.

25. Id.
26. See id. § 1005.30(e)(2), (d).
27. Id. § 1005.30(b)(i)-(vii).
28. Id. § 1005.32.
29. Id. § 1005.31(b)(2). The explanation of the right to cancel must meet the requirements of § 1005.36(c) if the transfer is scheduled for at least three days before the actual transfer is to take place. Id. § 1005.32(b)(iv).
30. Id. § 1005.31(b)(2)(iv). Senders have up to 180 days to report errors and request resolution of errors. Id. § 1005.33(b)(i).
31. Id. § 1005.33.
32. Id. § 1005.33(c)(2).
33. Id. § 1005.33(f)(2).
34. Id. § 1005.33(f)(3).
The Final Regulation E Remittance Transfer Amendments drew criticism from banks and non-bank providers of remittance services and praise from consumer groups. Some bank industry groups called for an extension of the mandatory compliance date and for substantive changes to the rule.

B. THE BOARD AMENDS REGULATION J TO PROTECT FEDWIRE PARTICIPANTS

Prior to the CFPB's amendments to Regulation E promulgated in early 2012, the Board had already proposed amendments to Regulation J's Fedwire provisions. On April 12, 2012, the Board amended Regulation J so that its subpart B would continue to apply to Fedwire fund transfers even if the fund transfers also would qualify as "remittance transfers." The Board explained that its Regulation J amendments were "intended to ensure that the provisions of Regulation J, and therefore Article 4A of the [U.C.C.], apply to all Fedwire funds transfers, except to the extent that section 919 of the EFTA and rules established thereunder apply." The Board also acknowledged the need for the U.C.C. Article 4A amendment described next in this survey to remedy the gap for non-Fedwire transactions.

C. THE AMERICAN LAW INSTITUTE APPROVES U.C.C. ARTICLE 4A AMENDMENTS TO PROTECT NON-FEDWIRE FUNDS TRANSFER PARTICIPANTS

As the Board proposed amendments to Regulation J, it also suggested amendments to U.C.C. § 4A-108, which explains the relationship of U.C.C. Article 4A to the EFTA. On May 23, 2012, the ALI approved amendments to U.C.C. § 4A-108, developed in cooperation with the Uniform Law Commissioners, to resolve the regulatory gap that will arise once the Final Regulation E Remittance Transfer Amendments go into effect in 2013.
Without the states' timely enactment of the proposed U.C.C. Article 4A amendments, some transfers no longer would be governed by either Article 4A or the EFTA. This result would be the case for funds transfers initiated by remittance transfers even if the remittance transfer would not also qualify as an "electronic fund transfer," as the EFTA defines that term.44 Thus, cross-border remittance transfers subject to the Final Regulation E Remittance Transfer Amendments and made in person or in writing, as opposed to by electronic means, would not qualify as "electronic fund transfers" under the EFTA and Regulation E.45 As a result, those transfers would no longer be covered by Article 4A's rules that govern parties' rights and responsibilities.46 Accordingly, providers of cross-border "remittance transfers" that are not "electronic fund transfers" would have to execute transaction-specific contracts or renegotiate their bilateral contracts with their transfer system counterparts to cover rights and responsibilities that U.C.C. Article 4A already addresses.47

The proposed U.C.C. § 4A-108 solution clarifies that Article 4A would govern issues affecting funds transfers that are "remittance transfers" but not "electronic fund transfers," as defined by 15 U.S.C. § 1693o-1 and Regulation E, an exception to the remittance transfer provisions of the EFTA and Regulation E.48 It also provides that the provisions of the EFTA govern in the event of a conflict to the extent of the inconsistency.49 With the ALI's approval, the proposed amendment became ripe for action by the Uniform Law Commissioners and state legislatures.

D. NEW YORK STATE CONSIDERS ITS OWN U.C.C. ARTICLE 4A AMENDMENTS

With modest textual differences from the ALI-approved amendments discussed in the preceding subpart, New York's State Assembly is considering Senate Bill No. 07493 to amend New York's section 4-A-108, to exclude consumer transactions governed by federal law from New York's section 4-A-108.50 If other states enact the ALI-approved amendments, Article 4A will not be as uniform as it might have been. At this time, Senate Bill No. 07493 has not been signed into law. Whether New York will amend its version to conform to versions adopted by other states, and the degree to which states follow New York's lead or follow the ALI's recommended version, remains an open question.

III. THE UNITED STATES AND THE EUROPEAN UNION TACKLE CREDIT CARD FEES (AGAIN)

This part of this survey covers three significant developments since June 2011 relating to credit card fees in the United States and the European Union.

44. Id.; see also Liebman-Sebert May 2012 Memorandum, supra note 7, at 1.
45. Liebman-Sebert May 2012 Memorandum, supra note 7, at 1.
46. Id. For additional information on the regulatory gap, see Clearing House Letter, supra note 37, at 4, 11.
47. Liebman-Sebert May 2012 Memorandum, supra note 7, at 5.
48. Id.
49. Id.
50. NY UCC Article 4A Proposed Amendment, supra note 8.
A. THE CFPB ADJUSTS FIRST-YEAR CREDIT CARD FEE REGULATIONS AFTER LOSING A CHALLENGE

The Credit CARD Act of 2009 added to the Truth in Lending Act new requirements for open-end consumer credit transactions, which include a prohibition on collection of any fees ("other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds") from the available credit of the account if the terms of the open-end plan require the payment of fees during the first year that amount to more than 25 percent of the authorized credit of the account. These new requirements have prompted multiple actions by the Board and CFPB, including a revision following a successful action to enjoin enforcement of one of the Board's actions, all of which are described below.

The Board had promulgated amendments to Regulation Z to implement the Credit CARD Act requirements in February 2010. Then, in April 2011, it promulgated expanded requirements. On September 23, 2011, a federal district court in South Dakota granted a preliminary injunction against the implementation of the expanded pre-account-opening fee limitations in the 2011 Credit Card Fee Rule. As a result of this preliminary injunction and following the transfer of authority for the Credit CARD Act to the CFPB described above, on April 12, 2012, the CFPB proposed amendments to the 2011 Credit Card Fee Rule. The 2012 proposed amendments exempt fees to be paid prior to account opening from the limitation in the 2011 Credit Card Fee Rule as codified at 12 C.F.R. § 1026.52(a).

B. MASTERCARD LOSES ITS CHALLENGE TO THE EUROPEAN COMMISSION'S 2007 RULING ON CROSS-BORDER CREDIT CARD INTERCHANGE FEES

On May 24, 2012, the General Court confirmed a December 2007 European Commission ban on charges by MasterCard and two subsidiaries—MasterCard

52. Truth in Lending, 75 Fed. Reg. 7658 (Feb. 22, 2010) (to be codified at 12 C.F.R. § 1026.52(a)).
55. Designated Transfer Date, supra note 2, at 57252 (designating transfer of certain authorities to the new Bureau of Consumer Financial Protection on July 21, 2011).
57. Id. at 21876.
International, Inc. and MasterCard Europe—for cross-border retail transactions on the ground that they breached EU antitrust laws. The 2007 ban applied EU antitrust laws to a class of interchange fees that the parties defined as “multilateral fallback interchange fees” which apply within the EEA or Euro area, that is, excluding interchange fees agreed bilaterally between issuing and acquiring banks or interchange fees set collectively at the national level (“MIF”). Key findings in the 2007 decision were that: (1) (a) MasterCard was an “association of undertakings” and (b) the MIF “led to a restriction of price competition between acquiring banks to the detriment of merchants and their customers”; (2) the MIF “aggravated” the effects of restrictions on competition in the issuing market and the interchange systems market; and (3) acquiring banks had no incentive to exert downward pressure on MIF pricing and, concurrently, merchants had no ability to “constrain the level of the MIF.” MasterCard had applied for annulment of the 2007 ban, or of portions of the ban, to the General Court.

The General Court rejected the application to annul the 2007 decision and dismissed MasterCard’s action. MasterCard promptly announced its intention to appeal the 2012 decision.

IV. U.S. REGULATORS AND COURTS TAKE ACTIONS ON PREPAID CARDS

This part of the survey discusses three significant developments relating to prepaid cards or access since June 2011.

A. FinCEN AMENDS ANTI-MONEY LAUNDERING REGULATIONS TO COVER PREPAID PRODUCTS

regulations for the "sale, issuance, redemption, or international transport of stored value, including stored value cards." 69 "Prepaid access" products include devices such as "plastic cards, mobile phones, electronic serial numbers, key fobs and/or other mechanisms that provide a portal to funds that have been paid for in advance and are retrievable or transferable." 70

FinCEN's 2011 Prepaid Access Rule adopts a "targeted approach to regulating sellers of prepaid access products" and focuses "on the sale of prepaid access products whose inherent features or high dollar amounts pose heightened money laundering risks." 71 Consistent with the targeted-approach philosophy, the rule exempts categories of products from its coverage. 72

Issuers, marketers, and sellers in a multi-level prepaid access program must designate a single entity to serve as the "provider" that will maintain transactional information and provide the information to FinCEN on request. 73 "Sellers" of prepaid access products must (1) maintain anti-money laundering programs, (2) file Suspicious Activity Reports, and (3) comply with other recordkeeping requirements governing customer identifying information. 74 Commentators hailed this requirement for making the rule "far more workable" than the proposed rule. 75

B. THE THIRD CIRCUIT UPHOLDS LIMITATIONS ON NEW JERSEY'S 2010 "GIFT CARD" ESCEHAT AMENDMENTS

Last year's survey reported on a federal district court's injunction against New Jersey's 2010 amendments to its escheat statutes to include certain "gift cards." 76 The district court had enjoined two aspects of the amendments, viz., the state's "place-of-purchase" presumption for its jurisdictional claim to escheat priority and the law's retroactive application for cards sold prior to its original effective date of July 1, 2010. 77 The district court did not enjoin the amendment's "data collection" provision requiring the collection of the

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71. 31 C.F.R. § 1010.100(ww).
72. Id. § 1010.100(ff)(4)(iii)(A)-(D).
73. Id. §§ 1010.100(ff)(4), 1022.420.
74. For the definition of "seller of prepaid access products," see id. § 1010.100(ff)(7).
75. Id. § 1022.210.
77. 2011 Electronic Payments Developments, supra note 3, at 277-78.
card purchasers' names and addresses and the maintenance of the purchasers' zip codes.79

In a January 5, 2012 decision, the United States Court of Appeals for the Third Circuit in New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff affirmed the district court's rulings on all three issues.80 Thus, following the decision, most sellers of cards in New Jersey must collect the names, addresses, and zip codes of gift card purchasers, and issuers of cards face a two-year period after a card's sale before the funds remaining on the card will escheat.81 Following the Third Circuit's decision, news media reported that retailers were withdrawing "gift cards" from the New Jersey markets in response to the 2010 statute.82

C. THE CFPB LOOKS AT REGULATING GENERAL PURPOSE RELOADABLE PREPAID CARDS

The CFPB issued both an Advance Notice of Proposed Rulemaking on Prepaid Cards83 and held a field hearing on prepaid cards on May 23, 2012.84 The ANPR seeks information on ten questions pertaining to general purpose reloadable prepaid cards and other devices, such as key fobs and cell phone applications, which allow consumer access to a financial account.85 The ANPR does not

79. Id. at 623. The court noted that its "opinion is limited to the challenge brought against 2010 N.J. Laws Chapter 25 . . . with respect to stored value cards." Id. at 623 n.1. Chapter 25's additions to the New Jersey escheat statute are codified in various subsections of N.J. STAT. ANN. § 46:30B (West 2003 & Supp. 2011).
80. 669 F.3d 374 (3d Cir. 2012).
81. N.J. STAT. ANN. § 46:30B-42.1 (West 2003 & Supp. 2011). Responding to the plaintiffs' arguments that the Credit CARD Act's provision on card expiry preempted New Jersey's new two-year escheat schedule, the Third Circuit ruled that New Jersey's 2010 amendments provided more protection for consumers and, accordingly, the Credit CARD Act did not preempt the New Jersey statute. N.J. Retail Merchs. Ass'n, 669 F.3d at 389. For a superb discussion of escheat and e-payments generally, see Anita Ramasastry, State Escheat Statutes and Possible Treatment of Stored Value, Electronic Currency, and Other New Payment Mechanisms, 57 BUS. L. W. 475 (2001).
83. Regulation E Reloadable Prepaid Cards ANPR, supra note 13, at 30923. The ANPR's Request for Comment covers regulatory coverage for prepaid products, product fees, and disclosures, product features, and other information on general purpose reloadable prepaid cards, including means of reducing the compliance burdens of prospective regulations. Id. at 30925.
85. Regulation E Reloadable Prepaid Cards ANPR, supra note 13, at 30923. The questions fall into four groups covering "(A) regulatory coverage of products by some or all of Regulation E, (B) product fees and disclosures, (C) product features, and (D) other information on GPR cards." Id. at 30925; see also Kristin A. McPartland, CFPB Issues Advance Notice of Proposed Rulemaking for Prepaid Cards, CONSUMER FIN. L. BLOG (May 23, 2012), http://www.consumerfinanciallawblog.com/2012/05/articles/consumer-financial-protection/cfpb-issues-advance-notice-of-proposed-rulemaking-for-prepaid-cards/.
cover issues with so-called "closed loop" cards, including "debit cards linked to a traditional checking account, non-reloadable cards, payroll cards, electronic benefit transfers (EBTs), or gift cards." 86

V. CONCLUSION

Despite efforts to alter the powers and funding of the CFPB that were underway as of the end of June 2011, 87 the CFPB has survived so far and, since Richard Cordray became the Director, has been active. For this survey, there was no new congressional legislation on which to report. But, because of so many other developments, the hardest task by far in writing this survey was not in deciding what to cover; it was more an exercise of what not to cover. E-payments law keeps expanding, offering up "l'embarras du choix."

86. Regulation E Reloadable Prepaid Cards ANPR, supra note 13, at 30923.
87. 2011 Electronic Payments Developments, supra note 3, at 278.