

May 1, 2020

BY ELECTRONIC DELIVERY

Jane Larimer, CEO
Nacha
2550 Wasser Terrace, Suite 400
Herndon, VA 20171

Re: Nacha Requests for Comment and Information on Meaningful Modernization Topics

Ms. Larimer:

The Clearing House Payments Company L.L.C. (“The Clearing House”)¹ respectfully submits this comment letter in response to Nacha’s request for comment on several “meaningful modernization” topics (“Proposal”), as well as a related request for information on the potential to allow Originators of ACH debits to dispute the return of an entry as unauthorized through arbitration or other means (“RFI”).²

I. Executive Summary

The Proposal would make changes to the Nacha Operating Rules (“Nacha Rules”) intended to “improve and simplify” use of ACH, including to:

- explicitly define the use of “Standing Authorizations” for consumer ACH debits;
- define and allow for “Oral Authorization” of consumer ACH debits beyond telephone calls;

¹ Since its founding in 1853, The Clearing House has delivered safe and reliable payments systems, facilitated bank-led payments innovation, and provided thought leadership on strategic payments issues.

Today, The Clearing House is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume. It continues to leverage its unique capabilities to support bank-led innovation, including launching RTP®, a real-time payment system that modernizes core payments capabilities for all U.S. financial institutions. As the country’s oldest banking trade association, The Clearing House also provides informed advocacy and thought leadership on critical payments-related issues facing financial institutions today. The Clearing House is owned by 23 financial institutions and supports hundreds of banks and credit unions through its core systems and related services.

² Nacha Request for Comment regarding Meaningful Modernization, <https://www.nacha.org/rules/meaningful-modernization>.

- clarify and provide greater consistency to ACH authorization standards across payment initiation channels;
- reduce the administrative burden of providing proof of authorization; and
- better facilitate the use of electronic and oral Written Statements of Unauthorized Debit (WSUDs).

The Clearing House supports Nacha’s goal of simplifying and improving the ACH user experience and believes these proposed changes would have a positive impact on the ACH network. As the private sector ACH Operator, we share the goal of a robust and thriving ACH system that allows new technologies and channels to be used for authorization and initiation of ACH payments, provided they are secure and do not diminish ACH network quality or consumer protections.

We have recommendations to clarify or refine certain aspects of the Proposal, including that Nacha:

- provide guidance regarding Standing Authorizations, such as expectations for documentation and evidence of acceptable “affirmative actions” to facilitate proper use of this new framework;
- provide further clarity regarding the application of the definition of an Oral Authorization to scenarios in which some information is spoken orally and other information may be confirmed through a key entered “Interactive Voice Response” (IVR) system;
- extend the effective date for changes to authorization standards so that Originators that need to make technology changes (e.g., Originators of WEB debits) have at least one year to make those modifications; and
- make explicit that an RDFI may obtain the minimum information required for a WSUD by telephone, and reflect such information and a record of the Receiver’s authentication in a written document that may be provided to the ODFI on request.

With respect to the RFI, we do not support a Nacha-sponsored arbitration or similar mechanism that would allow Originators to refute the basis of a return as unauthorized. Among other things, we believe such a process is inconsistent with the intended design and operation of the ACH network as it would create uncertainty for RDFIs that their returns of entries as unauthorized may not be honored, and unfairly create losses for RDFIs that have completed Regulation E investigations.

II. Discussion

A. Meaningful Modernization Proposal

1. Standing Authorizations for Consumer ACH Debits

Nacha has proposed to establish a new authorization framework that is intended to “fill the gap” between single and recurring ACH entries by establishing a streamlined process for a Receiver to authorize an Originator to initiate future entries to the Originator’s account at irregular intervals, rather than obtaining a new authorization for each individual entry.³ In particular, the Proposal would allow future debits to a consumer’s account (“Subsequent Entries”) pursuant to a “Standing Authorization” obtained by an Originator once the consumer Receiver takes an affirmative action defined in the Standing Authorization. The Proposal would allow ODFIs to use different SEC codes for Subsequent Entries, as appropriate based on the relevant communication channel, regardless of the manner in which the Standing Authorization was obtained.⁴ Nacha envisions this change as helping support use cases such as bill payments and payments initiated through digital assistants and mobile applications.

The Clearing House supports this proposed change. We agree that Standing Authorizations and Subsequent Entries may be useful as a means to allow new technologies and payment initiation channels to utilize ACH, particularly in the context of ongoing payment relationships and commerce. While we are supportive, we request Nacha provide additional clarification and explanation regarding certain aspects of Standing Authorizations.

First, we note that the proposed definition of Standing Authorization contemplates Subsequent Entries as debit entries created by an Originator and transmitted by an ODFI to the Receiver’s account at the RDFI, notwithstanding the proposed definition that Subsequent Entries “are initiated by a Receiver’s affirmative action ...” To avoid confusion, it may be helpful to clarify that an Originator initiates the Subsequent Entry to a Receiver’s account upon the occurrence of a Receiver’s affirmative action, rather than to state that it is the Receiver who initiates the entry.

In addition, we encourage Nacha to provide further guidance regarding the implementation of this new concept, particularly with respect to disputes. Maximizing the industry’s understanding of the intended operation of Standing Authorizations will be essential to facilitating proper use of this new authorization method, while minimizing unnecessary disputes and returns. For example, we request that Nacha provide additional detail on:

³ Recurring ACH entries are entries that occur at regular intervals for the same or a similar amount and do not require further action by the receiver.

⁴ For example, an ODFI could obtain a written Standing Authorization and then use the TEL or WEB codes for future Subsequent Entries the consumer initiates by an affirmative action over the phone or internet.

- expectations for Originator/ODFI documentation or evidence of the affirmative actions upon which a Subsequent Entry may be based and related information regarding the entry;
- whether ODFIs will be required to provide such documentation or evidence to RDFIs upon request (e.g., in the event a Receiver reports a Subsequent Entry as unauthorized); and
- how the Nacha Rules for stop payment orders would apply to Subsequent Entries.⁵

Moreover, similar to the contemplated Standing Authorization framework for debit entries, consumer Originators may seek to initiate credit entries to a Receiver at irregular intervals. For example, financial institutions may offer their own digital assistants and wish to permit their accountholders to instruct their institution to make payments to a particular business. The permissive nature of the authorization rules for single credit entries likely permits such activity without any modifications to the Nacha Rules. However, we encourage Nacha to provide the industry with clarity regarding the application of the Nacha rules to these arrangements (and to distinguish them from the Standing Authorization proposal), as this may help facilitate increased initiation of ACH credit entries through new technologies and channels.

2. Oral Authorization of Consumer ACH Debits beyond Telephone Calls

The Proposal would define “Oral Authorization” and allow it as an authorization method for consumer debits initiated orally through non-telephone means.⁶ Nacha explains that this proposed change is intended to address ambiguous rules for oral authorizations not provided during a telephone call, such as through voice interactions with digital assistants or over the internet through FaceTime, Skype or similar applications.⁷

The Clearing House supports this change, and agrees with Nacha’s view that additional certainty regarding oral authorizations may better enable businesses to adopt ACH in settings that use non-telephone “verbal interactions and voice-related technologies.” We understand the proposed definition of Oral Authorization to require a spoken statement by the consumer that he or she is authorizing an ACH debit entry (or entries) to his/her account and assent to or verification of the terms of the authorization (e.g., date, amount, account, etc). However, we request that Nacha provide further

⁵ Note that while Regulation E provides consumers with stop payment rights with respect to preauthorized (i.e., recurring) EFTs, the Nacha rules extend stop payment rights to one-time payments. See Nacha Operating Rules, Subsection 3.7.

⁶ Specially, the Proposal would define “Oral Authorization” to mean “a remote (not in-person) oral authorization of one or more Entries to a Consumer Account. An authorization that is created by voice-to-text technology is not considered an Oral Authorization if it is either (i) visually reviewed and confirmed by the Receiver prior to delivery to the Originator, or (ii) used by the Receiver without prompting by the Originator.”

⁷ The new definition would be incorporated into the definition of TEL entries by referring to a consumer’s Oral Authorization obtained via a telephone call.

guidance on whether information regarding the authorization may be provided or confirmed by the Receiver through a key entered IVR system.

In addition, with respect to the proposed record retention rule for recurring entries authorized orally, as well as the existing rules for recurring TEL entries, we request that Nacha consider alternatives to requiring Originators to retain a copy of the audio recording of the authorization, such as by permitting retention of transcripts reflecting the Receiver's identity, record of authorization, and verification of the authorization's terms. Such additional flexibility would be consistent with Nacha's aim that the Proposal reduce costs and administrative burdens.

3. Consistency of ACH Authorization Standards across Payment Initiation Channels

Nacha has proposed certain changes to reorganize and clarify the Nacha authorization requirements, which would apply the "readily identifiable" standard and requirement for "clear and readily understandable terms" to all authorizations, and incorporate the new "Standing Authorization" and "Oral Authorization" concepts into the Nacha Rules. The proposed changes would also explicitly define the minimum data elements required for all consumer ACH debit authorizations, which is a change intended to address inquiries Nacha has received from Originators regarding the specific elements that should be included in a "good authorization."⁸

The Clearing House supports these proposed changes and believes they will provide ACH stakeholders with greater clarity and consistency regarding Nacha's authorization requirements, as well as better understanding of those rules. We further agree that these changes may improve the quality of ACH authorizations, and ACH network quality more broadly, which we support.

However, for some Originator customers, such as Originators of WEB debit entries, the proposed effective date of July 2021 may not provide sufficient time. Such Originators may need to update their websites, electronic authorizations forms, and related systems and processes, which may necessitate securing internal technology resources and funding (if handled in house) or may require securing vendor updates. Additional time may also be needed given the impact of the COVID-19 pandemic on Originators' operations and the availability of staff resources to make required technical modifications. We recommend that Nacha take this into consideration when determining the effective

⁸ Specifically, an authorization for a debit Entry to Consumer Account of the Receiver would, at a minimum, be required to include: (a) Language regarding whether the authorization obtained from the Receiver is for a Single Entry, multiple Entries, or Recurring Entries; (b) The amount of the Entry(ies) or a reference to the method of determining the amount of the Entry(ies); (c) The timing (including the start date), number, and/or frequency of the Entries; (d) The Receiver's name or identity; (e) The account to be debited; (f) The date of the Receiver's authorization; and (g) Language that instructs the Receiver how to revoke the authorization directly with the Originator (including the time and manner in which the Receiver's communication with the Originator must occur). For a Single Entry scheduled in advance, the right of the Receiver to revoke his authorization must afford the Originator a reasonable opportunity to act on the revocation prior to initiating the Entry.

date of this change and set an effective date that is at least one year from the date approval of this rule change is announced.

4. Administrative Burden of Providing Proof of Authorization

The Nacha Rules require (i) Originators to retain proof of authorization, (ii) an ODFI to provide an RDFI with proof of authorization within ten Banking Days of receiving a written request, and (iii) Originators to deliver the proof authorization to the ODFI to enable the ODFI to comply with its obligation to the RDFI. Among other things, these rules establish a process for evidencing that a transaction was authorized, and are intended to assist RDFIs with their investigations of reported unauthorized debits. Nacha notes, however, that some Originators indicate they regularly receive debits returned as unauthorized even after they provide the proof of authorization. Rather than expend resources to provide the proof of authorization in every instance, Nacha has proposed to allow an ODFI to agree to accept the return of an ACH entry as an alternative.

Under the proposed rule, the ODFI would be required to confirm to the RDFI in writing the ODFI's agreement to accept the return, and to then accept the return within ten Banking Days of providing the confirmation.⁹ Nacha explains that the purpose of this proposal is to "alleviate the burden of providing proof of authorization in every instance in which it is requested." Importantly, if the RDFI later requires proof of authorization, under the proposed rule the ODFI would still be required to provide it.

The Clearing House supports this proposed change. It is our understanding that some financial institutions already use this practice, and we agree that explicitly allowing ODFIs to accept a return rather than expending time and resources to provide a proof of authorization each time it is requested would reduce an administrative burden. We note that this proposed change does not modify the requirement that the Originator obtain the Receiver's authorization for the entry in the first place, the related ODFI warranty and indemnity, or other rules designed to improve ACH quality and mitigate the risk of poor origination practices, and encourage Nacha to emphasize those points.

We also agree with the proposal to require an ODFI to later provide proof of authorization if an RDFI subsequently requests it for any reason. Proof of authorization may later be useful to RDFIs, including to assist RDFIs in identifying patterns of bad acts impacting their customers, or to help identify wrongdoers and take action to mitigate future losses. The proposed rule language states that upon this subsequent request, "the ODFI must provide the original, copy, or other accurate Record to the RDFI within the required time frame." We understand "the required timeframe" to mean the ten banking day period described in the existing rule, but ask that Nacha clarify or provide confirmation.

⁹ If Nacha were to implement an authorization dispute process, it may be appropriate for the ODFI's agreement to accept the return to estop the ODFI or its Originator customer from later asserting the validity of the authorization.

5. Use of Electronic and Oral Written Statements of Unauthorized Debit

Nacha has proposed to clarify and make explicit that an RDFI may obtain a consumer's WSUD electronically or orally, and that a consumer is permitted to sign a WSUD using an electronic signature. While not prohibited today,¹⁰ Nacha believes that explicit rules for electronically and orally provided WSUDs will clarify industry confusion.¹¹

The Clearing House supports these proposed changes. It is our understanding that some financial institutions already accept WSUDs electronically and orally, and that these changes would formalize in the Nacha Rules an existing industry practice. The Clearing House agrees that it is important to clear up any existing industry confusion regarding the acceptance of electronically or orally provided WSUDs and address an administrative burden by reducing exception costs and resolution time. We also note that obtaining WSUDs orally or electronically may provide a better customer experience.

Further, we believe it is important that Nacha retain parity between the methods by which telephone calls may be used by (i) an Originator to obtain a Receiver's authorization; and (ii) an RDFI to obtain a Receiver's Written Statement of Unauthorized Debit. To this point, we recommend that Nacha explicitly provide that an RDFI may obtain the minimum information required for a WSUD from the Receiver by telephone, and reflect that information, as well as a record of the Receiver's authentication of that information, in a written document that may be provided to the ODFI on request. We believe that such a change would promote further clarity regarding permissible means of obtaining a WSUD, while protecting the interests of Originators and ODFIs to obtain such information for their investigation purposes.

B. Request for Information

With the Proposal, Nacha also released an RFI that seeks industry feedback on the potential to allow ACH Originators to refute the basis of a return as unauthorized. Such an "authorization resolution dispute" mechanism could include providing evidence of a valid authorization to a third-party arbiter. Nacha states that the lack of recourse or appeal for ACH Originators that receive the return of a consumer debit as unauthorized is viewed by some Originators as a "pain point" for using the ACH network.

We understand that some Originators may have valid customer authorizations and suffer losses resulting from returns of debits that Receivers assert as unauthorized, including because the Originators

¹⁰ The Nacha Rules provide that a WSUD must be "signed or similarly authenticated" by the Receiver, and the Operating Guidelines further explain that "[i]f the similarly authenticated requirements are satisfied, an account holder does not need to sign the Written Statement of Unauthorized Debit in person at the financial institution."

¹¹ We also note that as a general matter, additional examples regarding the permissibility of electronic documentation under the Nacha Rules would likely be useful for the industry.

provided goods or services and are unable to collect payment.¹² However, we believe that Nacha-sponsored arbitration or a similar authorization resolution mechanism would undermine a fundamental aspect of ACH network design, and do not believe it is the appropriate way to address this “pain point” that Originators have raised.

We are concerned that the contemplated arbitration mechanism would unfairly shift losses to RDFIs if they were required to pay both the Receiver under Regulation E and the ODFI under the proposed authorization resolution mechanism. For example, an RDFI would take a loss if it had already provided final resolution regarding a reported unauthorized debit to its consumer customer under Regulation E and then, as a result of the authorization resolution mechanism, was required to settle with the ODFI outside of the Regulation E timeframes.¹³ The return of an ACH entry as unauthorized was not intended as a “dispute” subject to further resolution through the ACH network or rules. As the ACH network and rules were originally designed, RDFIs should have certainty that unauthorized entries they return to ODFIs will be honored where the RDFI returns the entry for valid reasons and within the established timelines. We believe that further disputes should be resolved by Originators and Receivers outside of the ACH network, rather than through their financial institutions.

Further, we believe that an authorization dispute resolution process would be costly, and agree with Nacha’s assessment that there “would be costs, perhaps substantial costs, to setting up and operating a system for authorization dispute resolution.”

While we oppose Nacha moving forward with the authorization resolution dispute concept for the reasons stated above, we believe that if Nacha were to do so, it should (i) provide the industry with additional detail regarding the estimated costs of this mechanism and how they would be covered; (ii) design proposed controls to prevent frivolous claims and misuse of any proposed process (such as dollar thresholds or a filing fee); and (iii) provide a clear explanation of why such a process would not have a negative impact on consumers.¹⁴

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¹² Although the Nacha Rules do not provide a specific recourse for Originators in these circumstances, Originators do have direct recourse options, and may also be able to protect themselves through their pricing, underwriting and insurance practices.

¹³ Under Regulation E, if a consumer reports a debit as unauthorized, the consumer’s financial institution must investigate, determine whether the error occurred, and if applicable, resolve the error within certain specified timelines. The regulation permits a financial institution to take additional time to investigate the error provided it provisionally credit the consumer’s account. The institution must, however, either finalize or reverse that provisional credit on the investigation’s conclusion.

¹⁴ Given Nacha’s acknowledgement that “[a]n appeal mechanism for ACH Originators could give a perception that the ACH Network is less consumer friendly” it may also be appropriate for Nacha to review this idea with the CFPB as part of its work to solicit feedback on this issue.

Thank you for the opportunity to comment on the Proposal and RFI. If you have any questions or wish to discuss The Clearing House's comments, please do not hesitate to contact me using the contact information provided below.

Sincerely,

/s/

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