



Leading the payments industry through rulemaking, dialogue, advocacy and education

September 13, 2016

*Via Email*

Monica Jackson  
Office of the Executive Secretary  
Bureau of Consumer Financial Protection  
1700 G Street, NW  
Washington, DC 20552

Re: Docket No. CFPB-2016-0025/RIN 3170-AA40; Proposed Rule Regarding Payday, Vehicle Title, and Certain High-Cost Installment Loans

Dear Ms. Jackson:

NACHA—The Electronic Payments Association (“NACHA”) respectfully submits the following comments to the Consumer Financial Protection Bureau (the “CFPB”) in response to the CFPB’s proposed rule regarding payday, vehicle title, and certain high-cost installment loans (the “Proposed Rule”).<sup>1</sup> We appreciate this opportunity to comment on the Proposed Rule.

## **I. Background—NACHA and the ACH Network**

NACHA manages the development, administration, and governance of the ACH Network, the backbone for the electronic movement of money and remittance information. The ACH Network serves as a safe, secure, reliable network for direct consumer, business, and government payments, and annually facilitates billions of payments. The ACH Network is governed by the *NACHA Operating Rules*, authored by NACHA, which guide risk management and create certainty for all participants. NACHA represents nearly 12,000 financial institutions via 11 regional payments associations and direct membership. Through its industry councils and forums, NACHA brings together payments system stakeholders to enable innovation that strengthens the industry with creative payment solutions.

## **II. Discussion**

A. *Overview.* NACHA supports the effort of the CFPB to improve consumer protections in connection with consumer credit products that may be prone to abuse. NACHA also supports the efforts of the CFPB to apply any payment-related limitations in this regard neutrally across different tender types, thereby helping to ensure a more level playing field between the Automated Clearing House (“ACH”) Network, where NACHA has long proactively addressed issues created by certain aggressive collection practices, and other payment mechanisms that do not benefit from the strong controls implemented by NACHA and its participating depository institutions for ACH payments. However, the CFPB must carefully craft its final regulations so as (i) to avoid over-regulating in a manner that impairs the ability of financial institutions to provide economically viable small loan

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<sup>1</sup> 81 Fed. Reg. 47864 (July 22, 2016).

products to needy consumers, and (ii) to take better account of industry efforts that address many of the CFPB's concerns in relation to the use of the payment systems by payday lenders. As the leading industry body for the oversight of electronic payments, NACHA will focus on the latter point as it relates to the implications of the Proposed Rule for ACH payments.

B. *The CFPB Should Acknowledge and Build on the Successes of the NACHA Rules.* As indicated at the outset, CFPB rulemaking has the potential to build upon the proactive efforts already taken by the industry to address inappropriate practices within the ACH Network and to expand those efforts to payment types not as carefully overseen as the ACH Network. Nonetheless, although the CFPB has the breadth of authority, enforcement powers and oversight resources that go well beyond those available to any private-sector entity, the CFPB's notice of proposed rulemaking ("NPRM") unfairly discounts the importance of private-sector efforts to combat the inappropriate use of the payment systems. While the NPRM suggest that the industry acts only when egregious practices cannot be ignored,<sup>2</sup> the history of NACHA activity in the area, which predates the creation of the CFPB itself, belies the implication that the industry cannot, or will not, address these types of practices.

For example, in 2005 the NACHA Board initiated a multi-pronged, long term effort to improve transaction quality and reduce problematic transactions in the ACH Network, including by adopting rules to create a disincentive for inappropriate origination activities, providing NACHA with additional enforcement authority, and creating new tools to facilitate the detection of and response to inappropriate origination activities. That initiative, and others since, resulted in a process of continuous assessment and improvement, and in the following successes:

- 2007: NACHA adopted a rule to establish an unauthorized transaction threshold of 1%, with associated enforcement provisions, including fines and the ability to terminate Originators from using the ACH Network; and implemented the Originator Watch List to identify Originators potentially subject to heightened scrutiny;
- 2008: NACHA adopted the "Company Name Rule" to mandate proper identification of Originators in ACH transactions, and therefore also on periodic statements, by the names that would be known to and readily recognized by consumers;
- 2009: NACHA adopted a rule enhancing consumer authorization requirements; adopted a rule requiring originating depository financial institutions ("ODFIs") to perform risk assessments; enhanced risk assessment and audit requirements; and adopted a rule requiring ODFIs to take on greater risk management practices with respect to third-party sender activities;
- 2010: NACHA adopted a rule to require separate and unique identification of ACH debits used to collect return item fees; and implemented the Terminated Originator Database to enable financial institutions to share information regarding terminated originators and third party processors;
- 2012: NACHA adopted a rule to prohibit "data passing" of consumer authorization information; and adopted a rule to shorten the timeline for correction of unauthorized return rate issues;

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<sup>2</sup> See NPRM, 81 Fed. Reg. at 48054 ("[W]hile payday industry presentment practices are so severe that they have prompted recent actions by the private rulemaking body that governs the ACH network....").

- 2013: NACHA published an ACH Operations Bulletins regarding High-Risk Originators and Questionable Debit Activity and Reinitiation of Return Entries;
- 2014: NACHA adopted a rule to reduce the unauthorized transaction threshold to 0.5% and establish new return rate levels for other types of transaction returns, with associated enforcement provisions; adopted a rule to require unique identification of reinitiated transactions, as well as specifically identifying practices deemed non-compliant with the rules on reinitiation; and adopted a rule assessing a fee on ODFIs for all transactions returned as unauthorized;
- 2015: NACHA implemented expanded return rate monitoring with respect to the reduced unauthorized transaction threshold and the other return rate levels;
- 2016: NACHA adopted a rule that will require registration or third-party senders; and will implement the Unauthorized Entry Fee as of October.

All of these successes are due to the strong and continued support of financial institutions to ensuring the ongoing integrity of the ACH Network. The outcome of these collective activities is the improvement in ACH transaction quality as measured by the rate at which ACH payments are returned. In 2004, prior to the start of NACHA's risk and quality framework described above, the return rate for ACH debits was 2.44%; whereas in 2015 that rate has been cut nearly in half to 1.28%. For unauthorized debits, the rate has been cut by more than half, from 0.065% in 2004 to 0.030% in 2015.

Notwithstanding this strong history of acting to protect the integrity of the ACH system, the NPRM makes the additional inappropriate statement that "because NACHA rules are private, there is no guarantee for the public that they will exist in the same, or an improved, form in the future."<sup>3</sup> Whether or not the NACHA Operating Rules are guaranteed in perpetuity simply is not relevant to an open-minded assessment of whether NACHA is capable or willing to address inappropriate activity in the ACH network. It is just as true, and just as irrelevant, to say that there is no guarantee that CFPB rules will not change in the future.

Instead, the CFPB should consider the concrete, proactive steps that NACHA already has taken to address potentially inappropriate activities within the ACH Network, NACHA's long history of working collaboratively with federal banking and enforcement agencies, and the extensive and inclusive rulemaking processes utilized by NACHA to generate and receive comments on its proposed rules. All of NACHA's committees that contribute to its rulemaking efforts include representatives from industries outside of the depository institutions that comprise the ACH Network. Moreover, the Federal Reserve is an observer both at the NACHA Rules and Operations Committee, which is the lead committee for rulemaking, and at the NACHA Board of Directors. Once a proposed rule has been reviewed by the Rules Committee, it is submitted for a period of public comment, including through publication on the NACHA website. Those comments are then considered and changes are made based on this input. Indeed, if the changes are sufficiently significant, the entire proposal may be republished for further comment. While this rulemaking process may not be subject to the Administrative Procedures Act, it is the most transparent rulemaking enterprise of any payments network of which we are aware. This extended and largely public process, as well as NACHA's close work with governmental agencies, has contributed to the robust set of NACHA Operating Rules that

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<sup>3</sup> See NPRM, 81 Fed. Reg. at 48055.

exist today, including those specifically designed to address the very concerns raised by the NPRM as well as others identified in the summary above.

For example, as the NPRM notes, the NACHA Operating Rules have long included a reinitiation cap that limits the re-presentation of returned ACH payments more than two times. For many years, this restriction has acted to protect consumers against excessive debits to their accounts, while providing a reasonable opportunity for duly authorized transactions to be paid when the account to be debited inadvertently has inadequate funds at the time of the original charge. More recently, because of concerns regarding potential evasion of the rule, NACHA took steps in 2014 to clarify the application of the rule (as described above). While no set of rules is able predict every possible concern that may arise in the future, the fact that NACHA has taken proactive steps to address perceived abuses of the Rules and enhance the Rules in light of evolving risks is a further indication that private sector rulemaking is working.

Although the NPRM highlights that NACHA itself has noted that bad actors may attempt to evade the NACHA Operating Rules, purposeful evasion of Rule requirements is subject to sanction through the NACHA enforcement processes and is likely to jeopardize an originator's payment processing relationships; financial institutions are unwilling to be associated with activities that violate the Rules, such as miscoding of reinitiations in order to evade reinitiation limits. Indeed, because the Federal Financial Institutions Examination Council's Bank Secrecy Act/ Anti-Money Laundering ("AML") Exam Manual has included the direction to monitor for patterns indicative of attempts to evade NACHA limitations on return entries, ODFIs will have added incentive to detect suspicious activity, lest they be criticized for an AML violation. As the NPRM acknowledges, NACHA has already further modified the NACHA Operating Rules to specify that modification of payment amounts or other similar acts of evasion will be treated as Rules violations for this purpose. The fact that NACHA is engaged in an on-going effort to prevent abusive practices on the ACH Network is an indication of the strength of the system in its ability to adapt to an ever evolving environment. Accordingly, we urge the CFPB to recognize that NACHA rulemaking is an essential adjunct to the CFPB's own efforts, and that CFPB rulemaking should be tailored to work with, and take advantage of, private sector efforts in this regard.

C. *CFPB Concerns Regarding the Reinitiation Limit are Misplaced.* As the NPRM indicates, the reinitiation limit applies to re-submission of the same payment request, not later submissions of future installments. Each separate installment on a loan, lease, or other recurring periodic payment represents a separate payment obligation. It should not be assumed that the return of a single ACH payment means that no further payments in that series will be satisfied. To the contrary, unless a payor takes action to stop payment, neither the ODFI nor the receiving depository financial institution ("RDFI") can or should simply assume that an authorization has been revoked.

Although the NPRM suggests that there is limited ability to differentiate reinitiations from recurring installments, we are not aware that has been a significant issue in practice, and NACHA's recently amended standard transaction description for reinitiations effectively differentiates those transactions. Nor is evasion as simple as the CFPB seems to suggest. As the CFPB's own data indicates, reinitiations typically occur shortly after the date of the original entry,<sup>4</sup> sometimes even on the same day. By contrast, recurring installments are typically on a monthly schedule. Moreover,

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<sup>4</sup> CFPB, *Online Payday Loan Payments*, at 16 (Apr. 2016) (a majority of re-representments occur within seven days).

potential violations can be identified by RDFIs when customers complain about multiple attempts to debit their accounts for the same transaction.

D. *The CFPB Should Not Rely on Stale Data.* Much of the NPRM relies on the analysis of data gathered by the CFPB for a period of 18 months in 2011 and 2012. The period since 2012 has seen substantial in growth ACH activity, with a 26% increase in overall ACH Network volume through 2015, and a 38% increase in online payment activity. At the same time, the NSF return rate for ACH debits fell by 21%, and fell by 31% for online payments.

This may be in part caused by the shift of some riskier payment activities to other forms of tender. As the NPRM acknowledges, “the NACHA unauthorized return and total return rate thresholds have already prompted migration to remotely created checks and debit network transactions, both of which are not covered by the NACHA rules.”<sup>5</sup> In any event, regardless of whether the substantial reduction in returns during the period of significant growth of the ACH network is the result of an absolute reduction in problematic transactions or a migration from ACH to other payment forms, the figures above confirm the success of NACHA’s efforts notwithstanding the challenges raised by the NPRM, and call into question the validity of the statistics on which the NPRM is founded. For example, the NPRM cites a 10.1% NSF return rate for online payday and payday installment lenders, and an “overall return rate” of 14.4% after taking into account “same-day presentments,” apparently based on the CFPB’s 2011-2012 study.<sup>6</sup> Although it is unclear what these data represent, to the extent that the return rates are based in part on multiple returns of a single re-presented entry, they do not take into account the impact of the September 2015 rule to update and enhance the reinitiation cap. For example, current data regarding presentments indicate that such transactions constitute only approximately 0.2% of ACH debit transactions. Similarly, other data cited in the NPRM, such as implications for NSF or overdraft fees, are significantly called into question by the consequences of the multiple initiatives that NACHA has implemented to address origination practices that lead to high rates of return. In light of the overall reduction in the rate of NSF returns described above, it is likely that the return rates on which the CFPB is basing its policy decisions have been similarly affected.

E. *The CFPB Should Clarify its “Unfair and Abusive Act or Practice” Finding.* Section 1041.13 would provide that “It is an unfair and abusive act or practice for a lender to attempt to withdraw payment from a consumer’s account in connection with a covered loan after the lender’s second consecutive attempt to withdraw payment from the account has failed due to a lack of sufficient funds, unless the lender obtains the consumer’s new and specific authorization to make further withdrawals from the account.” As the NPRM acknowledges, the NACHA Operating Rules already impose a limitation of two re-representments with the ACH Network (i.e., a total of three attempts to collect an ACH debit). NACHA offers no comment on the sufficiency of the proffered justification for this regulatory tightening of re-presentment options in connection with “covered loans.” We caution, however, that, if the CFPB adopts Section 1041.13 as proposed, it must be clear that its position relates solely to covered loans as an obligation of the lender, and should not be read to imply that any other type of re-presentment would be unfair or abusive if made in compliance with the NACHA Operating Rules or that financial institutions would have any responsibility for violation of the Proposed Rule by the lender. Although this should be self-evident to a careful reader of the Supplemental

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<sup>5</sup> See NPRM at 48055.

<sup>6</sup> See *id.* Since neither of these numbers actually appear in that study, it is difficult to assess their meaning.

Information related to Section 1041.13, which offers a justification solely as related to covered loans, we respectfully suggest that the CFPB add the following commentary provision to provide clear guidance to readers of the final rule: “The Bureau’s determination that excess attempts to withdraw payments in connection with covered loans is an unfair or deceptive practice of the lender is limited to the specific circumstances set forth in the regulation and should not be read to imply that more than two consecutive attempts to collect other types of payments in accordance with applicable private sector rules would be unfair or abusive.”

F. *The CFPB Should Clarify that the Proposed Rule is Not Intended to Excuse ACH Participants from Compliance with the NACHA Rules for ACH Entries.* Section 1041.14(c)(iii) provides authorization requirements for the collection of a late fee or returned item fee in connection with a failed payment on a covered loan. In this regard, the NPRM purports to permit the addition of the fee to the amount of the returned item. Under the NACHA Operating Rules, a lender that charges a late fee or returned item fee in such circumstances must process the fee as a separate Entry in order to preserve the ability of the RDFI to identify the re-presentation of the original Entry separate from the fee to assist consumers in recognizing when fees are being assessed in connection with transactions debited to their accounts. *See* NACHA Rule 2.12.4.3(a). If the lender wants to submit a single combined Entry, the lender must obtain a separate authorization for the amount of the re-presentation plus fee after it receives the return of the original Entry. It is important that any final Rule avoid creating confusion as to whether it is intended to override the protections provided by the NACHA Rules; we assume it is not. Accordingly, we respectfully request that the CFPB adopt a commentary provision that clarifies that: “The provisions in the regulation that provide conditions for the processing of transactions are not intended to override any additional requirements that may be imposed by the payment systems through which any payment transfer may be processed.”

### **III. Conclusion**

As explained above, although a properly composed rule related to payday, vehicle title, and high-cost installment loans could provide consumer benefits, it is important that (i) the rule substantively address abuses in a way that does not constrain the ability of financial institutions to provide needed credit products to all consumer segments, and (ii) the payment-related aspects of the rule are neutral across tender types, helping to ensure a more level playing field between the ACH system, which is subject to NACHA’s active oversight, and other payment systems that have not been proactive in addressing problematic transactions. The CFPB’s broad authority provides the means to build on the extensive work that NACHA has done for more than a decade and to extend the principles that underpin the NACHA Operating Rules to other forms of payment. This is an area where a public-private partnership is the best mechanism for achieving positive outcome for consumers that both protect against abuses and continue to encourage the growth of legitimate payment transactions. Accordingly, we trust that the CFPB will consider the above comments in that spirit.

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NACHA appreciates the opportunity to comment on this important issue. We strongly encourage the CFPB to make the clarifications requested above, to update the data on which the NPRM is based and to take into account NACHA’s role in managing the ACH system when finalizing

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the Proposed Rule. If you have any questions regarding these comments, please do not hesitate to contact me at (703) 561-3943 or [bsullivan@nacha.org](mailto:bsullivan@nacha.org).

Sincerely,

/S/

William D. Sullivan

Senior Director & Group Manager

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