NACHA
The Electronic Payments Association®

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

July 13, 2016

VIA EMAIL: regulations@labor.ny.gov

Mr. Michael Paglialonga
Department of Labor
Building 12, State Office Campus
Room 509
Albany, NY 12240

Re: Methods of Payment of Wages (LAB-21-15-00009-RP)

Dear Mr. Paglialonga:

NACHA – The Electronic Payments Association[1] respectfully submits this response to the Request for Comment regarding the Methods of Payment of Wages (LAB-21-15-00009-RP) issued by your office on June 15, 2016. The Revised Rule Making requests comment on the proposed regulation in New York state that will require employers to provide written notice to employees about available payment methods, and obtain written consent for employees to be paid by Direct Deposit or payroll debit card.

NACHA General Comments

The ACH Network enables the direct electronic movement of money and information from one bank account to another, and plays an important role in the payments landscape by serving as a safe, efficient, high-quality and ubiquitous payments system for billions of Direct Deposit and Direct Payment transactions via ACH annually. The federal government, the largest user of the ACH Network, utilizes ACH to pay its workers, beneficiaries (e.g., social security and veterans benefits, and Medicare and Medicaid payments), tax refunds and more. The value to the federal government and its electronic payment recipients is well documented.

Although not part of the text of the revised rule, the Department of Labor's response to Comment 10 says, "Prior consent that was provided without the requisite notices or in conflict with the terms of this rule is ineffective." The retroactive invalidation of employee Direct Deposit elections on the basis of detailed new disclosure obligations that did not exist at the time those agreements were entered would seriously disrupt employee expectations, with no corresponding benefit. If the Revised Rule Making is

[1] Since 1974, NACHA – The Electronic Payments Association has served as trustee of the ACH Network, managing the development, administration and rules for the payment network that universally connects all U.S. financial institutions, moving money and information directly from one bank account to another. Through its collaborative, self-governing model, education, and inclusive engagement of ACH Network participants, NACHA facilitates the expansion and diversification of electronic payments, supporting Direct Deposit and Direct Payment via ACH transactions, including ACH credit and debit payments; recurring and one-time payments; government, consumer and business transactions; international payments; and payments plus-related information. Through NACHA's expertise and leadership, the ACH Network is now one of the largest, safest, and most reliable systems in the world, creating value and enabling innovation for all participants. Visit nacha.org for more information.

finalized without modification, the unintended consequences could cause great harm to the employees in New York State that it was designed to help, as discussed further below. Given that the rule also provides that "consent may be withdrawn at any time," employees will suffer no harm, by contrast, from the Department making the new disclosure obligations prospective only. Accordingly, we strongly urge the Department to reconsider its approach to the Direct Deposit rule and address any concerns regarding existing authorizations by simply reminding employees of their option to opt out of Direct Deposit at any time.

Paper Checks Are Not the Answer

Paper payroll checks are on the decline in the U.S. for many reasons. More than 82 percent of employees nationwide are paid by Direct Deposit[2] via ACH, enabling them to receive their pay directly into their checking or savings accounts on payday. Employees that use Direct Deposit usually have faster access to their funds; paper usage is reduced, thus helping to protect the environment; expenses related to utilizing check cashing services that charge a fee to cash payroll checks are eliminated; and precious time away from the office or family is saved by not having to physically deposit paper checks with their banks or credit unions. Because Direct Deposit funds are transferred electronically, there is no risk of loss or theft of the paper check or account information reflected on the check and payments are more secure.

In addition, employees already have significant protections when entering into Direct Deposit relationships. Under the Federal Electronic Fund Transfer Act, they cannot be forced to accept Direct Deposit at an institution designated by the employer. *See* 15 U.S.C. § 1693k. Moreover, the NACHA Rules that govern the ACH network already require that a Direct Deposit authorization (i) be readily identifiable as an authorization, (ii) have clear and readily understandable terms and (iii) identify the means for revocation. In short, while the new disclosure requirements will add an additional layer of compliance complexity for Direct Deposit authorizations, employees are far from unprotected today. Moreover, as the widespread adoption of Direct Deposit makes clear, employees have a strong preference for this faster, more efficient, more cost-effective and more secure alternative for receiving pay.

If implemented retroactively, the proposed rule would turn this clearly demonstrated preference on its head by invalidating <u>all</u> prior Direct Deposit elections based on the perceived and unsubstantiated risk that some small portion of employees would change their election if presented with the full set of new N.Y. mandated disclosures. This bias toward paper is a vestige of the pre-information technology era and is directly contradicted by the actual choices that employees have made about their payroll options nationwide. Direct Deposit is the preferred method to receive pay and the Department of Labor should continue to allow an employees' existing written Direct Deposit consents to remain in effect, especially given that employees can withdraw their consent at any time.

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[2] April, 2016 Javelin Research Report, "Beyond Simple and Safe: Opportunities to Expand the use of Direct Deposit via ACH for Payroll, page 4.

The Retroactive Application of the Rule Would Harm Consumers Who have Chosen Direct Deposit

The use of Direct Deposit gives employees faster access to their funds than with paper checks. The NACHA Operating Rules define specific times when funds from Direct Deposits must be made available to employees. In most cases, employees have access to their funds at the opening of business on payday. The certainty of the availability of funds allows consumers the greatest control of managing their money. Direct Deposit can often help consumers avoid monthly bank fees because many financial institutions waive their monthly fees to when customers receive Direct Deposit. Consumers also are provided with the ability to split deposits into multiple accounts via Direct Deposit to encourage savings. The Consumer Federation of America and the U.S. House of Representatives[3] have recognized the importance of Direct Deposit to consumers and for helping consumers build savings by utilizing a split deposit of payroll.[4] Direct Deposit is also generally, perhaps universally, a free service. Consumers do not encounter fees and save time and money by not making unnecessary trips to check cashers, credit unions or banks. Unlike with paper checks, employees cannot lose their Direct Deposit, and because employees do not need to leave work to cash or deposit paychecks during the work week or wait at their desk for paychecks to be handed out by their employer, attendance and job satisfaction is improved.

In addition, many consumers have established automatic debits that are set to coincide with pay dates that are automatically satisfied through Direct Deposit. If employees are forced to reaffirm their prior Direct Deposit authorizations, some inevitably will fail to do so, either because they fail to understand the need to re-authorize a service that they have received without problem for years or due to inadvertence. Those employees would then be faced with the need to timely deposit their paychecks to ensure funds availability, a task that may be difficult to satisfy on a day to day basis, let alone when travel, vacation, holiday or illness interfere with the ability to ensure prompt deposit of checks. The unattended consequence if employees do not opt back in to Direct Deposit therefore could be that there are not enough funds in the employee's bank account to cover expenses when authorized monthly bills are debited from their accounts on certain dates that coincide with paydays. These bills could include mortgage, car, tuition, utilities and insurance or medical payments. If these bills go unpaid, employees could face drops in their credit scores, loss of a service from the entity that was not paid on a timely basis, and exposure to overdraft fees if their pay was not deposited on payday. Accordingly, NACHA strongly encourages the state of New York to reconsider this Revised Rule Making due to the many possible unintended consequences of forcing all employees to reaffirm their existing electronic payroll election.

In summary, driving consumers/employees to paper checks if they do not renew their existing ACH authorizations in a timely manner could cause security concerns, account management issues, potential overdrafts, additional fees and the burden of physically presenting checks to a bank or check casher. With 84 percent of workers in Census Region 1, which includes New York, relying on Direct Deposit for the certainty of their deposit; their bill pay timing; and for many, automated split their paychecks to

[3] Apr 29, 2016, Congressional Record, Pages E639-E640
[4] Feb. 27, 2013, Department of Labor webinar. Speaker Nancy Register, Associate Director of Financial Education, Consumer Federation of America and America Saves Week, transcript pages 18, 25-27.

promote automatic savings,[5] the proposed rule would cause unintended harm to those employees who do not choose an electronic alternative in a timely manner. Allowing employees who become dissatisfied with Direct Deposit, a miniscule subset if any, to affirmatively withdraw their existing consent is a much better alternative.

If I can be of further assistance, please do not hesitate to contact me at (703) 561-3943 or bsullivan@nacha.org.

Sincerely,
/S/
William D. Sullivan
Senior Director & Group Manager
Government & Industry Relations

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[5] Survey by Greenwich Associates dated May 11, 2016, special table #1.