

**COMMENTS
TO THE NATIONAL AUTOMATED CLEARINGHOUSE ASSOCIATION
ON ITS
PROPOSED RULE CHANGE FOR REVOKING SINGLE ENTRY AUTHORIZATION
AND OTHER MATTERS**

**BY
THE NATIONAL CONSUMER LAW CENTER
On behalf of its low incomes clients,
CONSUMERS UNION,
THE CONSUMER FEDERATION OF AMERICA,
THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES,
THE CENTER FOR RESPONSIBLE LENDING**

Proposed Rule Change For Revoking Single Entry Authorization

The National Consumer Law Center¹ on behalf of its low income clients, Consumers Union,² the Consumer Federation of America,³ the National Association of Consumer Advocates⁴ and the Center for Responsible Lending⁵ commend NACHA for its proposal to

¹ The National Consumer Law Center, Inc. (NCLC) is a non profit Massachusetts Corporation, founded in 1969, specializing in low income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low income consumers across the country. NCLC publishes a series of eighteen practice treatises and annual supplements on consumer credit laws, including Consumer Banking and Payments Law, (4th ed. 2009), and Truth In Lending, (6th ed. 2007), as well as bimonthly newsletters on a range of topics related to consumer credit issues and low income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low income people, conducted training for thousands of legal services and private attorneys on the law and litigation strategies to address predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of the all federal laws affecting consumer credit since the 1970s, and regularly provide extensive comments to the federal agencies on the regulations under these laws. These comments are written by Professor Mark E. Budnitz, the Bobby Lee Cook Professor of Law at Georgia State University College of Law, and a member of NCLC's Board of Directors. He is the co-author of four books, including NCLC's Consumer Banking and Payments Law, and over 30 law review articles, primarily about consumer payment systems.

² Consumers Union of United States, Inc., publisher of Consumer Reports, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union's publications have a combined paid circulation of approximately 7.3 million. These publications regularly carry articles on Consumers Union's own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and services, fees, and noncommercial contributions and grants. Consumers Union's publications and services carry no outside advertising and receive no commercial support.

³ The Consumer Federation of America is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy, and education.

⁴ The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

permit revocation of single entry authorization for WEB and TEL transactions scheduled in advance in circumstances where the Originator has a reasonable opportunity to act. However, we recommend that the revocation proposal also include ARC transactions. In addition, we propose that the Rules require banks to notify consumers of their right to revoke their authorization and stop payment of electronic debits. Moreover, we urge NACHA to consider providing consumers whose payments are processed through the ACH system with at least as great a right to stop payment as they currently have when they pay with checks.

Consumers should have the right to revoke single entry ARC transactions

In its proposed Rule change, NACHA correctly acknowledges that TEL and WEB payments often are scheduled in advance so the Originator has sufficient time to act on a consumer's revocation of an ACH authorization. NACHA's Request for Comment includes the example of the consumer who receives a credit card statement well ahead of the due date and calls the card issuer or goes on the issuer's web site to schedule an electronic debit to be made on the due date.

In the ARC situation, the consumer receives a credit card statement that includes a notice, required by Reg. E and the NACHA Rules, that informs the consumer that if the consumer pays by check, the card issuer may process the payment as a check or as an electronic debit. Under the Credit Card Reform Act, the issuer is required to give the consumer at least 25 days to pay. If the consumer pays by mailing a check, and the issuer chooses to process the payment as a check, the UCC provides consumers with the absolute right to stop payment on the check by notifying their bank. UCC Section 4-403. At the very least, consumers also should have the right to revoke authorization if the issuer decides to use the check solely as a "source document" and processes the payment as an electronic debit.

We have created a truly bewildering system of rights and duties. Consumers who mail a check to pay the credit card issuer likely and reasonably believe they have the right to stop payment on that check by sending timely notification to their bank. In fact, whether that is true, or whether they lose their rights is entirely beyond the consumer's control; the card issuer can decide to process the transaction as an electronic debit, and thereby deprive the consumer of the ability to stop payment of the check. The card issuer should not also be able to deprive the consumer of the right to revoke authorization by deciding to exercise the ACH option.

In the ARC scenario, consumers receive their bills well before the payment is required. As in the case of TEL and WEB transactions, a consumer in the ARC situation has the opportunity to provide notice of a revocation of authorization in sufficient time for the Originator to act on the consumer's revocation. NACHA Rules should be amended to provide consumers this right.

⁵ The Center for Responsible Lending is a non-partisan, non-profit research and advocacy organization dedicated to promoting wealth-building opportunities for low-and moderate income families and combatting abusive consumer financial practices. It is affiliated with the Center for Self-Help, a non-profit community development credit union. Self-Help also has retail credit union operations in North Carolina and California.

Notice of the Right to Revoke Authorization

For all transactions where consumers have the right to revoke their authorization, it is essential that the Originator be required to provide consumers with clear notice of their right to revoke, information about when the Originator must receive the revocation, and how to contact the Originator, such as a toll-free phone number, web site, or e-mail address. Otherwise, the right to revoke is largely meaningless because consumers will not be aware of that right. In addition, consumers need clear notices because they will be confused about who to notify. When they stop payment on a check, they must notify their bank. When they revoke authorization, they must notify the Originator.

Notice of Right to Stop Payment

NACHA Rule 8.4 contains the right to stop payment. This is a very important right for consumers. One of its key features is that consumers notify their banks that they want to stop payment of an electronic debit. This is in contrast to the right to revoke, in which consumers must notify the Originator. For many years we have received reports from consumers that when they tell the Originator they want to revoke their authorization, the Originator refuses to do so. As a practical matter, there isn't anything consumers can do to enforce NACHA's Rules permitting revocation. In contrast, banks routinely stop payment of checks (and impose hefty fees for doing so) as a matter of normal operating procedure, and as required by the UCC. We believe they are more likely to comply with consumers' stop payment orders on electronic debits than are merchants and creditors receiving consumers' revocation requests.

As in the case of revocation of authorization, the right to stop payment is meaningless unless the Rules require that consumers are informed of that right, information about when the bank must receive the stop payment request, and how to contact the bank, such as a toll-free phone number, web site, or e-mail address. The Rules should be amended to require such notice.

Consumers need equal rights; essential protection should not depend on which payment system the consumer uses or the Originator imposes

As the above discussion illustrates, in an ARC transaction consumer rights vary dramatically depending on which payment system the creditor decides to use (ACH or check processing). We believe that, whether a transaction is an ARC transfer or any other type of ACH transfer, consumers at a minimum should be guaranteed the stop payment protection provided by the Uniform Commercial Code. After all, even the UCC, which is certainly not a consumer protection statute since it lacks the most minimal disclosure requirements, error resolution procedures, and remedies that make private enforcement feasible, at least provides the right to stop payment. NACHA Rule 8.4, however, excludes from the stop payment provision ARC, BOC, POP, single entry WEB, and TEL entries. For those transactions that are not excluded, consumers must notify their banks at least three days before the scheduled date of the transfer. The three day advance notice provision being is the same as Section 907(a) of the EFTA governing preauthorized transfers.

We recommend that the Rules be amended to grant consumers the right to stop or reverse payments for those types of ACH transfers currently excluded under Rule 8.4. ACH transfers provide merchants and creditors with many advantages over check transactions such as the ability to be paid faster, at less cost, and with more certainty. Because it is so efficient, it also is more advantageous to the payment system as a whole, which is why the Federal Reserve favors electronic transfers. With everyone else benefiting from electronic transfers, it is only fair that consumers receive the benefit of protection equal to what they have when they pay by check.

Consumers need stop payment protection for several reasons. First, as explained above, the consumer's right to revoke an authorization is limited by the Originator's ability to stonewall by refusing to effectuate the revocation. Second, there are many instances in which consumers have a legitimate need to stop payment. One example is the rampant fraud committed by telemarketers and debt collectors, fraud that NACHA itself has acknowledged and taken steps to deter. See Operating Rules, Appendix 11.2 (NACHA may request information from an OFDI if the rate that debit entries are returned as unauthorized exceeds one percent). Federal regulators have sued telemarketers and their third party processors for unfair practices when they abused the payment system to collect unauthorized charges. Consumers often need to stop payment when goods are never delivered or are different from what they ordered. The epidemic of identity theft has resulted in countless unauthorized debits. Third, online payday lenders use single debit payment terms to make sure their triple-digit rate loans have first claim on deposited paychecks or benefits into the borrower's account. While the Electronic Fund Transfer Act gives accountholders the right to revoke periodic payments, this right does not apply to single payment debits. Since online lenders typically will extend a new loan as soon as payment is withdrawn from the borrower's account, many of these loans are, in practice, "periodic" loans with the finance charge deducted every payday. By extending the right to cancel a WEB single payment, NACHA will provide consumers the ability to safeguard their accounts from the modern banking equivalent of a wage assignment. A final example is the great potential for consumers to make honest typing and clicking mistakes when buying and paying on the Web. See Uniform Electronic Transactions Act, Section 10(2).

In situations involving single entry ARC, POP and WEB debits, consumers can be provided with the opportunity to stop payment by allowing the consumer to reverse a transfer within a specified number days. Alternatively, NACHA Rules could require that transfers not be finalized for a certain number of days to give consumers time to stop payment. The financial institution can always impose a reasonable fee when consumers exercise their stop payment right to compensate the institution for its trouble.