



13450 Sunrise Valley Drive • Suite 100 • Hemdon, VA 20171
Phone: 703-561-1100 • Fax: 703-787-0996
eMail: info@nacha.org
www.nacha.org

July 29, 2011

[Via e-mail to:](#)

CPSS Secretariat
Bank for International Settlements
4002 Basel
Switzerland
cpss@bis.org

IOSCO General Secretariat
28006 Madrid
Spain
fmi@iosco.org

**RE: CPSS-IOSCO Consultative Report On Principles For Financial
Market Infrastructures**

To whom it may concern:

NACHA – The Electronic Payments Association¹ respectfully submits this response to the “*Consultative Report On Principles For Financial Market Infrastructures*” (“FMI Principles”) jointly issued by the Bank for International Settlement’s Committee on Payment and Settlement Systems (“CPSS”) and the International Organization of Securities Commissions (“IOSCO”).² The issuance of the FMI Principles for public comment is particularly timely given the recent global

¹ NACHA manages the development, administration, and governance of the ACH Network, the backbone for the electronic movement of money and data. The ACH Network serves as a safe, secure, reliable network for direct consumer, business, and government payments, and annually facilitates billions of payments such as Direct Deposit and Direct Payment. Utilized by all types of financial institutions, the ACH Network is governed by the *NACHA Operating Rules*, a set of fair and equitable rules that guide risk management and create certainty for all participants. As a not-for-profit association, NACHA represents nearly 11,000 financial institutions via 17 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. To learn more, visit www.nacha.org, www.electronicpayments.org, and www.payitgreen.org.

² The CPSS serves as a forum for central banks to monitor and analyze developments in payment and settlement arrangements as well as in cross-border and multicurrency settlement schemes. The CPSS secretariat is hosted by the BIS. More information about the CPSS, and all its publications, can be found on the BIS website at www.bis.org/cpss. IOSCO is an international policy forum for securities regulators. The [Technical Committee](#), a specialized working group established by IOSCO’s Executive Committee, is made up of 18 agencies that regulate some of the world’s larger, more developed and internationalized markets.

financial situation and, in the United States, recent actions of both the Financial Stability Oversight Council (“FSOC”) regarding the designation of, and the Federal Reserve Board (as Regulation HH) regarding the regulation of, systemically-important “Financial Market Utilities” (“FMUs” – the equivalent of the CPSS/IOSCO reference to “FMIs”).

NACHA appreciates this opportunity to share our views with the CPSS and IOSCO as to the administration and operation of the ACH Network in the United States and the relevance of the FMI Principles as contemplated. We have not yet fully assessed the FSOC’s recent final ruling establishing a two-stage process for designating FMUs as systemically-important and the potential designation of the U.S. ACH Network.³ Nor has the Federal Reserve Board (“FRB”) issued its final Regulation HH. Nonetheless, both initiatives are clearly complementary of the approach taken in the FMI Principles and a collective assessment of all three policy initiatives targeting the management of clearing, settlement and other risks between counterparties is in order.

Background

New and more demanding international “principles” for payment, clearing and settlement systems have now been issued for public consultation by the Bank for International Settlement’s CPSS and the Technical Committee of IOSCO. They are set out in a consultative report [*Principles for financial market infrastructures*](#) which contains a single, comprehensive set of twenty-four (24) principles designed to apply to all systemically-important payment systems, central securities depositories, securities settlement systems, central counterparties and trade repositories (collectively “financial market infrastructures” or “FMIs”). These FMIs collectively record, clear and settle transactions in financial markets.

According to CPSS and IOSCO, the new principles are designed to ensure that the essential infrastructure supporting global financial markets is even more robust and thus even better placed to withstand financial shocks than at present. When finalized, the principles will replace the three existing sets of CPSS and CPSS-IOSCO standards, the [*Core principles for systemically important payment systems*](#) (2001); the [*Recommendations for securities settlement systems*](#) (2001); and the [*Recommendations for central counterparties*](#) (2004). The CPSS and IOSCO believe that a single set of principles will provide greater consistency in the oversight and regulation of FMIs worldwide. Compared with the current standards, the new principles introduce more demanding requirements in many important areas including:

- Financial resources and risk management procedures an FMI uses to cope with the default of participants;
- Mitigation of operational risk; and
- Linkages and other interdependencies between FMIs through which operational and financial risks can spread.

There are also principles covering issues that are not fully addressed by the existing standards. These include new principles on tiered participation and general business risk.

³ Financial Stability Oversight Council, 12 CFR Part 1320, RIN 4030-AA01, Authority to Designate Financial Market Utilities as Systemically Important. <http://www.treasury.gov/initiatives/Documents/Finalruledisclaimer7-18-2011.pdf>

After the consultation period, the CPSS and IOSCO expect to publish a final report in early 2012. Then, relevant domestic authorities (e.g., the FRB, the SEC and other agencies, including the multi-agency FSOC in the U.S.) are expected to strive to include the principles in their legal and regulatory framework by the end of 2012, and to apply the principles as part of their regulatory, supervisory and oversight activities as soon as possible. FMI's will be expected to take appropriate and swift action in order to meet the principles.

As noted, with respect to systemically-important payments and securities FMU's in the United States, the FSOC and FRB are already acting in response to Dodd-Frank Act Title VIII implementation requirements with proposals consistent with the FMI Principles.

The ACH Network in the United States

The ACH Network is a batch processing payment system that dates back to the early 1970s as financial institutions sought a method to use technology to replace paper check processing. Today, the ACH Network is a hub for the electronic movement of money and related data -- providing a safe, secure, reliable network for direct consumer, business and government payments. It is a fully electronic payment system that enables movement of money between accounts held at virtually all U.S. depository financial institutions ("DFI's").

The general public is most familiar with the ACH Network through various "Direct Deposit" programs, which are widely used for payroll, tax refunds and government benefit payments, including Social Security. Automated and online bill payments are other common and growing uses of the ACH Network by individual consumers. Businesses use the ACH Network for similar purposes, as well as to convert payment made by check into electronic debits. The single largest user is the U.S. government, which uses the ACH Network for employee payroll and retirement distributions, benefit payments, tax collections and refunds, vendor payments and collections of other payments from individuals and businesses.

In 2009 and 2010, the total number of interbank ACH entries processed and settled through the ACH Operators in the U.S. was 15.26 billion and 15.62 billion respectively. In 2010, the average daily volume of interbank ACH entries was approximately 59.8 million, and the average dollar value of these entries was \$2,032 (\$3,022 for credit entries and \$1,353 for debit entries).

A. Legal and Operating Environment: A unique aspect of the U.S. ACH Network is that it is (1) administered by NACHA as a private-sector rulemaking body, but (2) interbank clearing is conducted through other parties known as "ACH Operators." Interbank transactions through the ACH Network are governed by the *NACHA Operating Rules*, which establish the authorization requirements, certain risk mitigation requirements, data formats and other key aspects for the origination and processing of ACH transactions.

1. Role of NACHA and the ACH rulemaking process in the U.S.: The rights and responsibilities of end-users and third-parties in ACH transactions are governed by the *NACHA Operating Rules* and other provisions through contracts and agreements with Network-participant DFIs. DFIs originating ACH transactions into the ACH Network bear the financial risk and liability for those transactions.⁴ In the United States, Federal and

⁴ As prescribed by the *NACHA Operating Rules*, the Originating Depository Financial institution ("ODFI") is responsible for all entries originated through the ODFI, and becomes responsible for settlement of ACH entries upon

state laws also address ACH transactions to varying degrees depending on the type of party(ies) involved in the transaction (e.g., consumer vs. business vs. government agency) and other factors.

NACHA is the not-for-profit organization that, through its board of directors, staff and various committees helps manage the ACH Network. NACHA authors and maintains the *NACHA Operating Rules*, and enforces the *Rules* through its National System of Fines. ACH Network participants defined in the *Rules* include:

- Originators (account holders that initiate credit or debit entries into the ACH Network);
- Receivers (account holders that have authorized receipt of a credit or debit entry by their financial institutions);
- ODFIs (depository financial institutions that hold the accounts of Originators, originate entries on behalf of their account-holding Originators and debit or credit such entries to the accounts of their Originators), and
- RDFIs (depository financial institutions that hold the accounts of Receivers, receive ACH entries through the ACH Network and debit or credit such entries to the accounts of their Receivers).

Since 1974, NACHA has successfully administered these private-sector operating rules and currently represents approximately 11,000 member financial institutions of all sizes and types throughout the United States, both directly and through 18 Regional Payments Associations. NACHA also brings together more than 450 other companies and organizations through its industry councils and Affiliate Membership program.

The *NACHA Operating Rules* are amended through a deliberative and inclusive process similar to that used by Federal agencies under the Administrative Procedures Act. This allows participants in the ACH Network – commercial banks, community banks, credit unions, the ACH Operators, large corporations, small businesses, consumer advocates, and industry vendors – the opportunity to comment on proposed rule changes. Through this inclusive process, NACHA is able to maintain a fair and equitable set of rules that create certainty for all parties using in the ACH Network. The *NACHA Operating Rules* work in concert with applicable laws and regulations to provide a legal and business foundation for the use of ACH payments.

This private-sector rulemaking provides the flexibility to promptly identify and respond to participant requirements and new technologies, and to define in sufficient detail the roles and responsibilities of participants in the ACH Network. From this foundation, the

their receipt by the ODFI's ACH Operator. Currently, most ACH entries settle next-day, though credit entries can settle two days later (and in some limited circumstances entries may settle same-day). An ODFI cannot subsequently recall ACH entries it has already transmitted to an Operator. In limited circumstances, an ACH Operator can return to the ODFI an entry transmitted to the Receiving Depository Financial Institution ("RDFI") for which the RDFI cannot settle, and an Operator can reverse an entry to an RDFI for which the ODFI cannot complete settlement. ACH credit and debit entries are considered final on the morning of settlement, subject to the right of the RDFI to return such entries within specified timeframes and subject to certain conditions.

NACHA Operating Rules promote innovation and efficiency, and provide security and certainty regarding ACH payments.⁵

2. Role of the ACH Operators in the clearing and settlement of ACH transactions:

Currently, there are two ACH Operators in the ACH Network:

- The Clearing House (“TCH”), a private organization owned by major financial institutions, operates the Electronic Payments Network (EPN); and
- The Federal Reserve System, which operates through the Retail Payments Office at the Federal Reserve Bank of Atlanta (the “Fed Operator”).

Each ACH Operator serves as an intermediary among participating DFIs holding the accounts from which ACH transactions (both debit and credit) are initiated and the DFIs to which such ACH transactions are destined. The DFIs that conduct the vast majority of ACH transaction volume in the U.S. have relationships with both ACH Operators.⁶

The ACH Operators sort transactions initiated in the ACH Network by destination and make files available to each receiving financial institution. In each case, interbank positions are then netted and settled by the Operator via transfers among the settlement accounts of the participating financial institutions or their correspondents (generally the institution’s reserve or clearing account held with a Federal Reserve Bank – “fed account”). With respect to TCH, this interbank settlement is effected through the Federal Reserve’s Net Settlement Service (“NSS”).

B. The FMI Principles and the U.S. ACH Network: Of the twenty-four FMI Principles, nineteen could conceivably be applied to the ACH Network as a payments clearing and settlement system.⁷ If ultimately deemed by FRB/FSOC as a “systemically important” payment system and therefore a “Designated Financial Market Utility” (“DFMU”), these nineteen Principles would be directly relevant to the ACH Network through FRB/FSOC implementation of the Principles in the U.S. If not so designated – as has been the case historically and in our view appropriately⁸ – a number of the Principles may nonetheless guide the U.S. banking agencies in their assessment of risk and determination of risk mitigation regulatory requirements.

⁵ The *NACHA Operating Rules* are publicly-available online at www.achrulesonline.org.

⁶ These dual connections of DFIs to both ACH Operators increase the availability of the Network in the unlikely event of an ACH Operator failure or disruption.

⁷ See *Consultative Report on Principles for Financial Market Infrastructures*, March 2011, p. 13

⁸ See attached response to the Financial Stability Oversight Council. NACHA continues to believe that designating a low value payment system like the U.S. ACH Network as “systemically important” is unwarranted. FSOC has acknowledged there is significant consensus among commenters on four reasons why low aggregate value retail payment systems like the ACH Network are not “systemically important.” These four reasons are: “(i) retail payment systems operate relatively low-aggregate monetary value systems that do not settle transactions for important financial markets or other payment systems; (ii) there are reliable and timely substitutes for retail payments; (iii) retail systems do not operate real-time final settlement systems, meaning that the liquidity would not be guaranteed to be available immediately for pending outgoing payments; and (iv) retail systems are already under strong regulatory oversight and designations would result in unnecessary costs and regulatory burdens.” Nonetheless, FSOC’s final ruling does not categorically rule-out from potential designation such retail systems.

For these reasons, we believe it is important to the CPSS and IOSCO, as they evaluate the FMI Principles and their application within domestic systems, to understand the how the ACH Network in the United States is structured in terms of its administration and in the operation of multilateral clearing and settlement. In particular, since these roles (administration and operation) are in many respects performed by separate entities, this characteristic of the ACH Network might be of particular interest to the CPSS and IOSCO. Also of interest to the CPSS and IOSCO, we would expect, is a current initiative relevant to mitigating counterparty and other temporal risks. Specifically, NACHA’s rulemaking process is now evaluating expedited processing and settlement (“EPS”) capabilities for the ACH Network.

- 1. *Distinguishing between payments system administration and payments system operation in the U.S. ACH Network:*** Any application of the FMI Principles to the U.S. ACH Network – through the operation of the FSOC DFMU process and the FRB’s Regulation HH – would need to recognize the differences between system administration and rulemaking, performed by NACHA, and the role of the ACH Operators as the parties that route, clear and settle interbank ACH transactions.

As described above, NACHA is the not-for-profit entity responsible for developing and enforcing the *NACHA Operating Rules* for the U.S. ACH Network. The ACH Operators are responsible for technically routing transactions and performing associated settlement in the ACH Network in accordance with the *NACHA Operating Rules*. As NACHA has indicated to FSOC and the FRB, we strongly believe that neither the ACH Operators nor NACHA should be formally designated as systemically important. Nonetheless, we further believe that if either or both ACH Operators are designated, then NACHA would also need to be so designated given its rule writing and enforcement authorities. In this capacity, NACHA, as the *Rules* administrator, would have to submit proposed changes to the *NACHA Operating Rules* for FRB review when required. For consistent application of the *Rules* throughout the ACH Network and to avoid unnecessary and burdensome duplication of effort, it would be critical in our view that the FRB review and treat such rules changes consistently across all constituent FMUs comprising the U.S. ACH Network, and that the single submission of the proposed rules change by NACHA satisfy the obligation to provide notice for the entire ACH Network and all of its constituent DFMUs.

- 2. *Reducing counterparty risks through expedited processing and settlement:*** The U.S. ACH Network is currently evaluating, through the NACHA rulemaking process, potential changes to interbank clearing and settlement terms that would enable DFIs to originate, clear and settle ACH debit and credit entries on a same-day (not real-time) basis. As currently envisioned, this new capability would be added to the existing next-day (and for ACH credits, potentially 2-days) clearing and settlement process to support time-sensitive, premium clearing needs of DFIs and their customers.

Assumptions with this new capability now being evaluated in NACHA rulemaking include:

- EPS-eligible ACH transactions would include debit and credit entries, commercial and consumer entries, return and reversing entries

- EPS would be available Network-wide, meaning all RDFIs would be expected to process and settle for EPS entries on the same-day they are originated
- Both ACH Operators would provide the capability as a premium service and open a new window(s) that at a minimum would define an ODFI transmission deadline no earlier than 2:00 pm ET, with availability of EPS entries to RDFIs no later than 4:00 pm ET, and with interbank settlement at 5:00 pm ET.

Relevant to this response to the CPSS and IOSCO, use of this new capability could be expected to reduce several sources of risk exposure, including credit risk from returned ACH debit entries and overnight counterparty settlement risk. With respect this latter point, adding an EPS settlement window at 5:00 pm ET would reduce the duration of counterparty exposure for EPS entries by over 15 hours, and by one overnight cycle.⁹ This is depicted in the examples below:

- Bank A receives EPS credit entries from (or originates EPS debit entries to) Bank B through its ACH Operator. Before close of business that same day, Bank A will know definitively that those transactions have positively settled and it does not face the risk of an overnight default of Bank B.
- Bank A originates EPS credit entries (or receives EPS debit entries) through its ACH Operator. Before close of business, those transactions will be fully funded and Bank A will not be exposed to a default of its customer

While same day settlement will reduce many types of risks, it is important to note that credit entries on the ACH Network may be revocable in limited situations, for example when an ACH credit entry is a duplicate entry or in a duplicate file entered into the Network erroneously. This is a key characteristic of an ACH credit payment and is in contrast to irrevocable payments made in the wire transfer system.

* * *

NACHA appreciates the opportunity to provide comments to CPSS and IOSCO on the FMI Principles. If you have any questions regarding our comments, please do not hesitate to contact me at imacoy@nacha.org, or (703) 561-3927.

Sincerely,

/S/

Ian W. Macoy
 Managing Director, Government & Industry Outreach

Attachment:

May 26, 2011 NACHA response to Financial Stability Oversight Council, RIN 4030-AA01
 – Authority to Designate Financial Market Utilities as Systemically Important

⁹ Currently, next-day ACH settlement through the Fed Operator to the DFIs' fed accounts occurs at 8:30 a.m. ET for credit entries, and 10:00 a.m. ET for debit entries.



13450 Sunrise Valley Drive • Suite 100 • Herndon, VA 20171
Phone: 703-561-1100 • Fax: 703-787-0996
eMail: info@nacha.org
www.nacha.org

May 26, 2011

Via Electronic Submission

Financial Stability Oversight Council
Attention: Lance Auer
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: RIN 4030-AA01 – Authority To Designate Financial Market Utilities as Systemically Important

To Whom It May Concern:

NACHA – The Electronic Payments Association appreciates the opportunity to respond to the Proposed Rulemaking regarding the Authority of the Financial Stability Oversight Council (the “Council”) to Designate Financial Market Utilities (“FMUs”) as Systemically Important (the “Proposed Rule”). As NACHA stressed in its response to the Council’s Advance Notice of Proposed Rulemaking (“ANPR”) on this topic (“Initial Response”), NACHA believes that designating low value payment systems like the ACH Network as “systemically important” would be an unwarranted extension of the scope of regulation intended and permitted by Congress under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “DFA”). In this regard, we understand that the Council declined to exempt retail payment systems (or any other payment system) from the scope of the regulation in order to preserve flexibility to address unforeseen future developments. While NACHA recognizes the advantages to the Council of retaining some flexibility, we believe that additional clarity is required so that FMUs and their participants can predict whether they are likely to be designated as systemically important and to provide clearer guidelines for the Council’s exercise of the authority granted by Congress.

I. Background: The ACH Network – Who We Are

As described more thoroughly in our Initial Response, the ACH Network is a batch processing payment system. It is a hub for the electronic movement of money and other related data between accounts held at most of the nation’s financial institutions and provides a safe, secure and reliable network for direct consumer, business and government payments.

The ACH Network is managed and operated by NACHA and the ACH Operators. Currently, there are two ACH Operators in the ACH Network: The Clearing House (“TCH”), a private organization owned by major financial institutions, and the Federal Reserve Banks (the “Fed Operator”). The financial institutions that conduct the vast majority of ACH transaction volume

have relationships with both ACH Operators. Each ACH Operator serves as an intermediary among participating financial institutions that sorts the transactions initiated in the ACH Network by destination and makes files available to each receiving financial institution. In each case, interbank positions are netted and settled by the respective ACH Operator via transfers among the accounts each participating financial institution (or their correspondent) maintains with the Federal Reserve. With respect to TCH, this interbank settlement is effected through the Federal Reserve's Net Settlement Service ("NSS").

NACHA is the not-for-profit organization that, through its board of directors, members, staff, and various committees manages the ACH Network. NACHA develops and maintains standards for electronic fund transfers using the ACH Network, authors operating rules for the implementation of ACH standards and enforces those rules through its National System of Fines. The *NACHA Operating Rules* govern the exchange of ACH payments, establish transaction formats and authorization requirements, and define the roles and responsibilities of ACH Network participants. The participants in the ACH Network are identified and described in our Initial Response.

In 2009 and 2010, respectively, the total number of interbank ACH entries processed and settled through the ACH Operators was 15.26 billion and 15.62 billion. In 2010, the average daily volume of interbank ACH entries processed through both Operators was approximately 59.8 million, and the average dollar value of these entries was \$2,032 (\$3,022 for credits and \$1,353 for debits). The types of transactions processed through the ACH Network are described in greater detail in the Initial Response and include direct deposit programs, including government payments and payroll deposits, as well as retail payments made by individual consumers and businesses.

II. The Proposed Rule Should Use More Quantitative Measures

The Proposed Rule sets forth the criteria and process the Council will use to assess whether FMUs are, or are likely to become, "systemically important." Although the Proposed Rule generally describes the steps that will be involved in this process, including the opportunity for FMUs to participate at certain stages of the process, we believe the criteria is overly broad and fails to provide any substantive guidance by which an FMU or any of its participants would be able to predict whether the Council is likely to deem the FMU systemically important.

In light of the differences among existing FMUs and the likelihood of developments affecting FMUs in the future, NACHA understands the benefit of a rule that permits the Council to exercise some judgment in determining whether an FMU is systemically important. However, without more detailed qualitative, quantitative and/or relative parameters explaining how the Council will weigh its proposed criteria, the Proposed Rule creates the risk of arbitrary and inconsistent implementation. Therefore, NACHA requests that the final rule include the quantifiable metrics the Council intends to apply. This will ensure consistency in the designation of the systemic importance of FMUs describe how any qualitative and/or relative factors will influence the Council's decisions. For example, while the Council acknowledges that average transaction size is a relevant factor in its decision, there is no indication what transaction sizes may or may not give rise to potential issues, or how important this factor is relative to other factors, such as net settlement risks within the system. Providing such guidance ensures that all payment system participants are competing on a level playing field and under rules that enable both participants and observers to fairly assess whether an FMU is likely to be designated for further regulation.

III. The Final Rule Should Contain a Presumption that Retail Payment Systems are Not Systemically Important

As discussed above, NACHA recognizes that the Council will not categorically exclude any class of payment system in the final rule implementing Section 804(a) of the DFA. While we understand that the Council wishes to preserve its ability to react to future developments affecting FMUs, we respectfully suggest the final rule specify that FMUs sharing the characteristics of retail payment systems will be presumed not to be systemically important unless there are other factors that would overcome the presumption.¹⁰ For example, the Council could designate a set of criteria, such as aggregate settlement values below a specified amount or the availability of substitutes and existing regulatory oversight, that would be sufficient to qualify an entity as a regulated retail payment system that would not be designated as systemically important in the absence of other extraordinary factors. This would provide the Council the safety valve to overcome the presumption while providing a clearer path for retail payment systems to assess the risk that they may be designated under the final rule.

IV. The Final Rule Should Acknowledge All of the Factors that Make Retail Payments Systems Not Systemically Important

The Council acknowledges there is significant consensus among commenters to the ANPR on four reasons why low aggregate value retail payment systems are not “systemically important,” and it notes that these factors are “important considerations.” These four reasons are: “(i) retail payment systems operate relatively low-aggregate monetary value systems that do not settle transactions for important financial markets or other payment systems; (ii) there are reliable and timely substitutes for retail payments; (iii) retail systems do not operate real-time final settlement systems, meaning that the liquidity would not be guaranteed to be available immediately for pending outgoing payments; and (iv) retail systems are already under strong regulatory oversight and designations would result in unnecessary costs and regulatory burdens.” Nonetheless, although the Supplementary Information indicates that the Council will take all of these factors into consideration, the Proposed Rule itself includes only the first two of these factors as criteria that the Council will consider in determining whether to designate an FMU as systemically important in proposed Sections 1320.10(c) and (d)(2). NACHA respectfully requests that the Proposed Rule also include the third and fourth¹¹ factors as criteria that the Council will consider in evaluating the systemic importance of FMUs.

¹⁰ The Supplementary Information accompanying the Proposed Rule acknowledges that the factors raised in comments to the ANPR are important considerations that should be taken into account when deciding whether to designate an FMU.

¹¹ In connection with the fourth factor, we note that the Supplementary Information is somewhat unclear as to the consideration the Council will give to the effectiveness of the existing regulatory oversight of FMUs. As noted in the text, the Supplementary Information specifically indicates that the Council will take these factors into account. However, later in its discussion, the Council seems to indicate that “oversight” and “strong controls” might not be considered by the Council, at least in connection with the “likelihood” of a systemic disruption. The Council should clarify the consideration that it will give to existing regulatory oversight, which is clearly authorized by the broad discretion at Section 804(a)(2)(E) of the DFA to consider “any other factors that the Council deems appropriate.” Moreover, we respectfully suggest that not only is the cost and burden of additional regulation relevant for entities already subject to Federal Reserve oversight, but also the fact of existing oversight mitigates the need for any further federal involvement. Indeed, since much of the Federal Reserve’s proposed regulation of designated financial market utilities focus precisely on reducing the likelihood as well as the consequences of an FMU failure, it seems inconsistent

V. Substitutes Should Be Interpreted Broadly

NACHA agrees with, and supports, the Council’s decision to include the availability of substitutes among the considerations the Council evaluates when determining whether an FMU is systemically important. The inclusion of FMUs that serve the same “function” as well as the same “product” suggests that the Council understands that a variety of payment methods may be able to satisfy the same payment need. For example, if one ACH Operator were to experience a significant outage or failure, in addition to the other ACH Operator’s ability to offer the same “products” to satisfy the payment needs of ACH users, the same payment need could be satisfied through payments made using payment cards participating in the card brand networks (e.g. Visa, MasterCard, Discover and American Express), wires, checks and in some cases, cash. Accordingly, NACHA respectfully requests that the Council include in the final rule or the accompanying supplemental information a statement that, with regard to retail payment systems, the term “substitute” will be interpreted to include any payment method that satisfies the same payment need.

VI. If the operational and rulemaking responsibilities of a payment system are allocated to different entities, the Council should designate the rulemaking entity if it designates the operational entity.

As described above, NACHA is the not-for-profit entity responsible for developing and enforcing the *NACHA Operating Rules* for the ACH Network. The ACH Operators are responsible for conducting the transactions and associated settlement in the ACH Network in accordance with the *NACHA Operating Rules* and each of their respective contracts with participating financial institutions.

As discussed in our Initial Response, we strongly believe that neither the ACH Operators nor NACHA should be designated as DFMUs. Nonetheless, if an ACH Operator is so designated, NACHA also would need to be so designated in its capacity as a manager of the ACH Network through its rule writing and enforcement authorities. If an ACH Operator were designated as systemically important and NACHA was not, the Operator would, in theory, be obligated to submit *Rules* changes to the Board of Governors of the Federal Reserve System (“Board”) after they had already been fully vetted through the NACHA rulemaking processes. This would create the potential for significant delays. Instead, as suggested in NACHA’s comments to the Board’s proposed regulation on this topic, any review of *NACHA Operating Rules* should be done concurrently with the NACHA rulemaking processes to avoid unnecessary and burdensome duplication of effort, so that the single submission of the proposed rules change by NACHA will be able satisfy the obligation to provide notice for the entire ACH Network and all of its constituent DFMUs.

* * * * *

NACHA appreciates the opportunity to provide comments on the Proposed Rule. If you have any questions regarding our comments, please do not hesitate to call me at (703) 561-3927, or our counsel at Sidley Austin LLP in this matter, David E. Teitelbaum, at (202) 736-8683.

to suggest that existing oversight that has the same or similar impact should not be relevant to the Council’s determination.

Sincerely,

/S/

Jane Larimer
Executive Vice President
General Counsel

cc: David E. Teitelbaum, Esq.