UNC SCHOOL OF LAW

NORTH CAROLINA BANKING INSTITUTE

Volume 21 | Issue 1 Article 20

3-1-2017

Nested Payment Intermediaries in the ACH Network: Risks and Responsibilties of ODFIs

Edward McCartney

Nested Payment Intermediaries in the ACH Network: Risks and Responsibilities of ODFIs

I. INTRODUCTION

The rapid advancement of technology has stimulated innovation in electronic payment methods, but it has also created more opportunities for funds to be misappropriated and criminals to commit fraud.[1] Increasingly, perpetrators of payments fraud are taking advantage of these technological developments to exploit customers, corporations, and financial institutions.[2] Over the past decade, third-party entities have become more involved in the electronic payment sector by facilitating transactions between a customer and his bank.[3] Moreover, as the number of these payment intermediaries[4] increases, the potential for fraud and error also escalates.[5]

In response to nationwide reports of payments fraud, the United States Department of Justice ("DOJ"), Federal Trade Commission, and Consumer Financial Protection Bureau commenced operations to scrutinize the practices of banks and payment intermediaries.[6] In 2013,

1. ASS'N FOR FIN. PROF'LS, PNC FIN. SERVS. GRP., 2016 AFP PAYMENT FRAUD AND CONTROL SURVEY 1 (2016), https://www.pnc.com/content/dam/pnc/com/pdf/corporateandinstitutional/Treasury%20Management/2016_AFP_Payments_Fraud_Report.pdf.

2. *Id.*

3. *Third-Party Sender Identification Tool*, NACHA, https://www.nacha.org/third-party-sender-identification-tool (last visited Jan 4, 2017).

4. A payment intermediary is an entity that performs some aspect of the payment processing on behalf of a client. These entities enter into agreements with a bank, customer, or another payment intermediary, assenting to aid in the processing of entries through the Automated Clearing House electronic wire transfer system ("ACH Network"). *Id.*

5. *See id.* (explaining that with the proliferation of new payment models, there is an indefinable amount of payment intermediary business-case scenarios, which obfuscate the role of a financial institution involved in some aspect of ACH payment processing).

6. *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against Global Client Solutions for Processing Illegal Debt-Settlement Fees (Aug. 25, 2014), http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-global-client-solutions-for-processing-illegal-debt-settlement-fees/; Press Release, Fed. Trade Comm'n, FTC Settlements Crack Down on Payment Processing Operations that Enabled 'Google Money Tree' Scammers to Charge Consumers $15 Million in Hidden Fees (Nov. 18, 2013),

the DOJ launched "Operation Choke Point," an investigatory initiative aimed at penalizing third-party payment intermediaries and financial institutions that help scammers steal payments from customers despite clear evidence of fraud.[7] Through this operation, the DOJ successfully prosecuted the owner of Check Site, Inc., Neil Godfrey, for using his third-party payment-intermediary company to help scammers steal millions of dollars from consumers.[8] While the results of many similar investigations have been fruitful, the expansion of the third-party payment intermediary sector continues to expose customers to new and evolving threats of fraud.[9]

According to the 2016 Association for Financial Professionals' Payments Fraud and Control Survey, 73% of finance professionals reported that their companies experienced attempted or actual payments fraud in 2015.[10] Further, 25% of corporations reported an economic loss caused directly by unauthorized or fraudulent transactions facilitated through the Automated Clearing House ("ACH").[11] While

---

https://www.ftc.gov/news-events/press-releases/2013/11/ftc-settlements-crack-down-payment-processing-operation-enabled; *See also Managing Risks in Third-Party Payment Processor Relationships,* FED. DEPOSIT INS. CORP. (July, 2014), https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum11/managing.html (stating that federal regulators advise financial institutions to have appropriate risk management and control procedures to ensure compliance with federal regulation and project consumers against payment fraud committed by third party intermediaries).

7. NAT'L CONSUMER LAW CENTER, WHAT IS OPERATION CHOKE POINT 1 (2015), https://www.nclc.org/images/pdf/banking_and_payment_systems/payment-fraud/ib_what_is_operation_choke_point52815.pdf.

8. Press Release, U.S. DOJ, California Payment Processing Company Owner Pleads Guilty (July 16, 2015), http://www.justice.gov/opa/pr/california-payment-processing-company-operator-pleads-guilty-fraud (elucidating that Godfrey both aided scammers find banks that were willing to ignore red flags and helped the fraudulent merchants stay off the radar of other banks and regulators so that the fraud could continue).

9. Consumer Fin. Prot. Bureau, *supra* note 6 (stating that Global Client Solutions had paid $6 million to settle charges by the Consumer Financial Protection Bureau from a claim alleging that it violated the Telemarketing Sales Rule by making it possible for debt-settlement companies to charge consumers illegal fees upfront); Federal Trade Comm'n, *supra* note 6 (disclosing that the Federal Trade Commission cracked down of Process America, a third-party payment intermediary, which ignored plainly deceptive statements on merchant's websites that enabled 'Google Money Tree' scammers to steal $15 million from consumers through unauthorized ACH entries).

10. ASS'N FOR FIN. PROF'LS, *supra* note 1, at 28 (detailing how "The Association for Financial Professionals" conducts its yearly survey, which draws on the knowledge of corporate practitioner members to provide fraud data analysis in the area of bank relation management, risk management, payments and financial accounting reporting).

11. ASS'N FOR FIN. PROF'LS, *supra* note 1, at 4 (explaining that the ACH Network is a batch processing system in which financial institutions electronically transfer funds through

ACH transactions are generally considered to be a safe form of payment, the increase of third-party senders ("Third-Party Senders")[12] has exposed financial institutions to a greater level of compliance, credit, and legal risk.[13] The increased risk comes coupled with increased contention; when a financial institution or originator enter into contracts with these third-party intermediaries instead of direct agreements with each other, the responsibilities and potential liabilities of each party becomes less clear.[14] Even more troublesome, payment intermediaries are choosing to originate ACH transactions for other payment intermediaries, creating multiple, nested layers between a customer and his bank.[15] This "nesting" of third-party relationships adds complexity to the ACH transaction and further augments the potential for error and fraud.[16]

To help reduce the potential for payment fraud, the National Automated Clearing House Association ("NACHA")[17] publishes Operating Rules that provide the legal foundation for the ACH electronic payment system ("ACH Newtork").[18] Since its inception, NACHA has continually amended its Operating Rules in order to

debit or credit entries).

12. *See Third-Party Senders*, NACHA, https://www.nacha.org/content/third-party-senders (last visited Feb. 7, 2007) (explaining how NACHA coins the term Third-Party Senders as a type of third party payment intermediary).

13. *See* Linda McGlasson, *ACH Fraud: Avoid 3rd-Party Risk*, BANK INFO SEC. (June 22, 2010), http://www.bankinfosecurity.com/ach-fraud-avoid-3rd-party-risks-a-2678 (illustrating a recent case in which a court analyzed the responsibilities of an ODFI when contracting with Third-Party Senders).

14. *See* Clinton Plumbing & Heating of Trenton, Inc. v. Ciaccio, No. 09-2751, 2010 WL 4224473 (E.D. Pa. Oct. 22, 2010) (demonstrating the increase in error risks that occurs when third parties enter the ACH Network).

15. NAT'L AUTOMATED CLEARING HOUSE ASS'N, THIRD-PARTY SENDER CASE STUDIES: ODFI BEST PRACTICES TO CLOSE THE GAP AN ACH RISK MANAGEMENT WHITE PAPER 12 (2009) [hereinafter THIRD-PARTY SENDER CASE STUDIES], http://www.achthirdparty.com/wp-content/uploads/2012/08/thirdpartysenderwhitepaper.pdf (explaining the complex web of obligations and potential liabilities created by nesting payment intermediaries).

16. *Id.*

17. *What is ACH?: Quick Facts About Automated Clearing House Network*, NACHA (Oct. 1, 2015), https://www.nacha.org/news/what-ach-quick-facts-about-automated-clearing-house-ach-network (stating that NACHA is a nonprofit association representing nearly 11,000 financial institutions that the development, administration, and governance of the ACH Network).

18. *How the Rules Are Made*, NACHA, https://www.nacha.org/content/how-rules-are-made (last visited Jan. 4, 2017) (explaining that the Operating Rules define the roles and responsibilities of financial institution members and establish clear guidelines for each network participant in order to ensure millions of payments occur smoothly each day).

improve the quality and efficiency of the ACH Network.[19] Between 2013 and 2014, NACHA incorporated additional provisions to Article II of the Operating Rules, which governs the potential liabilities of each party to an ACH transaction.[20] Notably, this recent amendment concerned the obligations of an Originating Depository Financial Institution ("ODFI") when it originates ACH entries that are initiated by a Third-Party Sender.[21]

Prior to this amendment, courts consistently found that an ODFI is required to indemnify a Receiving Depository Financial Institution ("RDFI") from any claim resulting even remotely from a violation of the warranty provisions.[22] However, there is little case law that directly examines how the recent amendments to the Operating Rules would affect an ODFI's obligations and potential liabilities when its originating entries are initiated through a third-party intermediary.[23] Though NACHA has reiterated that ODFIs bear the bulk of the risk when originating ACH transactions, the issue becomes more nuanced when "nested" third parties ("Nested-Third-Party Sender")[24] initiate entries through ODFIs on behalf of originators with high return rates, such as payday lenders.[25]

---

19. *Id*.

20. *Id*.

21. NAT'L AUTOMATED CLEARING HOUSE ASS'N, 2016 ACH RULES: A COMPLETE GUIDE TO RULES AND REGULATIONS GOVERNING THE ACH NETWORK, § 2 (2016) [hereinafter NACHA OPERATING RULES (2016)]; *see also* NAT'L AUTOMATED CLEARING HOUSE ASS'N, 2016 ACH RULES: A COMPLETE GUIDE TO RULES AND REGULATIONS GOVERNING THE ACH NETWORK, § 2 (2014) [hereinafter NACHA OPERATING RULES (2014)].

22. PFG Precious Metals, Inc. v. SunTrust Bank, No. 10 C 7709, 2012 WL 404187 (N.D. Ill. Feb. 7, 2012) (holding that the warranty provision required the ODFI to indemnify the RDFI); Sec. First Network Bank v. C.A.P.S., Inc., No. 01 C 342, 2003 WL 22299011 (N.D. Ill. Oct. 7, 2003).

23. *See* NACHA OPERATING RULES (2016), *supra* note 21, at § 2.15.3 (delineating the relationship between an ODFI and Third-Party Senders).

24. For purposes of this Note, Nested-Third-Party Sender shall include any entity between an ODFI and an Originator, besides the Third-Party Sender with which it has an operating agreement. *See Third-Party Sender Registration Rule: Understanding the New Rule & the Broader Business Context,* NACHA, https://www.nacha.org/events/repeat-webinar-understanding-third-party-sender-registration-rule-what-you-need-know (last visited Jan. 4, 2017) (elucidating the introduction of Nested-Third-Party Sender's into the ACH Network).

25. *See* Press Release, NACHA, ACH Operations Bulletin #2-2014: ACH Transactions Involving Third-Party Senders and Other Payment Intermediaries (Dec. 30, 2014) [hereinafter NACHA Bulletin 2-2014], https://www.nacha.org/news/ach-operations-bulletin-2-2014-ach-transactions-involving-third-party-senders-and-other-payment (discussing a 2014 amendment to the definition of a Third-Party Sender and its implications

This Note analyzes the scope of an ODFI's liability in instances where a claim results from an ACH entry made through a Nested-Third-Party Sender. Part II explains the typical parties to an ACH transaction and provides examples to help illustrate the process.[26] Part III examines the additional risks involved when a Nested-Third-Party Sender initiates an ACH entry.[27] Part IV examines an ODFI's role in mitigating the risks associated with Third-Party Senders and discusses the implications of NACHA's new Third-Party Sender Registration Rule (effective 2017) on the risk mitigating duties of an ODFI.[28]

II. THE ACH TRANSACTION

The ACH Network moves money and information from an account at one bank to an account at another bank through Direct Deposit and Direct Payment.[29] Each year, the ACH Network transmits over $40 trillion in electronic financial transactions, and processes more than 20% of the total electronic payments in the U.S.[30] In order to discern the risks associated with the influx of Nested-Third-Party Senders into the ACH Network, it is important to understand the different parties involved in a typical ACH transaction.

A. Parties to the ACH Transaction

Within a typical ACH transaction, there are five parties involved: (1) the originating company or individual ("Originator"); (2)

on financial institutions); Press Release, NACHA, ACH Operations Bulletin #1-2014: Questionable ACH Debit Origination: Roles and Responsibilities of ODFIs and RDFIs (Sept. 30, 2014) [hereinafter NACHA Bulletin #1-204], https://www.nacha.org/news/ach-operations-bulletin-1-2014-questionable-ach-debit-origination-roles-and-responsibilities (explaining that the highest risk-originators are those not engaged in legitimate business practices which leads historic patterns of unauthorized returns); Devon Marsh, *Commentary: ACH Return Rates, and the Case for Transparency*, NACHA (June 11, 2015), https://www.nacha.org/news/commentary-ach-return-rates-and-case-transparency.

26. *See infra* Part II.

27. *See infra* Part III.

28. *See infra* Part IV.

29. *Direct Deposit and Direct Payment via ACH*, NACHA, https://www.nacha.org/payments (last visited Jan. 4, 2017).

30. *History and Network Statistics*, NACHA, https://www.nacha.org/ach-network/timeline (last visited Jan. 4, 2017).

the ODFI; (3) the ACH Operator;[31] (4) the RDFI; and (5) the receiving company or individual ("Receiver").[32] For an ACH transaction to occur, a Receiver must authorize an Originator to initiate the ACH entry (credit or debit) to the Receiver's account at the RDFI.[33] The Originator agrees to initiate the entry at his ODFI according to the arrangement made with the Receiver.[34] The ODFI receives payment instructions from the Originator and forwards the entry to the ACH Operator, who transmits the entry to the RDFI.[35] After verifying that it holds the account by checking the account and routing numbers on the transmission, the RDFI posts the entry to the account of the Receiver.[36] In a typical credit entry, the payor (Originator) initiates the entry through its bank (ODFI), which electronically transfers money into the payee's (Receiver) bank account at the RDFI.[37] In a typical debit entry, the payee (Originator) initiates the entry through its bank (ODFI) by requesting that funds be removed from the account of the payor (Receiver) at the RDFI.[38]

To illustrate a credit entry, suppose Company A holds an account with Bank of America and employs Employees B and C, who hold bank accounts at TD Bank and Citibank respectively.[39] Company A does not want to pay its employees with paper checks every week, so instead it asks Employee B and C to provide their bank account numbers in order to direct deposit payroll into their accounts. Employee B and C authorize Company A to initiate this credit entry by

31. An ACH Operator is a clearing facility, which receives and processes batches of electronic ACH entries from ODFIs. THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 4.

32. *See* THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 4 (explaining the typical parties to an ACH transaction).

33. NACHA, *supra* note 17, at 4 (explaining how each ACH transaction is governed by agreement, and discussing how the NACHA ACH Operator Rules binds each member bank who must agree to in order to send and receive ACH entries).

34. NACHA, *supra* note 17, at 4.

35. NACHA, *supra* note 17, at 4.

36. NACHA, *supra* note 17, at 4.

37. KAREN FURST & DANIEL E. NOLLE, OFFICE OF THE COMPTROLLER OF CURRENCY, ACH PAYMENTS: CHANGING USER AND CHANGING USES 2 (Oct., 2005), https://www.occ.treas.gov/topics/bank-operations/bit/ach-policy-paper-6.pdf.

38. *Id.*

39. *Cf. Automated Clearing House Transactions: Overview*, FED. FIN. INST. EXAMINATION COUNSEL, http://www.ffiec.gov/bsa_aml_infobase/pages_manual/olm_059.htm (proving additional examples of the types of parties that typically engage in an ACH transaction) (last visited January 4, 2017).

providing their banking and routing numbers. Once Company A (Originator) receives authorization, it initiates the ACH transactions by providing Bank of America (ODFI) with Employee B and C's (Receivers) bank information and the amount which is owed to each. Bank of America then submits this information to an ACH Operator, which forwards the credit entry to TD Bank and Citibank (RDFIs). TD Bank and Citibank verify that they hold the Employee B and C's account by authenticating the routing and account numbers on the entry, and then credit that account in the amount transmitted from Bank of America.

To demonstrate a debit entry, suppose student-payor (Receiver) wants to make a payment to lender-payee (Originator) on his student loans. Instead of sending a paper check to the lender to repay the principal and interest on the loan each month, student provides the lender with the routing and account number for his account at Bank of America (RDFI) and authorizes a withdrawal of $100 on the first of each month. Lender then provides the student's bank information to TD Bank (ODFI) and the amount that is owed to the lender. TD Bank then submits this information to the ACH Operator, which forwards the debit entry to Bank of America (RDFI). After verifying the account and routing number, Bank of America (RDFI) debits student's (Receiver) account for $100.

B. NACHA Rules Governing Dispute Resolution

Disputes typically arise when a customer (Receiver) reports an unauthorized debit to his bank account.[40] The Operating Rules state that the Receiver must report unauthorized ACH debit transactions to the RDFI within fifteen calendar days from the date the RDFI sends or makes available to the Receiver information relating to the debit entry.[41] If such a report is made, the RDFI is obligated to promptly credit the amount of the debit entry.[42] If a claim arises from a dispute as to the authorization status of an ACH entry, an RDFI can typically rely on the

40. *See ODFI Liability for Breach of Warranty*, NACHA (Mar. 28, 2003), https://www.nacha.org/news/odfi-liability-breach-warranty (illustrating that a customer begins the dispute process by contesting a debit entry on his bank account).

41. NACHA OPERATING RULES (2016), *supra* note 21.

42. NACHA OPERATING RULES (2016), *supra* note 21.

Operating Rules warranties to recover that amount from an ODFI.[43]

Under Article II of the Operating Rules, an ODFI sending an entry to an RDFI warrants, among other things, that the entry: (1) is in accordance with proper authorization provided by both the Receiver and Originator; (2) is for an amount which on the settlement date will be due and owing to the Originator from the Receiver or for a sum specified by the Receiver to be paid to the Originator; and (3) contains the correct account and routing number of the Receiver.[44] If a claim against an RDFI arises directly or indirectly from a breach of any of these warranties, Article II of the Operating Rules requires the ODFI to indemnify and defend the RDFI.[45]

For example, supposed in the student loan debit entry scenario above, TD Bank erroneously submits the debit entry to Bank of America a week too early; yet Bank of America is unaware of the agreement between student and lender, so it debits student's account for $100 and returns the entry to TD Bank. A few days later, student checks his bank account and it is $100 short so he requests that Bank of America refund his account for the amount of the unauthorized transaction. Because TD Bank warranted that on the settlement date the entry was for an amount that was owed to lender from student, TD Bank would be required to indemnify Bank of America if student brings a claim for the loss of his $100 since it resulted from a breach of Operating Rules warranties.[46]

Article II previously included a catchall provision, which required an RDFI to indemnify an ODFI from *any* claim resulting from "the debiting or crediting of the entry to a receivers account."[47] The

43. THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 6 (explaining that an ODFI's potential liability under the *Rules* for breach of warranty is not limited to the return time frames, but is limited only by the statute of limitations for breach of contract claims under the applicable state law; for example, the ODFI's liability for a breach of warranty exists for seven years in some states).

44. NACHA OPERATING RULES (2016), *supra* note 21, at § 2.4.

45. NACHA OPERATING RULES (2016), *supra* note 21, at § 2.4.5.1.

46. NACHA OPERATING RULES (2016), *supra* note 21, at § 2. *See Sec. First Network Bank*, Inc., No. 01 C 342, 2003 WL 22299011, at *21-22 (N.D. Ill. Oct. 7, 2003) (demonstrating a similar situation in which the ODFI was required to indemnify the RDFI for a breach of the NACHA warranties).

47. *See* NAT'L AUTOMATED CLEARING HOUSE ASS'N, 2013 ACH RULES: A COMPLETE GUIDE TO RULES AND REGULATIONS GOVERNING THE ACH NETWORK, § 2 (2013) (containing no catchall provision); *But see* NAT'L AUTOMATED CLEARING HOUSE ASS'N, 2009 ACH RULES: A COMPLETE GUIDE TO RULES AND REGULATIONS GOVERNING THE ACH NETWORK, §

most recent amendment to Article II qualifies the catchall language by including:

> [T]he debiting or crediting . . . in accordance with the terms of the Entry, including any claims, demands, losses, liabilities, or expenses, and/or attorney's fees and costs that result, either directly or indirectly, from the return of one or more items or Entries of the Receiver due to insufficient funds caused by a Debit entry.[48]

The added qualifying language narrows the scope of claims for which an ODFI must indemnify an RDFI by limiting an ODFI's duty to indemnify to only claims that arise from an RDFI's actions that are in accordance with "the terms of the entry."[49] Yet, the influx of Third-Party Senders into the ACH Network has increased the potential for error and dulled the precision of that qualification because the "terms of the entry" are typically disputed when multiple layers exist between an Originator and an ODFI.

C. *Regulatory Oversight*

In addition to NACHA's Operating Rules, state and federal governments also promulgate regulations governing the roles and responsibilities of parties using the electronic wire transfer system.[50] The regulations under the Electronic Fund Transfer Act ("Regulation E"), The Banking Secrecy Act ("BSA"), and the Uniform Commercial Code all regulate this sector by establishing the rights, liabilities, and responsibilities of parties in electronic fund transfers.[51] The focus of these acts is to protect the rights of consumers who use the ACH Network, requiring financial institutions to refund their customers' accounts for unauthorized entries if timely notice is given.[52]

2 (2009) (containing the catchall provision).

48. NACHA OPERATING RULES (2016), *supra* note 21, at § 2.4.1.

49. NACHA OPERATING RULES (2016), *supra* note 21, at § 2.4.1.

50. *See* Raj Bhala, *The Inverted Pyramid of Wire Transfer Law*, 82 KY. L.J. 347, 364 (1994) (discussing the macroeconomic purpose of government fund transfer laws).

51. Electronic Fund Transfers (Regulation E), 12 C.F.R. § 205 (2016); Bank Secrecy Act of 1970 § 202, 31 U.S.C. § 5311 (2015); U.C.C. Article 4A (2012).

52. 12 C.F.R. § 205; 31 U.S.C § 5311; U.C.C. Article 4A.

Furthermore, these laws establish the required procedures for resolving account errors and disputes when the financial institution disagrees with a consumer as to whether an error occurred.[53]

The Office of the Comptroller of the Currency ("OCC") implements the regulations for the BSA, which are intended to deter and detect the misuse of our nation's financial institutions through fraud or other criminal schemes.[54] The regulations require every national bank to have a system of internal controls monitoring its customers' accounts and to file suspicious activity reports when it detects any certain known or suspected violations of federal law.[55] Interestingly, the regulation does not include a Third-Party Sender provision to outline the responsibilities of financial institutions when these entities become involved in an ACH transaction.[56]

To ensure that the Operating Rules comply with the federal regulations, NACHA collaborates with multiple agencies such as the Federal Reserve, Consumer Financial Protection Bureau, the United States Department of Treasury, and the OCC.[57] While NACHA assists these regulatory agencies in protecting the interests of customers by regularly responding to inquiries, it also aims "to protect[] the interests of private sector rulemaking and network participants."[58] Moreover, because federal law provides little insight into the obligations of payment intermediaries in the ACH Network, NACHA's Operating Rules are the authoritative legal framework that governs the relationships between these third-party entities and financial institutions.[59]

53. 12 C.F.R. § 205; 31 U.S.C § 5311; U.C.C. Article 4A.

54. Bank Secrecy Act of 1970 Regulations, 12 C.F.R § 21.11 (2016) (explaining that regulation ensures that national banks file a Suspicious Activity Report when they detect a known or suspected violation of Federal law or a suspicious transaction related to a money laundering activity or a violation of the Bank Secrecy Act).

55. *Id.*

56. *See id.* (remaining silent on the roles and responsibilities of Third-Party Senders); 12 C.F.R § 205 (2016) (remaining silent on the roles and responsibilities of Third-Party Senders).

57. *Government Relations*, NACHA, https://www.nacha.org/content/government (last visited Jan 4, 2017).

58. *Id.*

59. NACHA Bulletin 2-2014, *supra* note 25.

III. Payment Intermediaries and Risk

The potential for misuse or fraud of the ACH Network exists in all payment channels; however, the most problematic activity occurs in the origination of ACH debits through third parties.[60] The most common risk is fraud, which arises frequently when an illicit telemarketer or online merchant obtains the consumer's account and routing information through coercion or deception and initiates an unauthorized ACH debit transfer.[61] For example, one of the most common types of ACH scam is fraudulent prizes or sweepstakes, where scammers contact individuals informing them that they won a cash prize and request their bank account information to complete the transfer.[62]

Another critical risk of third-party intermediaries is fund misplacement, which can be further complicated by a third-party intermediary declaring bankruptcy.[63] The risks are exacerbated when multiple layers of payment intermediaries nest between a customer and his financial institution.[64] Because each nested layer has access to the customer's routing and account information, there is greater potential for the submission of unauthorized debit entries from accounts of unwary customers.[65] Once the funds are misplaced among layers of nested third parties, the blame game begins.[66]

60. *See* Michael Bernard et al., Supervisory Insight, *Managing Risks in Third-Party Payment Processor Relationships*, FED. DEPOSIT INS. CORP. (July 15, 2014), https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum11/managing.html (elucidating that Third-Party payment intermediaries create the most risk for fraud and fund misplacement in the ACH network).

61. *Id*.

62. *Id*. (explaining that common occurrences of fraud entail an illicit telemarketer or online merchant contacting a consumer and obtaining his bank information to initiate an fraudulent ACH entry under terms that are not fully understood by the consumer).

63. *See* Doug Walker, *Release: Data Processing Services of Ga. Work with Federal Authority After Problems with Deposits*, ROME NEWS TRIBUNE (May 17, 2013), http://www.northwestgeorgianews.com/rome/release-data-processing-services-of-ga-working-with-federal-authorities/article_00319fb5-664b-55ea-a103-9099106a1b9f.html (providing insight into the federal investigation of Data Processing Services of Georgia, a Nested-Third-Party Sender that mishandled upwards of eight million dollars through the ACH network, which resulted in multiple Third-Party Senders declaring bankruptcy).

64. THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 12.

65. THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 12.

66. *See In re* Payroll Am., Inc., 609 F.App'x 367, 368 (9th Cir. 2015) (exemplifying the "blame game", i.e., when a third party service provider declares bankruptcy after debiting millions of dollars from employers accounts).

A. Payment Intermediaries

A payment intermediary is an entity like a Third-Party Sender which Originators and/or ODFIs use for outsourcing payment services (See Figure A).[67] The NACHA definition of a Third-Party Sender focuses on two fundamental characteristics of the Third-Party Sender's relationship with Originators and ODFIs: (1) the Third-Party Sender acts as an intermediary between the Originator and the ODFI; and (2) the Third-Party Sender (rather than the Originator) has the agreement ("Origination Agreement") with the ODFI.[68]

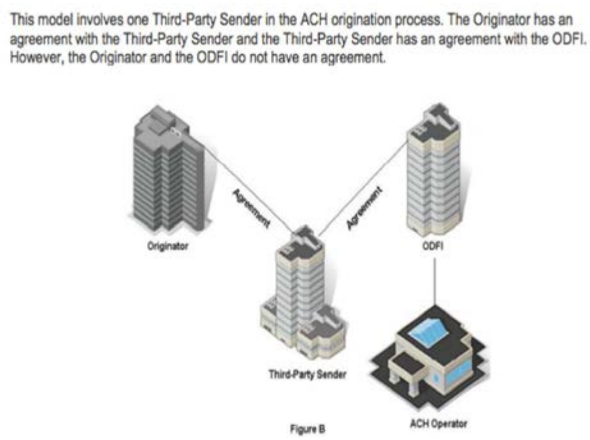

Figure A[69]

Increasingly, financial institutions are entering into depository relationships with payment intermediaries because they can earn attractive transaction fees.[70] Yet, the additional income comes at a cost; financial institutions that allow Third-Party Senders to establish deposit relationships for the purposes of processing transactions may find that these relationships expose the institutions to a greater level of risk and potential liability.[71] The heightened exposure derives from the riskiness

67. PCI SEC. STANDARDS COUNCIL, INFORMATION SUPPLEMENT: THIRD PARTY SECURITY ASSURANCE 4 (2014), https://www.pcisecuritystandards.org/documents/PCI_DSS_V3.0_Third_Party_Security_Assurance.pdf (defining Third-Party Sender and providing numerous examples of entities that act in the role).

68. THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 4.

69. THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 5 (denoting diagram as Figure A).

70. Bernard et al., *supra* note 60.

71. JILL FOREST, 2015 NACHA RULES, SAME DAY ACH AND REGULATION E CHANGES,

of the Third-Party Sender's clients, because the ODFI may initiate ACH entries for clients that engage in deceptive, abusive, or illegal practices.[72] Moreover, financial institutions that enter into agreements with Third-Party Senders may be viewed as facilitating practices of the Third-Party Sender's clients and could potentially be liable to an RDFI whose customer reports an unauthorized transaction on his bank account.[73]

One of the most common types of Third-Party Sender is a payroll company.[74] Typically, a payroll company enters into an originating agreement with an ODFI, which allows the Third-Party sender to initiate ACH entries on behalf of the financial institution.[75] When an employer contracts with a payroll company to complete its ACH credits to employees, the underlying transaction is generally split into two related ACH entries: (1) the payroll processor initiates an ACH debit to obtain payroll funds from the employer; and (2) the payroll processor initiates an ACH credit to complete the payment to the employee on behalf of the employer.[76] For instance, if a company (Originator) hires a payroll company (Third-Party Sender) to do its weekly payroll, the company would authorize the payroll company to complete two separate transactions: (1) to initiate an ACH debit entry from the company's account; and (2) to initiate an ACH credit entry to the employees' accounts.[77]

Where the primary relationship is unclear and there is a dispute as to the authorization status of an entry, the responsibilities of the Originator, ODFI, and RDFI become muddled.[78] If the payment intermediary is visible only to one party, it is clear that the intermediary acts on behalf of that party.[79] Yet, other circumstances necessitate a deeper inquiry into intermediaries' relationships to confirm its role,

THE CLEARING HOUSE PAYMENTS ASS'N 6 (2015), http://www.nyba.com/wp-content/uploads/2015/05/CS6_NACHA_Rules.pdf.

72. *Id.* at 20.

73. McGlasson, *supra* note 13 (discussing a 2014 amendment to the definition of a Third-Party sender and its implications on financial institutions).

74. THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 9.

75. NACHA Bulletin 2-2014, *supra* note 25.

76. NACHA Bulletin 2-2014, *supra* note 25.

77. NACHA Bulletin 2-2014, *supra* note 25.

78. NACHA Bulletin 1-2014, *supra* note 25.

79. NACHA Bulletin 1-2014, *supra* note 25.

including its activities in obtaining authorizations from different parties.[80] A recent amendment to the NACHA Operating Rule clarifies the more opaque relationship by outlining the obligations of a Third-Party Sender.[81]

B. The Obligations of a Third-Party Sender

In 2014, NACHA incorporated a new rule that defines the obligations of Third-Party Senders, ODFIs, and Originators that use Third-Party Senders.[82] Under Operating Rule § 2.15.2, a Third-Party Sender warrants "the authorization of each entry it originates through the ODFI and agrees to indemnify the ODFI from and against any claims, demands, losses, liabilities and expenses that result directly or indirectly from the failure of the Originator to perform its obligations as an Originator under these rules."[83] Further, under Operating Rule § 2.15.3, "a Third-Party Sender that is performing any of the obligations of an ODFI warrants that it is legally able to perform the requirements otherwise applicable to an ODFI."[84] However, the Third-Party Sender's performance of any of the obligations of an ODFI does not relieve the ODFI of any of its obligations under the Operating Rules.[85]

The overlap of responsibility is where the "blame game" remains.[86] Suppose that (1) a Third-Party Sender submits an entry on behalf of an ODFI and the authorization status of that entry is disputed; or (2) a Third-Party Sender declares bankruptcy while in the process of transmitting an entry to a Receiver's account.[87] With the proliferation of payment intermediaries, the possibility of a claim that fits into one of these areas of uncertainty increases.[88] In the first instance, because both

80. NACHA Bulletin 2-2014, *supra* note 25.
81. NACHA, *supra* note 3.
82. NACHA OPERATING RULES (2016), *supra* note 21, at § 2.15.2.
83. NACHA OPERATING RULES (2016), *supra* note 21, at § 2.15.2.
84. NACHA OPERATING RULES (2016), *supra* note 21, at § 2.15.3.
85. NACHA OPERATING RULES (2016), *supra* note 21, at § 2.15.3.
86. *See In re* Payroll Am., Inc., 609 F.App'x 367, 368 (9th Cir. 2015) (exemplifying the "blame game", i.e., when a third party service provider declares bankruptcy after debiting millions of dollars from employers accounts).
87. *Id*. (providing an example of this occurrence).
88. Joan Goodchild, *ACH Fraud: Why Criminals Love This Crime*, CSO ONLINE (Aug. 16, 2010), http://www.csoonline.com/article/2125833/malware-cybercrime/ach-fraud—why-criminals-love-this-con.html.

the ODFI and Third-Party Sender have warranted that the ACH entry was authorized, the Third-Party Sender will need to indemnify the ODFI, who in turn will need to indemnify the RDFI against any claim brought by a Receiver.[89] However, when the parties dispute the "terms of the entry," the resulting liabilities are unclear. Under (2), if a Third-Party Sender declares bankruptcy in the process of disputing the "terms of an entry," a court may still find an ODFI liable to an RDFI regardless of the ODFIs operating agreement with the Third-Party Sender.[90]

C. Nesting Third-Party Senders

The transaction between an Originator, Third-Party Sender, and an ODFI becomes even more complicated when two or more additional payment intermediaries nest.[91] A Nested Third-Party Sender is any entity whose services are contracted by another Third-Party Sender.[92] For instance, this might occur when a smaller payroll company contracts with a larger payroll company that has a better relationship with an ODFI and can more efficiently process the smaller payroll company's ACH entries.[93] Moreover, when there are multiple nested third parties, the responsibilities and potential liability of the ODFI and RDFI are even less clear.[94]

To illustrate, suppose aforementioned Payroll Company B (Third-Party Sender) has an agreement with Payroll Company C (Nested Third-Party Sender), who in turn has a depository agreement with an ODFI.[95] The relationship and potential liabilities between Payroll Company B and ODFI are still unclear under Operating Rule § 2.15.3.[96] If the ODFI terminated its relationship with Payroll Company C, all parties to that transaction—Payroll Company B, all of its clients,

89. *Id.*
90. *Id.*
91. PCI SEC. STANDARDS COUNCIL, *supra* note 67, at 23.
92. PCI SEC. STANDARDS COUNCIL, *supra* note 67, at 2.
93. PCI SEC. STANDARDS COUNCIL, *supra* note 67, at 4.
94. THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 9.
95. *See* NACHA OPERATING RULES (2016), *supra* note 21, at § 2.15.3 (requiring the Third-Party Sender to warrant that it can legally perform the requirements otherwise applicable to the ODFI, such as warranting the authorization of ACH entries submitted to RDFIs).
96. NACHA OPERATING RULES (2016), *supra* note 21, at § 2.15.3.

and its clients' employees—are impacted.[97] In these situations, a Third-Party Sender like Payroll Company B will be unable to complete the second stage of its clients' companies' ACH entries (the credit transaction), which will likely result in a loss of funds for the client's employees.[98] Due to the lack of regulation and case law governing the relationship between Nested-Third-Party Senders, payroll companies in this situation generally are unsure of their potential liabilities to their clients companies.[99]

D. Case Law Demonstrating the Increased Risk of Nested-Third-Party Senders

The federal courts have not made a direct ruling on the proper allocation of risk created by payment intermediaries; yet, the 9th Circuit affirmed the U.S. District Court of Idaho's ruling which suggested that even if the Third-Party Sender is acting on behalf of the Originator, the ODFI should bear the bulk of the risk resulting from its involvement with a particular ACH transaction.[100] While the new rule requires a Third-Party Sender to indemnify an ODFI for submitting an unauthorized entry, the question still remains as to the obligations of Nested-Third-Party Senders to other participants in the ACH Network.[101] This issue would arise when there is a factual dispute as to the authorization status of an entry initiated by a Nested-Third-Party

97. *See In re* Payroll Am., Inc., 609 F.App'x 367, 369 (9th Cir. 2015) (demonstrating the situation in which a Third-Party Sender is unable to complete its clients' companies' ACH entries).

98. *Id.*

99. *See* THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 9 (discussing the risks associated when terminating relationships with Nested-Third-Party Senders).

100. *In re* Payroll Am., Inc., 609 F.App'x at 369 (affirming the ruling of the lower court); Gugino v. Greater Rome Bank, 489 B.R. 252, at 257 (D. Idaho 2013) (ruling that, in a bankruptcy proceedings, an ODFI was not liable to a client of a third-party sender that initiated ACH transactions through the ODFI because the client failed to demonstrate either that (1) the ODFI had dominion over the money transferred through the ACH Network; (2) the ODFI was not an entity for whose benefit the ACH transactions were made; and (3) the ODFI was not a subsequent transferee); *See also* Clinton Plumbing & Heating of Trenton, Inc. v. Ciaccio, No. 09-2751, 2010 U.S. Dist. LEXIS 113215, at *28–34 (E.D. Pa. Oct. 22, 2010) (District Court of Pennsylvania finding that a claim against an RDFI resulting even remotely from an ODFI's alleged breach of warranty would permit the RDFI to bring a third-party indemnification claim).

101. *See* THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 9 (providing a case study dealing with a Nested-Third-Party Sender).

Sender who has no direct contractual relationship with the Originator or Receiver.[102]

In *Gugino v. Greater Rome Bank*,[103] the Idaho District Court analyzed the relationships between Originators and Nested-Third-Party Senders in a bankruptcy proceeding.[104] There, Payroll America, Inc., a local payroll processing company, collected money from its employer clients (Originators) and used that money to pay both the employee salaries and applicable taxing authorities.[105] Payroll America (Third-Party Sender) contracted with Data Processing Services ("DPS") (Nested-Third-Party Sender) to process its electronic transmissions through the ACH Network.[106] DPS entered into an originating agreement with Greater Rome Bank (ODFI), who in turn had an agreement with the Federal Reserve Bank for clearing and transmitting ACH entries.[107] At some point, Payroll America misappropriated monies that had been held to pay its customers' future tax bills and subsequently filed Chapter 7 bankruptcy.[108] The Chapter 7 trustee brought a claim against Greater Rome Bank (ODFI) contending that Payroll America fraudulently transferred over $30 million to Greater Rome before filing bankruptcy.[109] Ultimately, the court dismissed the claim against Greater Rome, ruling that its agreement with DPS (Nested-Third-Party Sender) did not establish liability to Payroll America's (Third-Party Sender) clients (Originator).[110] While this decision ruled that, in the context of a bankruptcy proceeding, an ODFI is not liable to an Originator whose funds are misappropriated by a Nested-Third-Party Intermediary, there is still uncertainty as to the ODFI's potential liability to the Receiver and RDFI when a Nested-Third-Party Sender initiates entries.[111]

102. Bernard et al., *supra* note 60.
103. 489 B.R. 252.
104. Gugino, 489 B.R. at 255.
105. *Id.*
106. *Id.* at 255–256.
107. *Id.*
108. *Id.*
109. *Id.* at 255.
110. *Id.*
111. THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 9 (discussing the risks associated when terminating relationships with Nested-Third-Party Senders).

IV. ODFI'S DUTY TO MITIGATE RISK

In order to prevent these types of cases from arising, NACHA promulgated three new Operating Rules that require ODFI's to mitigate the risks of Third-Party Senders.[112] Now, ODFIs must: (1) enter into Originating Agreements with Third-Party Senders, which among other things allows the ODFI to audit the entity and its Originator's compliance with the Rules;[113] (2) utilize a commercially reasonable method to verify the identity of the Originator or Third-Party Sender at the time the ODFI enters into the Originating Agreement;[114] and (3) perform due diligence with respect to the Third-Party Sender or Originator to form a reasonable belief that the entity has the capacity to perform its obligations under the Rules.[115] Additionally, the new Operating Rules requires ODFIs to periodically review the activities of their Third-Party Senders, specifically monitoring the return rate for unauthorized transactions.[116]

While these rules do encourage a more efficient ACH network, they do not regulate the relationships between Third-Party Senders and Nested-Third-Party Senders.[117] NACHA's Bulletin seems to suggest that ODFIs should still bear the increased risk of these relationships because they are in the best position to monitor against potential fraud.[118] Moreover, ODFIs are free to contract and collect fees with any third-party payment intermediary it chooses, but by doing so they should be prepared to assume the risks of fraud and error arising out of those agreements.[119]

A. New NACHA Rule Requiring Third-Party Sender Registration

Effective September 9, 2017, NACHA's new Operating Rule will require ODFIs to identify and register their Third-Party Sender

112. *See* NACHA OPERATING RULES (2016), *supra* note 21, at § 2.
113. NACHA OPERATING RULES (2016), *supra* note 21, at § 2.2.2.2.
114. NACHA OPERATING RULES (2016), *supra* note 21, at § 2.2.1.
115. NACHA OPERATING RULES (2016), *supra* note 21, at § 2.2.3.
116. NACHA OPERATING RULES (2016), *supra* note 21, at § 2.2.3.
117. *See* NACHA OPERATING RULES (2016), *supra* note 21, at § 2.2.3.
118. THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 12.
119. FOREST, *supra* note 71, at 25.

customers in order to promote consistent due diligence and improve the quality of the ACH Network.[120] As an initial registration, ODFIs must provide NACHA with basic registration information for each Third-Party Sender customer, including: (1) ODFIs name and contact information; (2) the name and principal place of business of the Third-Party Sender; (3) the routing number used in ACH transaction initiated by the Third-Party Sender; and (4) the company's identification(s) of the Third-Party Sender.[121] The new Operating Rule also provides for a supplemental registration requirement, which requires an ODFI to provide more specific information about a Third-Party Sender within ten days of an authorized request by NACHA.[122] A request for supplemental registration is authorized if NACHA believes that the Third-Party Sender poses an escalated risk of financial loss to ACH participants, a violation of the Operating Rules, or an excessive return rate of unauthorized entries.[123]

Notably, the new Operating Rule requires a Third-Party Sender to disclose to the ODFI any Nested-Third-Party Senders for which it transmits entries to the ODFI, prior to transmitting any entries for other Third-Party Senders.[124] Moreover, a Third-Party Sender must provide the ODFI, upon request, the information necessary for the ODFI to complete registration for the Nested-Third-Party Sender within two banking days.[125] Still, it is uncertain whether an ODFI's notice of its relationship with a Nested-Third-Party Sender impacts its potential liabilities to other participants in the ACH Network.[126] Overall, this new rule supports the notion that the most substantial obligation to prevent against fraud falls on the ODFI, but it does not go as far as requiring direct agreements between ODFIs and Nested-Third-Party Senders.[127]

120. *Third-Party Sender Registration*, NACHA (2016), https://www.nacha.org/rules/third-party-sender-registration (last visited February 7, 2017).

121. *Id*.

122. *Id*.

123. *Id*.

124. *Id*.

125. *Id*.

126. *See id.* (remaining silent as to whether notice of a Nested-Third-Party Sender relationship impacts an ODFI's potential liability).

127. *Id*.

B. ODFI's Capacity to Prevent Against Fraud in the ACH Network

An ODFI must deal directly with the Third-Party Sender before any ACH transaction is to be initiated.[128] Before agreeing to initiate a transaction on behalf of a Third-Party Sender, NACHA's new Operating Rule will require ODFIs to identify and register the entity.[129] During this registration period, an ODFI has the opportunity to assess the risk of the relationship with the Third-Party and verify the creditworthiness of this entity, including: (1) reviewing its financial history; (2) ensuring it has sufficient capitalization in relation to the volume of ACH transactions; (3) obtaining history of its ACH return rates; and (4) researching consumer complaints on the Better Business Bureau.[130] While the Operating Rule does not require ODFIs to examine Nested-Third-Party Senders with same degree of scrutiny, ODFIs should go beyond the Rule's requirements and employ the same investigatory mechanisms to evaluate Nested Third Parties in order to alleviate their potential exposure.[131]

The Federal Deposit Insurance Corporation published a "Supervisory Approach to Institutions Establishing Account Relationships with Third-Party Senders," which sets forth a list of specific risks that financial institutions should recognize and mitigate: (1) credit risks (charge back from unauthorized transactions); (2) operational risks; (3) compliance risks; (4) reputational risks; and (5) legal risks (class action lawsuits).[132] Though this list sets forth a "best practice" for financial institutions, courts will likely consider this as evidence weighing against an ODFI if ever a claim resulted from an erroneous ACH transaction.[133]

On the one hand, NACHA should require ODFIs to consider the

128. *See id.* (explaining the relationship between the ODFI a Third-Party Sender and discussing how the 2013 amendment requires transparency between the two parties).

129. *Id.*

130. THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 11; *Third-Party Payment Processors—Overview*, FED. FIN. INST. EXAMINATION COUNSEL, https://www.ffiec.gov/bsa_aml_infobase/pages_manual/OLM_063.htm (last visited Jan. 7, 2017).

131. FOREST, *supra* note 71, at 26 (providing methods for an ODFI to alleviate potential exposure).

132. Bernard et al., *supra* note 60.

133. *See* THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 11 (discussing the responsibilities of ODFIs when entering into operating agreements with Third Party Service Providers).

impact to all ACH participants when determining whether to enter or terminate a depository agreement with a third-party-payment intermediary, particularly because ODFIs typically make a profit on these transactions.[134] On the other hand, it may be unfair to require an ODFI to incur liability for unauthorized transactions initiated by Nested-Third-Party Senders with which the ODFI does not have an operating agreement.[135] A possible solution to minimize the risk of Nested-Third-Party Senders could be a requirement that ODFIs must always have a direct originating agreement between it and any Third-Party Senders for which it originates entries.[136] This requirement would minimize the risk of default or misallocation of funds that each nested-third-party intermediary places on all ACH participants.[137] Still, even without this requirement, ODFIs will be given notice of each Nested-Third-Party Sender through its agreements with a Third-Party Sender. Therefore, ODFIs can better serve their customers by applying the same rigorous investigatory standards before originating ACH entries on behalf of a Nested-Third-Party Sender.

C. RDFIs Incur the Bulk of Expenses for Unauthorized Entries

For each returned unauthorized ACH entry, the RDFI incurs considerable cost.[138] NACHA collected cost data from twenty-nine institutions that represent 82% of all ACH Network unauthorized returns in a year and found that the weighted average cost for RDFIs to handle unauthorized transactions was $5.97.[139] However, the cost drastically fluctuated depending on the size of the RDFI, ranging from $1,800 per unauthorized transaction for a small RDFI to $2.30 for a large RDFI.[140] NACHA Operating Rules currently require an ODFI to pay a fee of less than $5.97 to an RDFI for any ACH debit returned as

134. THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 12.
135. FOREST, *supra* note 71, at 23.
136. FOREST, *supra* note 71, at 25.
137. THIRD-PARTY SENDER CASE STUDIES, *supra* note 15, at 12–14.
138. FOREST, *supra* note 71, at 4.
139. FOREST, *supra* note 71, at 23 (explaining that the costs included labor, systems, and office space allocations but did not take into consideration cost related to customer contact via branch, compliance related to Reg. E disputes, and costs associated with obtaining a Written Statement of Unauthorized Debit).
140. FOREST, *supra* note 71, at 23.

unauthorized.[141] While the reimbursement fee is aimed at helping RDFIs with a portion of the compensation for unauthorized entries, it is clear that smaller institutions are most negatively impacted by an ODFI's lack of due diligence.[142]

If ODFIs were required to fully indemnify an RDFI for all claims and damages resulting from contested or unauthorized ACH Entries, ODFIs would be incentivized to implement strict screening before entering into agreements with Third-Party Senders (and potential, hidden Nested-Third-Party Senders).[143] Furthermore, a stricter screening policy would promote a more efficient ACH Network for all parties, thereby increasing both customer and merchant satisfaction.[144] Last, because a financial institution will typically participate in the ACH Network as an ODFI in one ACH entry and an RDFI in another, it is in the interests of all NACHA members to require implementation of a risk management system by the ODFI to protect against fraudulent entries submitted by Third-Party Senders.[145]

V. CONCLUSION

The new Operating Rule governing Third-Party Sender registration will likely reduce the occurrences of fraud by requiring transparency for all Third-Party Senders between an ODFI and Originator. Yet, it is still unclear as to whether Operating Rule § 2.2.2.2 would impose liability on an ODFI in the event that its contracted Third-Party Sender—or even a Nested-Third-Party Sender—commits fraud, misplaces funds, or declares bankruptcy. The *Gugino* case appears to reject this theory of liability in a bankruptcy proceeding, yet this decision is narrow and came down prior to the recent rule amendment.[146] For judicial clarity, ACH participants will likely need to

141. FOREST, *supra* note 71, at 23.
142. FOREST, *supra* note 71, at 23.
143. *See* FOREST, *supra* note 71, at 19–23 (discussing methods to improve the ACH Network, including strict screening of Third-Party Sender's by the ODFI).
144. NACHA, *supra* note 23 (explaining the National Automatic Clearing House Association's view on the risk of accepting originating ACH transactions from Third Parties).
145. PETE MARTINO, FED. DEPOSIT INS. CORP, ACH AND THIRD-PARTY PAYMENT PROCESSOR RELATIONSHIPS 18 (2014), https://www.kansascityfed.org/eventinfo/banking/2014-AML-Third-Party%20Payment%20Processors%20and%20ACH%20Presentation.pdf.
146. Gugino v. Greater Rome Bank, 489 B.R. 252, at 257 (D. Idaho 2013).

wait for a direct opinion on the issue that firmly defines the limits of liability in these situations. Overall, financial institutions should continue to take steps to protect consumers against the risk of nested payment intermediaries by strictly scrutinizing any ACH entry initiated by a Third-Party Sender.

EDWARD MCCARTNEY*

* I am particularly grateful to Tanisha Edwards, Brenna Sheffield, and Professor Lissa Broome for their thoughtful comments and guidance during the editing process. I would also like to thank my family and friends who have encouraged and supported me throughout my academic career.