

# OPPOSITION TO CLEARINGHOUSE RULE 04-041

CORPORATION	CONTACT PERSON/PH. #	COMMENTS
FRANCOIS OIL CO., INC Belleville, WI	SHELLY SEVERSON 608-424-3375	Strongly opposes Rule: "Cannot afford the time to get authorizations, and this would affect customer relations."
FRAWLEY OIL CO., INC Whitewater, WI	BETTY FRAWLEY 262-473-8605	Strongly opposes Rule: "I sent letters on CybrCollect's behalf in 2001, and I will do it again."
HEARTLAND COUNTRY CO-OP Westby, WI	PEGGY FORTUN 608-634-3184	Strongly opposes Rule: "We already have control over who we want to collect the fees from." "The checkwriters are already protected." "I don't know what we'd do without CybrCollect!"
HANSENS IGA Bangor, WI	ROBERTA BOYEA 608-486-2049	Strongly opposes Rule: "Don't have time to get signatures on every check."
BATTERIES PLUS Hartland, WI	WAYNE NELSON 262-912-3138	Strongly opposes Rule: "Would not be practical to get signatures."
ARNOLD'S SERVICE & TOWING Sparta, WI	MIKE ARNOLD 608-269-4241	Strongly opposes Rule: "Who keeps doing this?" "Are we supposed to stop taking checks?"
BURNSTADS' SUPERMARKET Tomah, WI	BRUCE SHONG 608-372-5355	Strongly opposes Rule: "Meeting with Wis. Grocers' Association on 7/14. Will bring this up at meeting in Madison."
COUNTRY KITCHEN La Crosse, WI	EARL ZUMACH 608-784-9660	Strongly opposes Rule: "This is not good for anyone involved."
DICK'S SUPERMARKETS Platteville, WI	TOM HINMAN 608-348-2343	Strongly opposes Rule: "I REFUSE to get authorizations on each check! I won't do it. This will be the end of electronic check collections in Wisconsin."
DOLLAR DISCOUNT, INC Superior, WI	DAVID STOCK 715-392-2580	Strongly opposes Rule: "This would not be good. CybrCollect works well for us the way it is."
DENNY'S MARKET Sparta, WI	KELLY MANTZKE 608-269-2727	Strongly opposes Rule: "I would have to stop taking checks!" "Demand letters, in my experience, get nothing collected!"
PRO-KELA, LLC (Fantastic Sams) Tomah, WI	CHRIS POKELA 608-374-3078	Strongly opposes Rule: "You bet I'll make contact with the legislators!"
McCATHIE, INC (BP-LaCrosse) La Crosse, WI	CHAD McCATHIE 608-787-0714	Strongly opposes Rule: "Not practical to get signatures on each check."
FLAWLESS ENTERPRISES Rice Lake, WI	TIM BODIS 715-234-2841	Strongly opposes Rule: "Who can I contact to help CybrCollect's case?"
DIAMOND LANES Beloit, WI	DAN BUCHOLTZ 608-362-9166	Strongly opposes Rule
ANLON CO., LLC (Dollar Discount) Viroqua, WI	MELISSA SHERRY 608-637-8633	Strongly opposes Rule: "Why does this keep happening? Things work so well the way they are..."
PADFIELD, INC (Fantastic Sams) Altoona, WI	GARY PADFIELD 715-832-0873	Strongly opposes Rule: "Getting authorizations would not be practical. The current system is beneficial to our customers as it is."
ASHMORE OPTICAL La Crosse, WI	JIMMIE ANN GATES 608-784-1150	Strongly opposes Rule: "How much would check collection cost if this goes through?"
HEGENBARTH FOOD GROUP Gatesville, WI	BARB HEGENBARTH 608-582-4994	Strongly opposes Rule: "I have already contacted Dale Schultz & Ron Brown and am testifying on CybrCollect's and our behalf on July 26. If this Rule passes, it will cost everyone - and will only be beneficial to the check-writer that never intended to pay."

Every person on this list expressed strong intentions of contacting state legislators with opposition to Clearing House Rule 04-041.

# OPPOSITION TO CLEARINGHOUSE RULE 04-041

LIONS QUICK MARTS Janesville, WI	HEIDI NEWLAND 608-754-1159	Strongly opposes Rule: "I already emailed a legislator expressing my opposition."
LAKE SUPERIOR CLEANERS Superior, WI	VICKY SCHOLD 715-394-8626	Strongly opposes Rule: "This is going to effect everyone."
MIDWEST HOTEL & CONF. CTR. Fond du Lac, WI	MARTA BERGSTROM 608-756-3100	Strongly opposes Rule: "My accountant is contacting legislators."
NEW HORIZONS SUPPLY CO-OP Fennimore, WI	SHARI CHRIST 608-822-3217	Strongly opposes Rule: "Getting authorizations on every check would be very time-consuming."
Q-MART Oshkosh, Menasha, Neenah, etc.	JODIE McLEOD 920-209-3000	Strongly opposes Rule: "We're bringing more stores aboard with CybrCollect. We are very happy with the services as they exist now. Our accountant will contact legislators in opposition."
QUILLINS, INC. La Crosse, WI	CONNIE SEMANN 608-785-1424	Strongly opposes Rule: "Intends to email a committee chairman expressing our opposition."
O'CONNOR OIL CORP. Fond du Lac, WI	JOHN VENTURINI 920-921-8020	Strongly opposes Rule: "I definitely will make contact with legislators. The effects of this Rule would not be practical for our business."
UNITED AUTO SUPPLY La Crosse, WI	RICHARD BEIRNE 608-782-6262	Strongly opposes Rule: "I have already contacted several representatives both by email and phone expressing my displeasure of this proposed Rule. I wish I could attend the hearing to voice my opposition."

Every person on this list expressed strong intentions of contacting state legislators with opposition to Clearing House Rule 04-041.



State of Wisconsin  
*Department of Financial Institutions*

Jim Doyle, Governor

Lorrie Keating Heinemann, Secretary

Testimony of

Michael J. Mach  
Administrator  
Division of Banking

on  
Clearing House Rule 04-41

Chairman Schlutz and members of the committee, thank for the opportunity to testify on Clearing House Rule 04-41, relating to oppressive and deceptive practices by collection agencies.

The purpose of the rule is to ensure that there is a level playing field for the collection agencies licensed by the department and that consumers receive the protection that they are already entitled to.

Now is a good time to state what the rule does not do. The rule does not impose any new requirements on anyone.

First I will touch on the issue of a leveling playing field and the events that lead us here today.

Several years ago we were approached by several collection agencies with a concern that they were being disadvantaged because one or more other collection agencies engaged in the business of collecting nonsufficient fund checks ("NSF") were also collecting an NSF fee without obtaining proper authorization. The agencies that were not obtaining authorization were marketing that as a benefit to their clients.

To address this issue we issued written guidance to all collection agencies on October 12, 2001. That guidance stated our position on this matter and reflects what is contained in the proposed rules.

We were challenged on our guidance by one of the agencies that was advising its clients that written authorization was not required and the matter went to circuit court for review. We actually lost that case. The court determined that the guidance that we issued had the attributes of an administrative rule and was not properly promulgated. Although we lost the case, the court did comment on the content of the guidance.

I would like to direct you to various pages of the transcript from the hearing. On page 16 the court states, "Plaintiff makes a variety of assertions about why a rule that encompassed the content of the letter would be invalid, and I simply do not find them to be persuasive". The court then goes through various issues one by one and supports our position on each issue. I will not go through those separately here, but I have provided you with pages 15 through 19 of the transcript.

*Division of Banking*

Mail: PO Box 7876 Madison, WI 53707-7876

Voice: (608) 261-7578

Fax: (608) 267-6889

Courier: 345 W. Washington Ave. 4<sup>th</sup> Floor Madison, WI 53703

TTY: (608) 266-8818

Internet: [www.wdfi.org](http://www.wdfi.org)



State of Wisconsin  
Department of Financial Institutions

Scott McCallum, Governor

John F. Kundert, Secretary

October 12, 2001

TO THE COLLECTION AGENCY ADDRESSED:

The purpose of this letter is to set forth the Division of Banking's ("Division") position on the collection of returned check fees by an Automated Clearing House ("ACH") transaction or a bank draft.

Section 404.401(1), Wis. Stats., indicates that a bank may charge a properly payable item against the account of a customer. It also indicates that an item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and the bank.

Because a bank may only charge a customer's account for a returned check fee if the fee is authorized by the customer, a collection agency or creditor attempting to collect a returned check fee must, necessarily, also have the authorization of the customer. A collection agency that attempts to collect an unauthorized fee is violating Rule DFI-Bkg 74.14(11), which provides that a licensee shall not engage in any deceptive or oppressive practices, including claiming or attempting to threaten to enforce a right with a knowledge or reason to know that the right does not exist.

Collecting a returned check fee through the use of an ACH transaction without the proper authorization from the customer would be a violation of Section 404.401(1), Wis. Stats., and Rule DFI-Bkg 74.14(11). It is the Division's position that, with respect to the collection of fees by an ACH transaction, notification does not equate authorization and that the posting of a sign at the merchant's place of business does not satisfy the requirement of obtaining a customer's authorization. Acceptable authorization must, at a minimum, comply with National Automated Clearing House Association ("NACHA") rules. Also, the collection agency or creditor initiating the ACH transaction must be able to document that they have such an authorization.

Collecting a returned check fee through the use of an unauthorized paper draft would violate Sections 404.401(1), 403.401, and 403.402, Wis. Stats., and Rule DFI-Bkg 74.14(11). As in the use of ACH transactions, it is the Division's position that notification does not equate authorization and that the posting of a sign at the merchant's place of business does not satisfy the requirement of obtaining a customer's authorization.

If you have questions regarding this matter, you may contact Examiner Ray Hellmer at 608-267-3776, Examiner Maggie Schmelzer at 608-261-2310, or me at 608-266-0447.

Sincerely,

  
Jean Plale, Director  
Licensed Financial Services

JMP/jp

Division of Banking

Mail: PO Box 7876 Madison, WI 53707-7876

Courier: 345 W. Washington Ave. 4<sup>th</sup> Floor Madison, WI 53703

Phone: (608) 261-7578

Fax: (608) 267-6880

TTY: (608) 266-8818

Internet: [www.wdfi.org](http://www.wdfi.org)

2 =====  
3  
4 CYBRCOLLECT, INC.,

5 Plaintiff,

6 v.

MOTION TO DISMISS

Case No. 03-CV-572

7 WISCONSIN DEPARTMENT OF  
8 FINANCIAL INSTITUTIONS,

9 Defendant.

**COPY**

10 =====  
11 TRANSCRIPT OF PROCEEDINGS held in the

12 above-entitled matter before the HONORABLE MICHAEL N.  
13 NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse,  
14 in the City of Madison, Wisconsin, on the 2nd day of  
15 June, 2003, commencing at 1:15 o'clock p.m.

16 PRESIDING: HONORABLE MICHAEL N. NOWAKOWSKI  
17 Circuit Judge

18 APPEARANCES:

19 JOAN L. EADS and ELIZABETH E. PEVEHOUSE,  
20 Foley & Lardner, Attorneys at Law,  
150 East Gilman Street, P.O. Box 1497,  
Madison, Wisconsin, appeared on behalf of  
the Plaintiff;

21 STEPHEN J. NICKS, Assistant Attorney General,  
22 WI Department of Justice, 17 West Main Street,  
P.O. Box 7857, Madison, Wisconsin, appeared  
23 on behalf of the Defendant.

24 ALSO PRESENT:

25 GARY DOHERTY, President, CybrCollect, Inc.

1 I quote, "TO THE COLLECTION AGENCY ADDRESSED." No  
2 argument or statement has been included in DFI's  
3 brief that its letter was not sent generally to  
4 collection agencies or that the position expressed in  
5 the letter was not generally applicable to all  
6 licensed collection agencies or that it would not be  
7 applicable to any new company that sought a license.

8 I would conclude that the letter, therefore, has  
9 general application. And for all of those reasons, I  
10 would conclude that this letter does constitute a  
11 rule that the Department would be required to  
12 promulgate through the rule-making procedures of  
13 Chapter 227 before it can have any further effect.

14 And thus, I conclude that the plaintiff has  
15 stated a legally sufficient cause of action in claim  
16 number one that the letter is a rule and is invalid  
17 because not properly promulgated.

18 I would agree with Mr. Nicks that because of  
19 that conclusion it would be unnecessary for me to  
20 address the allegations made within claim number two  
21 because they do premise themselves on the assertion  
22 that the rule is invalid for additional reasons. But  
23 I do think that given the briefing that was done by  
24 the plaintiff with regard to this, a couple of  
25 observations would be in order.

1           The Department of Financial Institutions, and in  
2           particular the Division of Banking, under section  
3           218.04(7) has the authority to make rules for the  
4           administration and enforcement of this section, and  
5           it is entitled to issue general or special orders to  
6           protect the public from oppressive or deceptive  
7           practices of licensees. Were the Department to issue  
8           and properly promulgate the position taken in the  
9           October 12th, 2001 letter as a rule, I would conclude  
10          that there would be no legal impediment to its doing so.

11          Plaintiff makes a variety of assertions about  
12          why a rule that encompassed the content of the letter  
13          would be invalid, and I simply do not find them to be  
14          persuasive.

15          First off, insofar as the contention that  
16          somehow Regulation E within the federal system  
17          provides a "safe harbor", well, perhaps it provides a  
18          safe harbor with respect to any requirements that are  
19          imposed by federal law, but there is no indication  
20          that Regulation E preempts state law or that the DFI  
21          would be bound by the limitations found in Regulation E.

22          The next legal challenge that appears to have  
23          been made is that somehow the requirements of section  
24          404.401(1) cannot be relied upon as the basis for a  
25          rule by the DFI. And I won't get into all of the

1 arguments that are made, but if the DFI, in defining  
2 an oppressive or deceptive practice, wants to in  
3 effect make applicable to collection agencies the  
4 kind of rule that is clearly applicable under this  
5 statute to a bank, I see nothing that would prevent  
6 it from doing so.

7 Likewise, to the extent that the DFI in  
8 promulgating a rule, and presumably it would be a  
9 part of the Administrative Code DFI-Bkg 74.14 and  
10 would either be part of subsection 11 or a separately  
11 stated rule altogether, there's nothing that would  
12 interfere with the adoption of such a rule because it  
13 appears to clearly be the kind of thing that would be  
14 addressing what the agency determined, if it did so  
15 determine, and apparently this letter suggests it was  
16 an oppressive or deceptive practice.

17 Next the plaintiff makes argument under section  
18 403.414(7), which is the statute which authorizes a  
19 person to whom a check has been issued that was not  
20 honored upon presentment to collect the reasonable  
21 costs and expenses in connection with the collection  
22 of the bad check.

23 Well, were the DFI to adopt a rule similar to  
24 the position it took in the October 12th letter, it  
25 would be doing nothing that was inconsistent with



1 this provision. What this provision provides is that  
2 someone, a merchant, who wishes to collect from a  
3 person who has given it a bad check is entitled to go  
4 to court, and the person who gave them the bad check  
5 within such a court proceeding would be liable for  
6 all reasonable costs and expenses.

7 What the DFI is doing is saying that, if it were  
8 to adopt such a rule, is simply that unless the  
9 person who issues the check has authorized in a  
10 particular way a direct debit from their checking  
11 account, that such a debit from the account cannot be  
12 made and is simply saying you can't go and obtain  
13 this directly without going to court or collecting it  
14 through some other means where proper authorization  
15 was obtained, but it clearly would not be inconsistent  
16 with the provisions of that statute.

17 Finally as to 402.204 where the statute speaks  
18 about a contract for sale of goods may be made in any  
19 manner sufficient to show agreement, again such a  
20 rule, were it to be adopted, would not be inconsistent  
21 with the provisions of that statute. That statute,  
22 of course, by its very terms applies only to contracts  
23 for sale of goods. The kind of checks that are  
24 presumably submitted to the plaintiff for collection  
25 include checks that are not used for the payment of

1 goods. They may very well be the payment for  
2 services. They may be a payment -- they may be a  
3 check that was simply presented for cash, and a  
4 merchant agreed to cash somebody's check. Under all  
5 of those circumstances, that statute would not even  
6 be applicable.

7 I think those are the primary bases, and those  
8 will be the only observations that I would offer  
9 about that claim number two.

10 Now, we are in a somewhat difficult procedural  
11 status. All that I have done today is to fail to  
12 dismiss a Complaint. No request for summary judgment  
13 seeking a declaration consistent with the conclusions  
14 I've made here today has been filed.

15 MS. EADS: Would the Court entertain such a  
16 motion orally?

17 THE COURT: Well, let me ask Mr. Nicks  
18 whether he thinks that while I obviously have reached  
19 a conclusion different than he has asked me to, is  
20 there something more in the way of evidence that  
21 could be offered that would suggest that there's a  
22 reason to have this case go forward to --

23 MR. NICKS: I would like the opportunity to  
24 talk to my client, your Honor. And then what I would  
25 do is promise the plaintiff's counsel that in two

MAY 28 2004

May 26, 2004

Senator Ronald Brown  
Room 104 South  
State Capitol  
PO Box 7882  
Madison, WI 53707-7882

RE: Cellular One Billing and Payment Issues

Dear Senator Brown,

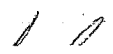
I have attached a copy of a recent "Important Customer Notice" issued to me by Cellular One. In a nutshell, Cellular One is advising me that unless I agree to allow them to access my checking account electronically at their discretion, the company may revoke my check-paying ability with them. After calling Cellular One to ask about this new procedure, the customer representative told me that I can still use checks to pay my account, but if a NSF situation arises, they can cancel my check writing ability to pay my account...and access my checking account electronically. Incidentally, I have never had an NSF situation arise with Cellular One, and I have controls in place to make sure that a NSF will never occur on any of my accounts.

I strongly object to this type of arbitrary action on the part of a company here in the United States. I do not allow anyone to access my checking account for electronic payments. My concern with Cellular One is that if I have a billing dispute with this company, can they then take my money regardless if I agree or not since they basically have a right to access my checking account electronically?

**With all of the identity theft occurring in this country right now, this is just another example of how various entities can bypass consumer's rights and gain access to personal information.**

I believe this something our legislators should address as a privacy issue with this company and any others engaged in this type of business practice. I would appreciate your feedback regarding any legislation in progress regarding this or similar issues. I would be happy to provide any additional information or testimonial that would be useful to your efforts in controlling company/s access to consumer's personal information. I travel extensively and understand that our legislators are addressing security issues throughout the country, but I am greatly concerned with my right to privacy.

Sincerely,



Attachment: Copy of Cellular One Customer Notice.

**IMPORTANT MESSAGES**

Long Distance charges. (Example: Billable charges \$50 x 0.220% = \$0.11).

\*\*\*\*\*

To secure your rights do not enclose correspondence with your payment. Please include account and cellular number on correspondence. All correspondence should be sent to the following address:

Cellular One Customer Service  
PO Box 16110  
Duluth, MN 55816-0110

To better serve you, you may contact Cellular One 24 hours a day, 7 days a week and be guaranteed a response within 48 hours at the following e-mail address:

MNCustCare@dobson.net

\*\*\*\*\*

**Important Customer Notice:**

In an effort to help maintain our low service rates, Cellular One added a new returned-check policy. When paying by check, you are authorizing Cellular One or its Agent to electronically collect the face value of your check, plus any returned check fees (as allowed by state law), should the check be returned for any reason.

You may revoke authorization for electronic collection of the returned check fee at anytime by providing written notice to:

~~Cellular One~~  
~~P.O. Box 5677~~  
~~Oxnard, CA 93031~~

*If cancel - can still use cks - but if send NSF ck - they can cancel ck privileges.  
② Spoke w/ Jessica - Mgr.*

① Kelly - in Duluth Call Ctr -

Please include your Cellular One account information with any written correspondence. Revocation of this authorization may result in the loss of your check writing privileges on your client account and will not stop Cellular One from collecting the returned check fee via bank draft or traditional collection methods.

\*\*\*\*\*

PRIDE Scholarship applications are now available at [www.dobson.net](http://www.dobson.net) <<http://www.dobson.net>>.

# MORRISON & FOERSTER LLP

## M O R A N D U M

TO: The Members of Senate Committee on Agriculture, Financial Institutions and Insurance

FROM: Oliver Ireland  
Morrison & Foerster LLP

DATE: July 24, 2004

RE: Reauthorization for ACH Transactions

---

I understand that the State of Wisconsin Department of Financial Institutions is considering adopting DFI—Bkg 74.14(16) (“Proposed Rule”). The Proposed Rule would provide that it is an oppressive and deceptive practice to collect a returned check fee through the use of an Automated Clearing House Network transaction without proper authorization from the customer. The Proposed Rule would go on to provide that proper authorization shall comply with National Automated Clearing House Association Rules and guidelines addressing such transactions. The analysis of the Proposed Rule prepared by the Department of Financial Institutions, Division of Banking, notes that the Proposed Rule codifies an existing practice. I understand that it has been asserted that the NACHA Rules do not bind merchants or their agents who initiate electronic debits from consumer accounts.

As explained more fully below, under the NACHA Rules, an ACH debit entry that is initiated to collect a returned check fee requires written authorization. Although the NACHA Rules do not apply automatically to a merchant or an agent of a merchant who initiates an electronic debit to the account of a consumer, the NACHA Rules do apply automatically to the bank, or “ODFI,”<sup>1</sup> whose customer initiates the electronic debit. Failure of the ODFI to require its customer to be bound by the NACHA Rules is a violation of the NACHA Rules. Even if the NACHA Rules do not apply to a merchant or its agent, an ODFI would be liable for the amount an entry that is not authorized under the NACHA Rules. If the ODFI was not able to charge the entry back to its customer, the ODFI would be required to absorb the loss.<sup>2</sup>

### **Entities Subject to the NACHA Rules**

The NACHA Rules apply to all entries transmitted through an ACH Operator. Each Participating DFI agrees to comply with the NACHA Rules. Under subsection 2.1.1 of the NACHA Rules, it is a prerequisite to the origination of an ACH entry that the Originator has agreed to be bound by the NACHA Rules. Under subsection 2.2.1.3 of the NACHA Rules, an

---

<sup>1</sup> Capitalized terms used in this memorandum that are not defined in this memorandum are used as defined in the NACHA Rules.

<sup>2</sup> The provisions of the Electronic Fund Transfer Act (“EFTA”) ( 15 U.S.C. §§ 1693-1693r) and Regulation E (12 C.F.R. pt. 205.), which was adopted by the Board of Governors of the Federal Reserve System to implement the EFTA would not shield the ODFI from this potential liability.

## MORRISON & FOERSTER LLP

ODFI warrants that the prerequisites to origination, including that the Originator has agreed to be bound by the NACHA Rules, have been satisfied.

### **Authorization Requirements under the NACHA Rules**

The requirements for the authorization of ACH debit entries are generally stated in subsection 2.1.2 of the NACHA Rules. That subsection provides that before an Originator may initiate a debit entry to a Receiver, or to a Receiver's account at an RDFI, the Receiver must have authorized the Originator to initiate the entry to the Receiver's account. Subsection 2.1.2 states that:

In the case of debit entries to a consumer Account, the authorization must be in writing and signed or similarly authenticated by the consumer. . . . The authorization process must evidence both the consumer's identity and his assent to the authorization. . . . The authorization must be readily identifiable as an authorization [and] must clearly and conspicuously state its terms . . . .<sup>3</sup>

Under subsection 2.2.1.1 of the NACHA Rules, by sending an entry, such as a debit entry to collect a returned check fee, an ODFI warrants to each RDFI, ACH Operator, and Association that the entry is in accordance with proper authorization.

### **Risks to the ODFI from Unauthorized Debit Entries**

Under subsection 2.2.3 of the NACHA Rules, each ODFI breaching these warranties shall indemnify each RDFI, ACH Operator and the Association from and against any and all claim, demand, loss liability, or expense, including attorneys' fees and costs, that result directly or indirectly from the breach of warranty or the debiting or crediting of the entry to the Receiver's account. As noted above, an ODFI would breach this warranty by transmitting an ACH debit entry that was not authorized in accordance with the NACHA Rules.

In addition to liability for breach of warranty, under the NACHA Rules an ODFI would be required to accept the charge back of an unauthorized transaction. Under subsection 7.6.1 of the NACHA Rules, if a consumer whose account has been debited due to a debit entry sends or delivers to his or her bank, known as the RDFI under the NACHA Rules, a written statement under penalty of perjury that the debit entry was not authorized by the consumer within 15 days after receiving a bank statement showing the entry, the RDFI must promptly credit the amount of the entry to the consumer's account. A debit entry that was not authorized in accordance with subsection 2.1.2 of the NACHA Rules would not be authorized within the meaning of subsection 7.7.6.1 of the NACHA Rules.

Once an RDFI has recredited a consumer's account based on a written statement from the consumer, the RDFI would be able to obtain a recredit of the amount of the debit entry from the ODFI under the return and adjustment procedures in Article Five and section 7.7 of the NACHA

---

<sup>3</sup>Subsection 2.1.2 of the NACHA Rules goes on to specify how authorization may be obtained electronically under the Electronic Signatures in Global and National Commerce Act. (15 U.S.C. §§ 7001-7006, 7021, 7031.)

## MORRISON & FOERSTER LLP

Rules. Further, failure of the Originator to obtain proper authorizations also may result in the ODFI being subject to fines under Appendix Eleven of the NACHA Rules.

In light of this potential liability, for their own protection, all ODFI's should require their customers to agree to be bound by the NACHA Rules. Where a merchant customer is bound by the NACHA Rules, the customer would be required to obtain written authorizations for returned check fees as required by the NACHA Rules, and the Proposed Rule would be codifying that practice. To the extent that an ODFI does business with customers that are not bound by the NACHA Rules, the ODFI would be exposing itself to liability that could be significant.

Imagine yourself to be a consumer, who honestly believes they have \$100 in their account to draw a check against, and issues a \$50 check to a merchant for a new pair of shoes. Unbeknownst to the consumer, their cellular phone company has debited their account for their \$55 monthly cellular bill not once as expected, but twice, drawing their account down to a \$45 balance. When their \$50 check for shoes hits this account, it bounces. The consumer's bank now charges them an overdraft fee of \$25, pushing the balance to \$20. The next check the consumer writes is for dinner, only \$30, but it too is presented against a now overdrawn account, and their bank assesses another \$25 fee, driving the balance to a minus \$5. It's now to the point where even the check they wrote the babysitter won't clear the account. To this consumer, it appears that no matter how much money they deposit to try to clear the matter up, they can never get ahead. And let's not forget that this was all the result of something not this consumer's fault. Someone without authority taking money from their account started it all.



## OPPOSITION TO CLEARINGHOUSE RULE 04-041

CORPORATION	CONTACT PERSON/PH. #	COMMENTS
FRANCOIS OIL CO, INC Belleville, WI	SHELLY SEVERSON 608-424-3375	Strongly opposes Rule: "Cannot afford the time to get authorizations, and this would affect customer relations."
FRAWLEY OIL CO, INC Whitewater, WI	BETTY FRAWLEY 262-473-8605	Strongly opposes Rule: "I sent letters on CybrCollect's behalf in 2001, and I will do it again."
HEARTLAND COUNTRY CO-OP Westby, WI	PEGGY FORTJUN 608-634-3184	Strongly opposes Rule: "We already have control over who we want to collect the fees from." "The checkwriters are already protected." "I don't know what we'd do without CybrCollect!"
HANSENS IGA Bangor, WI	ROBERTA BOYEA 608-486-2049	Strongly opposes Rule: "Don't have time to get signatures on every check."
BATTERIES PLUS Hartland, WI	WAYNE NELSON 262-912-3138	Strongly opposes Rule: "Would not be practical to get signatures."
ARNOLD'S SERVICE & TOWING Sparta, WI	MIKE ARNOLD 608-269-4241	Strongly opposes Rule: "Who keeps doing this?" "Are we supposed to stop taking checks?"
BURNSTADS' SUPERMARKET Tomah, WI	BRUCE SHONG 608-372-5355	Strongly opposes Rule: "Meeting with Wis. Grocers' Association on 7/14. Will bring this up at meeting in Madison."
COUNTRY KITCHEN La Crosse, WI	EARL ZUMMACH 608-784-9660	Strongly opposes Rule: "This is not good for anyone involved."
DICKS SUPERMARKETS Platteville, WI	TOM HINMAN 608-348-2343	Strongly opposes Rule: "I REFUSE to get authorizations on each check! I won't do it. This will be the end of electronic check collections in Wisconsin!"
DOLLAR DISCOUNT, INC Superior, WI	DAVID STOCK 715-392-2580	Strongly opposes Rule: "This would not be good. CybrCollect works well for us the way it is."
DENNY'S MARKET Sparta, WI	KELLY MANTZKE 608-269-2727	Strongly opposes Rule: "I would have to stop taking checks!" "Demand letters, in my experience, get nothing collected!"
PRO-KELA, LLC (Fantastic Sams) Tomah, WI	CHRIS POKELA 608-374-3078	Strongly opposes Rule: "You bet I'll make contact with the legislators!"
McCATHIE, INC (BP-LaCrosse) La Crosse, WI	CHAD McCATHIE 608-787-0714	Strongly opposes Rule: "Not practical to get signatures on each check."
FLAWLESS ENTERPRISES Rice Lake, WI	TIM BODIS 715-234-2841	Strongly opposes Rule: "Who can I contact to help CybrCollect's case?"
DIAMOND LANES Beloit, WI	DAN BUCHOLTZ 608-362-9166	Strongly opposes Rule
ANLON CO, LLC (Dollar Discount) Viroqua, WI	MELISSA SHERRY 608-637-6633	Strongly opposes Rule: "Why does this keep happening? Things work so well the way they are..."
PADFIELD, INC (Fantastic Sams) Alcoona, WI	GARY PADFIELD 715-832-0873	Strongly opposes Rule: "Getting authorizations would not be practical. The current system is beneficial to our customers as it is."
ASHMORE OPTICAL La Crosse, WI	JIMMIE ANN GATES 608-784-1150	Strongly opposes Rule: "How much would check collection cost if this goes through?"
HEGENBARTH FOOD GROUP Galesville, WI	BARB HEGENBARTH 608-582-4994	Strongly opposes Rule: "I have already contacted Dale Schultz & Ron Brown and am testifying on CybrCollect's and our behalf on July 26. If this Rule passes, it will cost everyone - and will only be beneficial to the check-writer that never intended to pay."

Every person on this list expressed strong intentions of contacting state legislators with opposition to Clearing House Rule 04-041.

## OPPOSITION TO CLEARINGHOUSE RULE 04-041

LIONS QUICK MARTS Janesville, WI	HEIDI NEWLAND 608-754-1159	Strongly opposes Rule: "I already emailed a legislator expressing my opposition."
LAKE SUPERIOR CLEANERS Superior, WI	VICKY SCHOLD 715-394-8626	Strongly opposes Rule: "This is going to effect everyone."
MIDWEST HOTEL & CONF. CTR. Fond du Lac, WI	MARTA BERGSTROM 608-756-3100	Strongly opposes Rule: "My accountant is contacting legislators."
NEW HORIZONS SUPPLY CO-OP Fennimore, WI	SHARI CHRIST 608-822-3217	Strongly opposes Rule: "Getting authorizations on every check would be very time-consuming."
Q-MART	JODIE MCLEOD 920-209-3000	Strongly opposes Rule: "We're bringing more stores aboard with CyberCollect. We are very happy with the services as they exist now. Our accountant will contact legislators in opposition."
Oshkosh, Menasha, Neenah, etc.	CONNIE SEMANN 608-785-1424	Strongly opposes Rule: "Intends to email a committee chairman expressing our opposition."
QUILLINS, INC. La Crosse, WI	JOHN VENTURINI 920-921-8020	Strongly opposes Rule: "I definitely will make contact with legislators. The effects of this Rule would not be practical for our business."
O'CONNOR OIL CORP. Fond du Lac, WI	RICHARD BEIRNE 608-782-6262	Strongly opposes Rule: "I have already contacted several representatives both by email and phone expressing my displeasure of this proposed Rule. I wish I could attend the hearing to voice my opposition."
UNITED AUTO SUPPLY La Crosse, WI		

Every person on this list expressed strong intentions of contacting state legislators with opposition to Clearing House Rule 04-041.

**Schlei, Mark**

---

**From:** Mary Schnell [mschnell@wacha.org]  
**Sent:** Thursday, May 27, 2004 9:28 AM  
**To:** jean.plale@dfi.state.wi.us  
**Subject:** FW: State of Wisconsin NACHA's comments

-----Original Message-----

**From:** Jane Larimer [mailto:jarimer@nacha.org]  
**Sent:** Wednesday, May 26, 2004 3:26 PM  
**To:** Mary Schnell; Fred Laing, II  
**Subject:** State of Wisconsin

Mary,

Earlier this afternoon I sent you a memorandum from NACHA's outside counsel Oliver Ireland of Morrison & Foerster. NACHA had requested Mr. Ireland to analyze the interrelationship between the NACHA Operating Rules, the EFTA and Regulation E.

As General Counsel of NACHA, I fully support and concur with Mr. Ireland's conclusions - in short, that participants of the ACH Network must comply with not only relevant laws and regulations, but with the relevant payments system rules as well (in this case the NACHA Operating Rules).

I hope you find this memo helpful.

Sincerely,

Jane Larimer  
General Counsel  
NACHA.

# WACHA

*The Premier Payments Resource*

May 26<sup>th</sup>, 2004

Jean Plale  
Wisconsin Dept. of Financial Institutions  
P.O. Box 7876  
Madison, WI 53707

Dear Jane,

This letter is in support of the bill being considered by the Wisconsin State Legislature that would reference the ACH Rules when dealing with the collection of NSF (non-sufficient funds) service fees on checks re-presented electronically. The ACH Rules allow a check that has been returned NSF or for uncollected funds to be collected electronically, but any fee collected for this service must be separately authorized. This position is explained in detail by the attached memo from Morrison & Foerster, LLP.

Support for the bill is coming not only from WACHA (Wisconsin ACH Association) but also from UMACHA (Upper Midwest ACH Association), which supports financial institutions in the north and northwest portions of the state. Both organizations have dealt with firms that have collected fees inappropriately and feel that the bill being considered will do a great deal to discourage this practice and provide more consumer protection and less consumer confusion. In the letter from Morrison & Foerster it states that "while a consumer cannot waive his or her rights under the EFTA, the EFTA expressly provides that it does not prohibit an agreement which grants to a consumer a more extensive right or remedy or greater protection than contained in the EFTA."

If there is any other assistance we can render please don't hesitate to call, write, or e-mail either of us. We would also like to thank you for the opportunity to comment.

Sincerely,

Mary Schnell AAP  
President  
WACHA

Fred Laing, II AAP CCM  
President  
UMACHA

# MORRISON & FOERSTER LLP

## MEMORANDUM

TO: Jane Larimer  
NACHA

FROM: Oliver Ireland  
Morrison & Foerster LLP

DATE: May 26, 2004

RE: Authorizations for ACH Transactions

---

You have asked for a review of the requirements for the authorization of individual ACH debit transactions under the Electronic Fund Transfer Act<sup>1</sup> ("EFTA"), the Board of Governors of the Federal Reserve System's ("Board") Regulation E<sup>2</sup> and under the rules of the National Automated Clearing House Association ("NACHA Rules"). I understand that this inquiry arises out of practices relating to debit entries that are originated to collect fees that merchants or others impose in addition to initiating represented check entries. NACHA Rules apply to both RCK, or represented check, entries and to debit entries to collect fees associated with the return of the original check.<sup>3</sup> Regulation E does not apply to RCK entries, but it does apply to entries to collect fees for returned checks. Accordingly, entries to collect fees for returned checks must meet the requirements of both Regulation E and the NACHA Rules.

The EFTA is a Federal statute adopted by Congress to "provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective of [the EFTA] is the provision of individual consumer rights."<sup>4</sup> Regulation E, and the related Official Staff Commentary on Regulation E ("Commentary"),<sup>5</sup> were adopted by the Board to implement the EFTA and to explain the implementation of the EFTA. In contrast the NACHA Rules form an agreement between the various participants in the ACH system, including ODFIs, RDFIs and ACH Operators. While a consumer cannot waive his or her rights under the EFTA, the EFTA expressly provides that it does not prohibit an agreement which grants to a consumer a more extensive right or remedy or greater protection than contained in the EFTA.<sup>6</sup>

In describing the scope of Regulation E, the Commentary expressly states that:

---

<sup>1</sup> 15 U.S.C. §§ 1693-1693r.

<sup>2</sup> 12 C.F.R. pt. 205.

<sup>3</sup> Capitalized terms used in this memorandum that are not defined in this memorandum are used as defined in the NACHA Rules.

<sup>4</sup> 15 U.S.C. § 1693.

<sup>5</sup> 12 C.F.R. pt. 205, Supp. I.

<sup>6</sup> 15 U.S.C. § 1693l.

## MORRISON & FOERSTER LLP

"The electronic representation of a returned check is not covered by Regulation E because the transaction originated by check. Regulation E does apply, however, to any fee authorized by the consumer to be debited electronically from the consumer's account because the check was returned for insufficient funds. Authorization occurs where the consumer has received notice that a fee imposed for returned checks will be debited electronically from the consumer's account."<sup>7</sup>

As Regulation E applies to electronic funds transfers, including ACH entries to collect fees for returned checks, the authorization of these transactions is subject to any requirements imposed by Regulation E. Regulation E requires written authorization for preauthorized transfers.<sup>8</sup> A preauthorized transfer is defined as "an electronic fund transfer authorized in advance to recur at substantially regular intervals."<sup>9</sup> However, the authorization requirements for preauthorized transfers will have little or no application to transfers to collect fees for returned checks. Aside from the requirements for preauthorized transfers, Regulation E does not contain express requirements for determining what constitutes appropriate authorization for individual transfers. Indeed, in explaining changes to the Commentary relating to the application of Regulation E to RCK entries in 2001, the Board stated: "While the Board did not propose to amend the regulation at this time to require compliance by merchants or other payees with the Regulation E authorization requirement, the Board fully expects them to obtain a consumer's authorization to initiate an EFT from the consumer's account."<sup>10</sup> Accordingly, under Regulation E and the Commentary, the process of obtaining an authorization for a single transfer to collect a fee for a returned check is left up to the consumer and the merchant or other payee. For ACH transactions, the NACHA Rules provide the terms of that agreement.

The NACHA Rules apply to all entries transmitted through an ACH Operator. Each Participating DFI agrees to comply with the NACHA Rules and, under section 1.2 of the NACHA Rules, warrants that it is legally able to comply with all applicable requirements of the NACHA Rules. Under subsection 2.1.1 of the NACHA Rules, it is a prerequisite to the origination on ACH entry that the Originator has agreed to be bound by the NACHA Rules.

The requirements for the authorization of ACH debit entries are generally stated in subsection 2.1.2 of the NACHA Rules. That subsection provides that before an Originator may initiate a debit entry to a receiver, or to a Receiver's account at an RDFI, the Receiver must have authorized the Originator to initiate the entry to the Receiver's account. Subsection 2.1.2 states that:

---

<sup>7</sup> Commentary, paragraph 3(c)(1)-1.

<sup>8</sup> 12 C.F.R. § 205.10(b).

<sup>9</sup> 12 C.F.R. § 205.2(k).

<sup>10</sup> 66 Fed. Reg. 15,189-90 (Mar. 16, 2001).

## MORRISON & FOERSTER LLP

In the case of debit entries to a consumer Account, the authorization must be in writing and signed or similarly authenticated by the consumer. . . . The authorization process must evidence both the consumer's identity and his assent to the authorization. . . . The authorization must be readily identifiable as an authorization, must clearly and conspicuously state its terms, and, for [most consumer ACH entries], the authorization must provide that the Receiver may revoke the authorization only by notifying the Originator in the manner specified in the authorization.

Subsection 2.1.2 of the NACHA Rules goes on to specify how authorization may be obtained electronically under the Electronic Signatures in Global and National Commerce Act.<sup>11</sup> The requirements of the NACHA rules for authorizations for ACH entries are in addition to the requirements of the EFTA and Regulation E.

Failure to adhere to the NACHA requirements has consequences over and above the consequences for origination of an unauthorized transaction under the EFTA and Regulation E. Under subsection 2.2.1.1 of the NACHA Rules, each ODFI sending an entry warrants to each RDFI, ACH Operator, and Association that each entry transmitted by the ODFI to an ACH Operator is in accordance with proper authorization provided by the Originator and the Receiver. Under subsection 2.2.3 of the NACHA Rules, the liability for breach of this warranty includes liability for any loss, liability or expense including attorney's fees, and costs that result directly or indirectly from the breach of warranty or the debiting or crediting of the entry to the Receiver's account. Failure of the Originator to obtain proper authorizations also may result in the ODFI being subject to fines under Appendix Eleven of the NACHA Rules.

---

<sup>11</sup> 15 U.S.C. §§ 7001-7006, 7021, 7031.

**Klein, Jonathan**

---

**From:** OBrien, John  
**Sent:** Monday, July 12, 2004 5:48 AM  
**To:** Klein, Jonathan  
**Subject:** FW: Objection to Clearing House Rule 04-041

JK

File with rule

-----Original Message-----

**From:** Melissa Sherry [mailto:dollar@mwt.net]**Sent:** Friday, July 09, 2004 5:45 PM**To:** Casper, Tim - Office of Governor Jim Doyle; Sen.Schultz; Sen.Brown; Sen.Hansen; Sen.Kendzie@legis.state.wi.us; Sen.Lassa; Rep.Montgomery; Rep.Fitzgerald; Rep.Freese; Rep.Kreibich; Rep.Wieckert; Rep.Townsend; Rep.Kerkman; Rep.Towns; Rep.Nischke; Rep.Richards; Rep.Sherman; Rep.WilliamsA; Rep.Schilling@legis.state.wi.us; Rep.Zepnick; Rep.Taylor; Rep.Molepske**Subject:** Objection to Clearing House Rule 04-041

To whom it may concern:

I'm expressing my objection to Clearing House Rule 04-041.

Current law permits merchants to collect the face value of a dishonored check, along with reasonable "returned check fee" provided the merchant gives the customer notice of this practice at the point of purchase. We as merchants should not be required to obtain a further agreement to this process as the transaction becomes authorized from the moment the check is provided and accepted in exchange for goods and services. It's a crime to present for anyone to present a check in this manner that they know there are non-sufficient funds to provide payment. Whether the actual paper document is processed or via electronic collection shouldn't be of issue. Consumers have 60 days to reverse any unauthorized debits to their account which occurs through Automated Clearing House. This is supported by the federal law under the Electronic Fund Transfer Act which provides the rights to consumers to address illegitimate and unauthorized withdrawals.

In the end the consumer who presents a bad check understands that they were wrong and that their NSF check causes us as merchants to incur unnecessary expenses. Please don't penalize us for using this efficient, cost effective method of check recovery and take our concerns into consideration when making your decision.

Thank you for your time and attention.

Sincerely,  
Melissa A. Sherry  
Dollar Discount #9337

07/15/2004



## OBrien, John

---

To: Dale Coenen  
Subject: RE: Checking accounts

Dear Mr. Coenen,

Thank you for taking the time to contact State Senator Dale Schultz.

Please respond with you postal mailing address. Upon receipt, Senator Schultz will reply to your concern by formal correspondence.

John O'Brien, Committee Clerk  
Senate Agriculture, Financial institutions and Insurance.  
Senator Dale Schultz, Chair.  
John.O'Brien@legis.state.wi.us  
(800) 978 8008 (Toll Free In State Only)  
(608) 26 6-0703

-----Original Message-----

From: Dale Coenen [mailto:dalec@chorus.net]  
Sent: Wednesday, June 23, 2004 6:43 PM  
To: governor@wisconsin.gov; Rep.Freese; Sen.Schultz;  
info@dfi.state.wi.us  
Subject: Checking accounts

I am greatly concerned that Wisconsin Banks allow direct access to my checking account to anyone that I pay by check. If I wanted these people to be able to access my account I would pay by debit card.

Daily the papers carry a story about people that wipe out peoples savings through crooked business dealings; Investors that abscond with peoples retirement moneys, Insurance agents that do not forward the customers checks, Travel agents that sell tickets for cruises that are never booked, etc. What is going to stop some person from wiping out all their customers checking accounts and getting out of the country before the checks start bouncing?

Also, as a matter of privacy, I do not want all these people meddling in my banking affairs. By giving these companies the computer link to my bank account they have seriously opened a whole in the firewall to all my personal information that the bank my have. And how do I know that the business that is direct accessing my bank account has appropriate safeguards against hackers? Who is responsible if the bank allows these people to take more than what the check is written for? Who covers the cost of other checks that may bounce because the account was wiped out?

I am also concerned about how many senior citizens and other people that will get severely hurt financially and not have the understanding to stand up for themselves when these things happen. I am sure the banking industry has set this whole thing up to safeguard themselves, but who looks out for the consumer?

American Family Insurance and VISA have both started doing this without my authorization.

I look forward to all our responses. Was this practice ever given a public forum before it was introduced?