



THIRD-PARTY SENDER ROLES AND RESPONSIBILITIES *Request for Comment*

Proposed Modifications to the Rules May 21, 2021

ISSUE #1 – APPLICABILITY OF RULES TO NESTED THIRD-PARTY SENDER ARRANGEMENTS

Proposed Effective Date – June 30, 2022. Changes to Origination Agreements would be effective on a going-forward basis – i.e., apply to Origination Agreements entered into or revised on or after the effective date. The additional registration requirement would be required to be completed by December 31, 2022.

ARTICLE ONE – GENERAL RULES

Section 1.2 Participating DFIs Must Comply with Rules

Subsection 1.2.2 Audits of Rules Compliance

Subsection 1.2.2.1 General Audit Requirements

A Participating DFI must annually conduct, or have conducted, an audit of its compliance with these Rules. ~~A Third-Party Service Provider or a Third-Party Sender that has agreed with a Participating DFI to process Entries~~ ~~A Third-Party Sender, and a Third-Party Service Provider that processes Entries for a Participating DFI or a Third-Party Sender,~~ must annually conduct, or have conducted, an audit of its compliance with these Rules. An annual audit must be conducted under these Rule Compliance Audit Requirements no later than December 31 of each year.

This requirement to conduct an audit relates solely to compliance with these Rules and is not limited to compliance with any specific rule or group of rules. This audit obligation does not address other audit considerations with regard to a financial institution's ACH policies, procedures, or regulatory compliance.

For a Third-Party Service Provider, these audit requirements apply only to the functions of ACH processing that it performs on behalf of a Participating DFI or a Third-Party Sender. For a Third-Party Sender, these audit requirements apply to its performance of any obligations of an ODFI under these Rules. References within these Rules to an audit of an ODFI's or RDFI's performance therefore also apply to a Third-Party Service Provider or Third-Party Sender acting in the capacities described above.

An audit of compliance with these Rules must be performed under the direction of the audit committee, audit manager, senior level officer, or independent (external) examiner or auditor of the Participating DFI, Third-Party Service Provider, or Third-Party Sender.

ARTICLE TWO – RIGHTS AND RESPONSIBILITIES OF ODFIS, THEIR ORIGINATORS, AND THIRD-PARTY SENDERS

Section 2.2 Prerequisites to Origination

Subsection 2.2.2.2 ODFI Must Enter Origination Agreement with Third-Party Sender

An ODFI must enter into an Origination Agreement with each Third-Party Sender that (i) Transmits Entries directly to the ODFI, or (ii) has Direct Access on behalf of the ODFI. The Origination Agreement must include each of the following:

- (a) The Third-Party Sender, on behalf of the Originator, must authorize the ODFI to originate Entries on behalf of the Originator to Receivers' accounts;
- (b) The Third-Party Sender must agree to be bound by these Rules;
- (c) The Third-Party Sender must agree not to originate Entries that violate the laws of the United States;
- (d) Any restrictions on the types of Entries that may be originated;
- (e) The right of the ODFI to terminate or suspend the agreement, or any Originator or Nested Third-Party Sender of the Third-Party Sender, for breach of these Rules in a manner that permits the ODFI to comply with these Rules;
- (f) The right of the ODFI to audit the Third-Party Sender's and its Originators' and Nested Third-Party Senders' compliance with the Origination Agreement and these Rules; and
- (g) The Third-Party Sender must agree that, before permitting an Originator to originate any Entry directly or indirectly through itself or the ODFI, it will enter into an agreement with the Originator that satisfies each of the requirements of Subsection 2.2.2.1 (ODFI Must Enter Origination Agreement with Originator).
- (h) The Third-Party Sender must agree that, before permitting a Nested Third-Party Sender to originate any Entry directly or indirectly through itself or the ODFI, it will enter into an agreement with the Nested Third-Party Sender that satisfies each of the requirements of this Subsection.

Subsection 2.2.3 ODFI Risk Management

An ODFI must perform due diligence with respect to the Originator, or with respect to the Third-Party Sender for which it has an Origination Agreement, sufficient to form a reasonable belief that the Originator or Third-Party Sender has the capacity to perform its obligations in conformance with these Rules.

In addition, the ODFI must:

- (a) assess the nature of the Originator's or Third-Party Sender's ACH activity and the risks it presents;
- (b) establish, implement, and periodically review an exposure limit for the Originator or Third-Party Sender; and
- (c) establish and implement procedures to:
 - (i) monitor the Originator's or Third-Party Sender's origination and return activity across multiple Settlement Dates;
 - (ii) enforce restrictions on the types of Entries that may be originated; and
 - (iii) enforce the exposure limit.

Section 2.15 Obligations of Third-Party Senders, and of ODFIs and Originators That Use Third-Party Senders

An ODFI may originate Entries initiated by a Third-Party Sender, subject to compliance with these Rules, including Section 2.2 (Prerequisites to Origination).

Subsection 2.15.1 Third-Party Sender Agreements (new subsection)

Subsection 2.15.1.1 Third-Party Sender Origination Agreement with an Originator or a Nested Third-Party Sender

In its performance of the obligations of an ODFI (as required by Section 2.15.3 (Performance and Warranty of ODFI Obligations by Third-Party Senders)), a Third-Party Sender must enter into an Origination Agreement with either the Originator that meets the requirements of Subsection 2.2.2.1 (ODFI Must Enter Origination Agreement with Originator) prior to initiating Entries on the Originator's behalf, or a Nested Third-Party Sender that meets the requirements of Subsection 2.2.2.2.

If more than one Nested Third-Party Sender acts as an intermediary between the Originator and the Third-Party Sender that has the Origination Agreement with the ODFI, each Nested Third-Party Sender in the chain must enter into an Origination Agreement that meets the requirements of Subsection 2.2.2.2 (ODFI Must Enter Origination Agreement with Third-Party Sender) with the immediately adjacent, downstream Nested Third-Party Sender.

Subsection 2.15.1.2 Chain of Nested Third-Party Senders

An ODFI is responsible for each Nested Third-Party Sender in the chain of agreements between the ODFI and the Originator to the same extent as if each Nested Third-Party Sender had a direct agreement with the ODFI. A Third-Party Sender is responsible for each Nested Third-Party Sender in the chain of agreements between the Third-Party Sender and the Originator to the same extent as if each Nested Third-Party Sender had a direct agreement with the Third-Party Sender.

Subsection 2.15.1 2.15.2 Third-Party Senders' Provision of Information to ODFIs

A Third-Party Sender must disclose to the ODFI the information required at Subsection 2.17.3.1(a)-(f) for any other Nested Third-Party Sender for which it Transmits Entries to the ODFI, prior to Transmitting Entries for the other Nested Third-Party Sender.

A Third-Party Sender must, upon the ODFI's request, provide the ODFI with any additional information the ODFI reasonably deems necessary to identify each Originator or other Nested Third-Party Sender for which the Third-Party Sender Transmits Entries. A Third-Party Sender must also, upon the ODFI's request, provide the ODFI with the information required by Subsection 2.17.3(g)-(k) (Third-Party Sender Registration) for purposes of the ODFI's registration of the Third-Party Sender with the National Association. The information must be provided to the ODFI by the Third-Party Sender within two Banking Days of receipt of the ODFI's request.

Subsection 2.15.2 2.15.3 Warranty of and Indemnification by Third-Party Senders

Each Third-Party Sender (including any Nested Third-Party Sender) initiating one or more Entries through an ODFI to a Receiver's account warrants to the ODFI that the Originator has agreed to assume the responsibilities of an Originator under these Rules. In any case where such Originator fails to perform its obligations as an Originator under these Rules, Each Third-Party Sender (including any Nested Third-Party Sender) authorizing such Entry indemnifies the ODFI from and against any and all claims, demands, losses, liabilities, and expenses, including attorneys' fees and costs, that result directly or indirectly from the failure of the Originator to perform its obligations as an Originator under in accordance with these Rules or from the failure of such Third-Party Sender or any of its Nested Third-Party Senders to perform their obligations in accordance with these Rules.

In addition to the other warranties contained within these Rules, a Third-Party Sender also makes to the ODFI each of the warranties set forth at Subsection 2.4.1 (General ODFI Warranties), Subsection 2.5.17.4 (Additional ODFI Warranties for Debit WEB Entries), and Section 5.2 (Warranties of Gateway).

Subsection ~~2.15.3~~ 2.15.4 Performance and Warranty of ODFI Obligations by Third-Party Senders

To the extent that a Third-Party Sender (including any Nested Third-Party Sender) performs any of the obligations of an ODFI under these Rules, the Third-Party Sender must perform the requirements of these Rules otherwise applicable to the ODFI, including, but not limited to, monitoring the origination and return activity of its Originators across multiple Settlement Dates, enforcing restrictions on the types of Entries that may be originated through its Originators, and enforcing, with respect to its Originators and Nested Third-Party Senders, the exposure limit set by the Third-Party Sender or ODFI as set forth in Subsection 2.2.3 (ODFI Risk Management), and warrants that it is legally able to do so. The performance by a Third-Party Sender of any of the obligations of the ODFI under these Rules shall not relieve the ODFI of any of its obligations under these Rules.

Subsection ~~2.15.4~~ 2.15.5 Payment to ODFI by Third-Party Senders or Originators

A Third-Party Sender agrees to make payment to the ODFI for any credit Entries it originates and for any debit Entries returned by the RDFI. An Originator that utilizes a Third-Party Sender to authorize an ODFI to Transmit Entries agrees to make payment to the ODFI for any credit Entries originated and for any such Entries returned by the RDFI to the extent that the ODFI does not receive payment from the Third-Party Sender.

Subsection ~~2.15.5~~ 2.15.6 Performance of Originator Responsibilities by Third-Party Senders

A Third-Party Sender shall be jointly and severally liable with each of its direct or indirect Originators for the retention and delivery to the ODFI or RDFI, as required by these Rules, of any Records, documentation, or data regarding records of authorization of Entries, copies of items, and copies of Eligible Source Documents.

Subsection 2.15.7 Performance of Third-Party Sender Responsibilities by Nested Third-Party Senders (new subsection)

A Third-Party Sender shall be jointly and severally liable with each of its Nested Third-Party Senders for the performance of such Third-Party Sender's obligations under these Rules.

Subsection 2.17.3 Third-Party Sender Registration

Subsection 2.17.3.1 ODFIs with Third-Party Senders

An ODFI must register with the National Association each Third-Party Sender for which it originates Entries, including 1) a any Nested Third-Party Sender that originates Entries through another Third-Party Sender customer of the ODFI; and 2) a any Third-Party Sender that originates Entries through Direct Access. The ODFI must provide the following information to the National Association for each Third-Party Sender:

- (a) the ODFI's name;
- (b) the name, title, telephone number, email address, and street address for a contact person at the ODFI;
- (c) the name of the Third-Party Sender and its principal city and state location;
- (d) the Originating DFI Identification number(s) used in Entries Transmitted for the Third-Party Sender; and
- (e) the Company Identification(s) of the Third-Party Sender; and
- (f) whether or not each registered Third-Party Sender originates for other Nested Third-Party Sender customers.

The ODFI must register the Third-Party Sender with the National Association within the later of 30 days of Transmitting the first Entry on behalf of the Third-Party Sender, or within 10 days of becoming aware that an unregistered customer for which the ODFI Transmits Entries is actually a Third-Party Sender. The ODFI must update the registration information on the Third-Party Sender within 45 days following any change to the information previously provided, including termination of the Third-Party Sender.

If Nacha believes that a Third-Party Sender poses an escalated risk of (i) financial loss to one or more Participating DFIs, Receivers or Originators, (ii) violation of the Rules or applicable Legal Requirements, or (iii) excessive Returns, Nacha may request in writing supplemental registration information from the ODFI.

Upon the receipt of a written request by Nacha, the ODFI must provide within 10 Banking Days any of the following additional registration information about a Third-Party Sender, including a Nested Third-Party Sender, that is requested:

(f)(g) the Third-Party Sender's doing-business-as name(s) if any, taxpayer identification number(s), street address and website address;

(g)(h) the name, title, telephone number, and email address for a contact person at the Third-Party Sender;

(h)(i) the name(s) and title(s) of the principal(s) of the Third-Party Sender;

(i)(j) the approximate number of Originators for which the Third-Party Sender Transmits Entries; and

(j)(k) a statement as to whether the Third-Party Sender Transmits debit Entries, credit Entries, or both; and

(l) the name of each Nested Third-Party Sender for which it Transmits Entries.

ARTICLE EIGHT – DEFINITIONS OF TERMS USED IN THESE RULES

Section 8.60 “Nested Third-Party Sender”

a Third-Party Sender that (i) has an Origination Agreement with another Third-Party Sender to act on behalf of an Originator, and (ii) does not have a direct agreement with the ODFI itself. Unless otherwise expressly stated in these Rules, each reference to a Third-Party Sender includes a Nested Third-Party Sender.

Section 8.110 “Third-Party Sender”

a type of Third-Party Service Provider that acts as an intermediary in Transmitting Entries between an Originator and an ODFI, including through Direct Access, and acts on behalf of an Originator or another Third-Party Sender. A Third-Party Sender must have an Origination Agreement with the ODFI of the Entry. A Third-Party Sender is never the Originator for Entries it Transmits on behalf of another Organization. However, a Third-Party Sender of Entries may also be an Originator of other Entries in its own right.

a type of Third-Party Service Provider that acts as an intermediary on behalf of an Originator or another Third-Party Sender in Transmitting Entries between the Originator and the ODFI, including through Direct Access, when the Originator and ODFI do not have a direct relationship and Origination Agreement. A Third-Party Sender must have an Origination Agreement with an ODFI or with another Third-Party Sender acting on behalf of the ODFI.

A Third-Party Sender is never the Originator for Entries it Transmits on behalf of another Organization; however, a Third-Party Sender of Entries may also be an Originator of other Entries in its own right.

ISSUE #2 – THIRD-PARTY SENDER RISK ASSESSMENTS

Proposed Effective Date – June 30, 2022. A TPS that has not yet conducted a Risk Assessment would be expected to complete one by Dec 31, 2022.

ARTICLE ONE – GENERAL RULES

Section 1.2 Participating DFIs Must Comply with Rules

Subsection 1.2.4 Risk Assessments

A Participating DFI and a Third-Party Sender must:

- (a) conduct, or have conducted, an assessment of the risks of its ACH activities;
- (b) implement, or have implemented, a risk management program on the basis of such an assessment; and
- (c) comply with the requirements of its regulator(s) with respect to such assessment and risk management program.

ARTICLE TWO – RIGHTS AND RESPONSIBILITIES OF ODFIS, THEIR ORIGINATORS, AND THIRD-PARTY SENDERS

Section 2.15 Obligations of Third-Party Senders, and of ODFIs and Originators That Use Third-Party Senders

Subsection 2.15.3 Performance and Warranty of ODFI Obligations by Third-Party Senders

To the extent that a Third-Party Sender (including any Nested Third-Party Sender) performs any of the obligations of an ODFI under these Rules, the Third-Party Sender must perform the requirements of these Rules otherwise applicable to the ODFI, including, but not limited to: (a) the obligation to conduct, or have conducted, an assessment of the risks of its ACH activities, as required by Subsection 1.2.4 (Risk Assessments); (b) monitoring the origination and return activity of its Originators across multiple Settlement Dates; (c) enforcing restrictions on the types of Entries that may be originated through its Originators; and (d) enforcing, with respect to its Originators, the exposure limit set by the Third-Party Sender or ODFI as set forth in Subsection 2.2.3 (ODFI Risk Management), and warrants that it is legally able to do so. The performance by a Third-Party Sender of any of the obligations of the ODFI under these Rules shall not relieve the ODFI of any of its obligations under these Rules. The performance by a Third-Party Sender of any of the obligations of the ODFI under these Rules shall not relieve any other Third-Party Sender of any of its obligations under these Rules.