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January 30, 2014

Stuart F. Delery, Esq.  
Assistant Attorney General, Civil Division  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Dear Mr. Delery:

Thank you for your letter of January 22, 2014 concerning the Department of Justice's (DOJ) policy and approach in investigating institutions that process payments for merchants engaged in fraudulent activity.

The Electronic Transactions Association (ETA) supports DOJ's efforts to protect the public from fraudulent merchant practices. Fraudulent merchants not only harm consumers but also payment processors that must frequently bear the costs of fraudulent activity. ETA, however, is concerned that the efforts of DOJ and other consumer protection agencies in seeking to hold the payment processing industry responsible for the harm suffered by consumers of fraudulent merchants may have unintended consequences and costs that may ultimately outweigh any good done by this law enforcement effort. We request the opportunity to meet with you to discuss our concerns summarized below.

Most payment processors handle hundreds if not thousands of merchant accounts and operate in a multi-party, complex regulatory environment governed by rules issued by the credit card brands and the banks that acquire credit card transactions. Trying to regulate conduct in such a complex environment through the blunt instrument of litigation will result in government lawyers second-guessing business judgments made in real time with less than perfect information. Regulation through litigation is likely to unfairly harm those processors that happen to be the subject of an investigation by forcing them to operate on an uneven playing field. Further, to the extent that this regulation through litigation has *in terrorem* effects on others in the industry changing their behavior, that effort will result in higher costs and burdens for merchants seeking to process credit card transactions. While these costs and burdens will be borne by legitimate processors and merchants, there is scant evidence that the DOJ's effort will actually reduce the incidence of consumer fraud.

The DOJ and other consumer protection agencies apparently have decided that pursuing merchants directly is too difficult and akin to a game of "whack a mole." Placing that law enforcement responsibility on payment processors and requiring that they guard the credit card system from fraudsters and guarantee 100% of their merchants' transactions if a mistake is made is not the solution to reducing consumer fraud. Credit card processors are not equipped to perform this task, and to the extent that processors attempt to perform this task, the costs for this considerable effort will have to be borne by legitimate merchants and their consumers. In addition, many new merchants may find it difficult if not impossible to obtain a merchant account. While legitimate merchants, customers and processors will bear these costs, the fraudsters will continue to lie to processors to obtain or maintain accounts or find less scrupulous off-shore processors and continue to operate. In short, when government agencies promulgate regulations they must do a cost benefit analysis. We are concerned that the current effort to regulate the payment processing industry through the blunt instrument of litigation has failed to weigh the costs and overstated the benefits of the current approach. Given the importance of credit cards to the economy, this is an issue of tremendous importance not just to ETA but to the nation. This is what we wish to discuss further with you.

ETA members strive to do the best job possible in screening and monitoring merchants, and ETA is developing an educational program to help its members better underwrite and monitor merchants. This type of industry-driven initiative is an appropriate mechanism for helping to protect consumers from fraudsters. Seeking to hold processors fully responsible for 100% of the charges processed by merchants in their portfolio is not.

We look forward to further discussions with you on this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason Oxman". The signature is fluid and cursive, with the first name "Jason" being more prominent than the last name "Oxman".

Jason Oxman  
CEO