RUSSELL W. SCHRADER
Senior Vice President
Assistant General Counsel

November 19,2004

REVISED

By Electronic Delivery

Jennifer J. Johnson
Secretary
Board of Governors of the Federal
Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Docket No. R-1210

Dear Ms. Johnson:

This comment letter is submitted on behalf of Visa U.S.A. Inc. in response to the notice of proposed rulemaking ("Proposed Rule") and request for public comment by the Federal Reserve Board ("FRB"), published in the Federal Register on September 17,2004. The Proposed Rule would revise Regulation E, which implements the Electronic Fund Transfer Act ("EFTA"), and the official staff commentary of Regulation E ("Commentary"), to address payroll cards and electronic check conversion services. In addition, the Proposed Rule includes revisions and clarifications relating to: stop payment and revocation of authorizations for preauthorized electronic fund transfers ("EFTs"); replacement of existing debit cards with multiple renewal or substitute cards; telephonic authorizations for preauthorized EFTs; requirements for automated teller machine ("ATM") notices; error resolution procedures; and notices of transfers varying in amount.

The Visa Payment System, of which Visa U.S.A.' is a part, is the largest consumer payment system, and the leading consumer e-commerce payment system, in the world, with more volume than all other major payment cards combined. Visa plays a pivotal role in advancing new payment products and technologies, including technology initiatives for protecting personal information and preventing identity theft and other fraud, for the benefit of its member financial institutions and their hundreds of millions of cardholders.

PAYROLL CARDS

FRB SHOULD APPLY A "REGULATION E-LITE" APPROACH TO PAYROLL *CARDS*

The FRB's Proposed Rule would subject the majority of payroll cards to full Regulation E coverage — regardless of whether the account is operated by the employer, a third-party payroll processor or a financial institution. The full application of Regulation E would

[1] Visa **U.S.A.** is a membership organization comprised of U.S. financial institutions licensed to use the Visa service **marks** in connection with payment systems.

VISA U.S.A. INC.
Post Office Box **194607**
San Francisco, CA 94119-4607
U.S.A.

Phone **415 932 2178**
Fax 415 932 2525

require covered entities to provide initial and subsequent disclosures, periodic statements, limited consumer liability for unauthorized transactions, and to follow error resolution procedures and rules pertaining to the issuance of access devices.

The requirements in the EFTA[2] were designed with traditional deposit accounts in mind at a time when electronic access to consumer deposit accounts was largely confined to automated clearing house credits and debits and limited ATM transactions. Since that time, the volume and diversity of electronic payments has grown exponentially. These new developments challenge the original structure of the EFTA and Regulation E; in addition, they have caused the FRB to consider whether, and to what extent, new electronic services should be regulated. Fortunately, in enacting the EFTA, Congress foresaw the need to deal with the challenges presented by new developments and gave the FRB significant flexibility under section 904 of the EFTA[3] to address new developments and technological advances.

One of the most significant developments in the area of electronic payments has been the growth in prepaid card usage. Less than a decade ago many envisioned that this type of payment instrument would develop based on a store of value on a computer chip embedded in the card itself, and that such cards would use new technology to transfer value. Instead, the greatest growth in non-credit payment mechanisms has been through the use of cards that build off of existing payment and communication platforms, such as the credit card and debit card networks. These payment cards closely resemble traditional travelers checks and money orders, but with the added benefit of being able to accommodate variably denominated transactions. At the same time, the use of such payment cards is more constrained than the use of travelers checks, as they may only be employed at endpoints, such as merchants and ATMs that are prepared to accept these card payments. Thus, unlike a check or a money order, these cards typically cannot be used for payments between individuals or at merchants that lack the necessary card reader and transmission technology.

Although both deposit accounts and some payment instruments can serve as both a store of value and a means of making payments, the focus of these financial products is different. A deposit, or in EFTA terms, a consumer asset account, often serves primarily to safeguard the consumer's liquid assets, and secondarily to enable the consumer to engage in payment transactions. A payment instrument is designed primarily for engaging in payment transactions although it can also serve, secondarily, as a temporary store of value pending its use in transactions. Although prepaid card products are clearly designed to be, and function as, payment instruments, some have suggested that the use of prepaid cards as a vehicle for paying employees carries with it such importance to those employees that such payroll products should be treated as consumer asset accounts for purposes of the EFTA and Regulation E. We view the FRB's Proposed Rule as the FRB's concurrence with these concerns.

---

[2] 15 U.S.C. §§ 1693-1693r.
[3] 15 U.S.C. § 1693b.

While we agree that protecting the wages of working men and women is important and, therefore, that the application of Regulation E to payroll cards when they are established by an employer on behalf of an employee may be appropriate, we believe that any such application needs to take into account that even payroll cards are primarily payment instruments. Some of the requirements of Regulation E that were designed and are appropriate for consumer asset accounts may not be appropriate for, or desired by, the holders of payroll cards.

Accordingly, we believe that full, unmodified, Regulation E coverage would not be appropriate for, and would not be consistent with the unique attributes of, payroll cards. The principal requirement of Regulation E that we believe should not be applied to payroll cards is the requirement to deliver periodic statements, or the requirement to include certain content-specific information in periodic statements if they are required. Instead, we believe that entities offering payroll cards should be subject to rules similar to those contained in section 205.15 of Regulation E for administering government-issued or government-sponsored electronic benefit cards. In this regard, section 205.15 exempts government agencies from the periodic statement-related requirements, provided the agencies make balance information available to consumers.

Many recipients of payroll cards are more mobile than holders of deposit accounts, which makes the mailing of periodic statements a less reliable means of conveying information to the payroll cardholder than for the deposit accountholder. Furthermore, payroll cards often are held by individuals commonly referred to as the "unbanked." This unbanked community includes seasonal employees or more transient employees that are less likely to have an address at which they are able to receive mail and periodic statements. The primary information that is of concern to most holders of payroll cards is the current balance remaining on the card. This real time information is not required to be provided to accountholders under Regulation E, although today it is made available by most payroll card issuers.

For these reasons, we believe that payroll cards should not be subject to the periodic statement requirements in Regulation E that apply to traditional deposit accounts. Instead, we believe that it is more appropriate to apply alternative balance information requirements to payroll cards, similar to the requirements for electronic benefit cards. More flexible balance information requirements would be more appropriate for the unique structure and design of payroll cards and the characteristics and needs of payroll cardholders.

In the supplemental information accompanying the Proposed Rule ("Supplemental Information"), the FRB states that payroll card products are, in effect, designed, implemented, and marketed as substitutes for traditional checking accounts at banks.[4] As discussed above, we do not believe that this statement is accurate. Most payroll cards are designed to operate in a closed-payment system, and unlike traditional deposit accounts, payroll cards either do not provide consumers with the ability to load or deposit additional funds onto the card or limit the means to do so. In many instances, new recipients of payroll cards draw the balance on the card down to zero almost immediately by using an ATM to convert the balance on the card into cash.

---

[4] *69* **Fed. Reg.** 55,996, 55,999 **(Sept.** 17,2004).

As recipients become more comfortable with the card, they may carry at least some balances for longer periods. At the same time, many institutions issuing payroll cards actively seek to convert cardholders who regularly carry balances into holders of deposit accounts and users of additional banking services by gaining their trust and confidence. Similarly, the means of accessing the balance on the card is typically limited to use of the card and cannot otherwise be withdrawn directly from an account. As a result, payroll cards typically provide more limited services to the holder of a payroll card than to the holder of a deposit account.

In this context, we believe that alternatives to the Regulation E periodic statement requirements are appropriate information requirements for payroll cards and will be adequate to provide for the effective delivery of appropriate information to payroll card recipients. Electronic access, including access via telephone, to balance information should be the cornerstone of any such requirements. Additional transactional information, such as that required for electronic benefit cards, also could be available on request. However, we believe that issuers of payroll cards need to be able to specify reasonable procedures for submitting these requests and for providing statement information, both to help to ensure effective delivery of the information and to protect against the possibility that such requests will become a means of identity theft. As a practical matter, once such a regulatory floor of protection is established we believe that additional means of delivering information that payroll cardholders want will evolve as a competitive matter, and in part to avoid the costs of providing more lengthy statements. For example, many issuers of payroll cards already make available balance and recent transactional information over the telephone.

In addition, there are other aspects of the standard Regulation E requirements that the FRB should modify to reflect the differences between payroll cards and traditional deposit accounts. For example, akin to the rules for electronic benefit cards, the 60-day period for reporting unauthorized transfers should begin with the transmittal of a written account history.

ROPOSED ITION OF "ACCOUNT" IS ERLY BROAD

Visa believes that the proposed definition of "account," which would subject payroll cards to Regulation E, is overly broad. The proposed definition could inadvertently result in the coverage of products that should not be covered and that the FRB did not intend to cover. Under the Proposed Rule, a payroll card is covered whether the funds are held in an individual employee account or in a pooled account.

In addition, the proposed definition of account appears to result in double coverage of many payroll cards so that both the employer and the financial institution administering (or the financial institution servicing on behalf of the employer) the payroll card program would be covered by Regulation E. The Supplemental Information states that "[o]ne or more parties involved in offering payroll card accounts may meet the definition of a 'financial institution' under the regulation — whether it be the employer, a financial institution, or other third party

involved in the transfer of funds to the account or in the issuance of the card."[5] While the financial institution and the employer may be able to allocate responsibilities by contract, this allocation is not a shield from civil liability. This double coverage also raises the specter of vicarious liability, and attendant reputational risk, to financial institutions for acts by an employer or a processor used by the employer. Where an institution is merely the depository of the employer's payroll account and the employer is the issuer, the employer should be responsible for compliance with Regulation E, rather than the financial institution, especially in situations where the institution is merely maintaining the payroll deposit account on behalf of the employer.

In addition, the broad definition of account raises the question as to whether the processors or servicers used by an employer or a financial institution are covered by the definition. The FRB should clarify that third parties, such as payroll card processors or servicers, that are merely "involved in the transfer" but are acting on behalf of other parties, are not covered unless such parties hold a consumer (rather than an employer) account or issue an access device.

Moreover, if the FRB determines to adopt a version of the Proposed Rule in final form, the FRB should make it clear that the new requirements apply only to basic employment compensation paid by means of a payroll card and that the requirements do not apply to other employment-related payments such as bonuses, holiday gifts or other incentive payments. In addition, the final rule should include language in the Commentary that makes it clear that any new requirements apply only to payroll cards as defined in the final rule, and that the requirements have no application to other forms of prepaid or stored value card products.

Furthermore, Visa strongly recommends that the FRB clarify that flexible spending accounts ("FSA") that can be accessed by a card, rather than through reimbursement, would not be covered under Regulation E as a payroll card account. FSAs are established by employers and are offered to employees to allow a fixed amount of pre-tax wages to be set aside for qualified expenses, including child care or uncovered medical expenses. FSAs can be funded through salary reduction, employer contributions or a combination of both.

The Proposed Rule would include as an account under Regulation E a payroll card account "established by an employer on behalf of a consumer" to which EFTs of the "consumer's wages, salary, or other compensation are made on a recurring basis." Given the breadth and plain language of the proposed definition, we are concerned that FSAs could be viewed as covered by Regulation E since such accounts are established by employers using employee compensation. However, the concerns underlying the Proposed Rule to cover payroll cards as accounts under Regulation E do not apply to FSAs. FSAs are not a substitute for bank deposit accounts.

---

[5] *Id.* **At** 55,999.

The Proposed Rule itself recognizes that not all employment-related cards should be treated as payroll cards. The proposed commentary to section 205.2(b), however, indicates that the Proposed Rule would not cover a card used solely to disburse non-salary-related payments, such as petty cash or travel per diem. Visa believes that a card issued in connection with an FSA should be viewed as a card used solely for a non-salary-related payment and thereby not covered by Regulation E. The mere transfer of employee compensation to an account established indirectly by an employer should not result in such an account being covered by Regulation E. While employee compensation may be used to fund FSAs or cards issued in connection with such accounts, the funds should not be viewed as employee compensation once such funds are transferred to the FSA or card. Today, employers directly deposit employee compensation into deposit and checking accounts. Once these funds are transferred into the deposit or checking account, they are no longer viewed as employee compensation and the same should be true of transfers to FSAs. That is, once funds are in an FSA, or loaded on a card that provides access to an FSA, those funds are no longer compensation. In addition, we believe that the same should be true of similar accounts or products funded by using employee compensation, such as transportation reimbursement programs.

Moreover, current section 205.2(b)(2) of Regulation E exempts fi-om the definition of an "account" an account held by a financial institution under a bona fide trust agreement. Accordingly, an FSA should not be considered an "account" for purposes of Regulation E because financial institutions act as fiduciaries or custodians under FSA arrangements, holding the FSA funds on behalf of employees. Because such fiduciary or custodial arrangements are "bona fide trust agreements," such relationships should not be subject to Regulation E.

COVERAGE OF PAYROLL CARDS UNDER REGULATION E SHOULD NOT AFFECT OTHER REGULATORY REQUIREMENTS

Any regulatory coverage of payroll cards by the FRB should be carefully limited to Regulation E. Other existing regulatory requirements, including Regulations D (Reserve Requirements of Depository Institutions), CC (Availability of Funds and Collection of Checks), DD (Truth in Savings) and the requirements under section 326 of the USA PATRIOT Act, raise different policy and practical issues than those raised by the application of Regulation E to payroll cards and, thus, a determination of coverage of payroll cards under Regulation E should not affect the coverage of such cards under any other regulatory requirements. For example, compliance with section 326 of the USA PATRIOT Act for the recipients of certain prepaid cards would be impossible in many instances.

COVERAGE SHOULD NOT BE DETERMINED BY WHETHER FUNDS ARE ELIGIBLE FOR DEPOSIT INSURANCE

In connection with the Proposed Rule, the FRB solicited comment on whether Regulation E coverage should be determined by whether a payroll card holds consumer funds that qualify as eligible "deposits" for purposes of the Federal Deposit Insurance Act ("FDIA").

Visa believes that Regulation E coverage should not be tied to whether the funds accessed by payroll cards are eligible for deposit insurance. The policy implications driving Regulation E are quite different from the policy implications underlying deposit insurance coverage. As a result, it may be appropriate to cover certain products under Regulation E, but not under the FDIA, and vice versa.

ISSUANCE OF PAYROLL CARDS

The Supplemental Information states that for "purposes of the access device issuance rule in [section] 205.5, a payroll card would be considered a solicited access device so long as a consumer must elect to have his or her salary credited to a payroll card account."[6]

The FRB should clarify that a consumer's application for employment and acceptance of employment-related terms that inform the consumer that compensation will be provided by means of a payroll card, rather than a paper check, should be deemed to be a request for an access device. This approach is consistent with section 205.15 of Regulation E where an application for benefits is deemed to be a request for an access device.

OTHER REGULATION E ISSUES

REPLACEMENT OF EXISTING DEBIT CARDS WITH MULTIPLE CARDS AS RENEWALS OR SUBSTITUTES

Under section 205.5 of Regulation E, access devices may be distributed to consumers on a solicited or unsolicited basis. Section 205.5(a) governs the solicited issuance of access devices and permits the issuance of an access device as part of a renewal or substitution of an existing access device. Section 205.5(b) governs the unsolicited issuance of access devices and permits the issuance of access devices, provided institutions meet certain disclosure and validation requirements. With respect to solicited issuances, existing section 205.5(a)(2)-1 of the Commentary sets forth a one-for-one rule that states, "[i]n issuing a renewal or substitute access device, a financial institution may not provide additional devices."

[6] *Id.*

The Proposed Rule would maintain the existing comment, but add another comment that would clarify that the "regulation does not prohibit a financial institution from replacing an accepted access device with more than one access device during the renewal or substitution of a previously issued device, provided that any additional access device is not validated at the time it is issued,"[7] and the institution complies with the validation requirements of section 205.5(b) of Regulation E. Visa supports the clarification that multiple cards may be distributed to existing cardholders. This clarification is consistent with the issuance rules under Regulation Z (Truth in Lending) for credit cards and would enhance the development of debit card services and overall consumer convenience by enabling consumers to make use of new advances in card technology, such as cards issued in different sizes and formats.

While Visa supports the proposed clarification that Regulation E does not prohibit a financial institution from replacing an accepted access device with more than one access device as part of a renewal or substitution, we believe that such renewals and substitutions should fall under section 205.5(a) of Regulation E concerning solicited issuances and, therefore, should not be subject to the unsolicited issuance provision requiring institutions to comply with the validation requirements of section 205.5(b) of Regulation E. Under the existing regulatory framework, a single validated access device may be issued in connection with a renewal or substitution. The validation requirements for a single device and for multiple devices should not be any different when the devices are being issued in connection with a renewal or substitution. In this regard, the liability is on a per account basis and there is no additional risk associated with issuing more than one substitute or renewal card, particularly when they are sent together.

If the FRB determines to maintain the validation requirements contained in the Proposed Rule, Visa recommends that the FRB clarify that Regulation E does not preclude a single validation activating both access devices sent to a consumer as a renewal or substitute for a single access device. For example, as part of a substitution or renewal, a bank should be permitted to send a standard-sized debit card and a mini-sized debit card to its customers. The two debit cards may have the same account number and, therefore, the activation of one card would also serve to activate the other card.

ELEPHC AUTHORIZATION FOR PREAUTHORIZED EFTS

Currently, preauthorized EFTs from consumer accounts under section 907(a) of the EFTA must be authorized by the consumer in writing.* Section 205.10(b) of Regulation E implements this provision by requiring that preauthorized EFTs be authorized by consumers in the form of a "writing signed or similarly authenticated." Moreover, the existing Commentary section 205.10(b)-3 states that a tape recorded telephone conversation does not constitute proper authentication for the purposes of authorizing preauthorized EFTs.

---

[7] 69 Fed. Reg. at 56,010.
[8] 15 U.S.C. § 1693e.

Under the Proposed Rule, the FRB would remove language from the Commentary in order to clarify that telephonic authorizations may comply with the writing and signed or similarly authenticated Regulation E requirement. Visa strongly supports this important clarification and the FRB's determination that the language contained in the Commentary is no longer appropriate in light of the passage of the Electronic Signatures in Global and National Commerce Act, which gives legal effect to an electronic record used as a substitute for a statutory writing requirement.[9]

The existing Commentary states that a payee's failure to obtain written authorization is not a violation of Regulation E if the failure was not intentional, provided the payee maintains procedures reasonably adapted to avoid error. In this regard, the Proposed Rule would address what constitutes reasonable procedures when during a telephone transaction a merchant seeks to obtain a consumer's authorization for recurring payments for goods or services using the consumer's credit or debit card. Specifically, the Proposed Rule would add a comment to section 205.10(b) to state that procedures reasonably adapted to avoid error will vary with the circumstances. The comment also would state that asking the consumer to specify whether the card to be used for the transaction "is a debit card or is a credit card, using those terms, is a reasonable procedure."" Furthermore, the Proposed Rule would clarify that merchants are not required to obtain or consult bank identification numbers tables in order to establish that they maintain procedures reasonably adapted to avoid error.

Visa supports this clarification and believes that such a clarification is important in connection with card-not-present transactions. In card-not-present transactions, banks have to rely upon the consumer's assertion that the card is either a debit card or a credit card. The bank should not have to second guess the consumer's assertion or take additional steps to confirm the consumer's assertion.

STOP PAYMENT AND REVOCATION OF AUTHORIZATIONS FOR PREAUTHORIZED EFTS

Section 205.10(c)-2 of the existing Commentary explains that after a consumer has given notice to a financial institution that he or she has revoked his or her authorization for a specific preauthorized transfer, the financial institution "must block all future payments for the particular debit" and "may not wait for the payee-originator to terminate the automatic debits."

The Proposed Rule would revise section 205.10(c)-2 and -3 of the Commentary to clarify that an institution that does not have the capability of blocking a preauthorized debit from being posted to the consumer's account, such as debits made on a real-time system, may instead use a third party to block the transfers, provided the recurring debits are stopped.

---

[9] 15 U.S.C. §§ 7001-7031.
[10] 69 Fed. Reg. at 56,011.

Visa supports the proposed clarification. In the case of debit card transactions, the interception of transactions at the network level may be more effective than blocking transactions at the level of the account-holding institutions.

ERROR RESOLUTION PROCEDURES

The Proposed Rule also would provide guidance on the procedures required under Regulation E for resolving errors, including the time limits and the extent of the investigation. In particular, the Proposed Rule would clarify that where the consumer fails to provide the institution with timely notice (within 60 days after the sending of the statement first reflecting the alleged error), the institution need not comply with the error resolution requirements. Nevertheless, if the claim involves allegations of an unauthorized EFT, the institution still must satisfy the unauthorized use provisions of Regulation E before imposing liability on the consumer.

The Proposed Rule also clarifies the scope of the investigation requirement where the institution does not have an agreement for the type of EFT involved. Specifically, under the Proposed Rule and the "four walls" rule, an institution would be required to "review all information within the institution's own records relevant to resolving the consumer's particular claim."[11] Visa strongly opposes this proposed revision to the Commentary. Requiring an institution to review all information within the institution's records is an unrealistic standard to establish for any financial institution. For example, it would be impractical for large banks to comply with such a standard, since it would include review of information relating to other accounts and transactions. Such information may be stored at various locations, and it may be difficult, if not impossible, to identify all such information. Visa encourages the FRB to limit the investigation to the particular account affected and to provide financial institutions with flexibility in conducting investigations of unauthorized transactions and billing errors. This flexibility can be accomplished by stating generally that institutions must conduct reasonable investigations and, similar to section 226.12(b) of Regulation Z, by providing examples of steps that a financial institution may take in conducting such a reasonable investigation. Visa believes that providing guidance concerning the elements an institution may consider in conducting a reasonable investigation is more appropriate than specifying any single method for conducting a reasonable investigation.

NOTICE OF TRANSFERS VARYING IN AMOUNT

Section 205.10(d) requires the designated payee or the consumer's bank to send written notice of the amount and date of the transfer at least ten days before the scheduled date of a transfer, if the transfer falls outside a specified range or exceeds the most recent transfer by more than an agreed upon amount. Banks have suggested that this notice is costly and is not appropriate where the transfer is between accounts owned by the same consumer, even when those accounts are at different institutions.

---

[11] *Id.*

To provide additional flexibility, the Proposed Rule would state that a bank need not give the consumer the option of receiving such a notice before transfers of funds where the transfer is to an account of the consumer held at another bank, even when the other account is a joint account and the consumer is one of the joint accountholders. Visa supports this clarification as proposed.

ATM SIGN

The Proposed Rule would amend the Commentary to clarify the current Regulation E provision for notices posted on or at an ATM. More specifically, the Proposed Rule would clarify that if there are circumstances in which an ATM fee will not be imposed, the ATM operator may disclose in the notice posted on or at the ATM that a fee "may" be imposed. We strongly support the proposed clarification and applaud the FRB's effort to assist ATM operators in understanding and complying with the ATM fee disclosure requirements of section 205.16(b)(1) of Regulation E.

We believe that the Proposed Rule is fully consistent with section 904(d)(3)(A) and (B) of the EFTA, [12] which provides that an ATM operator, who charges a consumer for EFT services, must provide notice to the consumer indicating "that a fee is imposed" for the service in a prominent and conspicuous location on or at the ATM and through an ATM on-screen disclosure accompanied by the fee amount. We believe that it is important to clarify that the current regulatory language of section 205.16(b)(1) of Regulation E should not be read to require a notice stating that a fee will be charged when there are circumstances where a fee, in fact, will not be charged. Such an interpretation ignores current ATM fee practices that benefit many consumers.

We believe that the current ATM disclosure scheme, as clarified by the Proposed Rule, adequately informs consumers of fees that will be imposed by ATM operators. Specifically, section 205.16(b)(1) of Regulation E provides that "[a]n [ATM] operator that imposes a fee on a consumer for initiating an [EFT] or a balance inquiry shall . . . [p]rovide notice that a fee will be imposed for providing [EFT] services or a balance inquiry" (emphasis added). This notice must be posted in a "prominent and conspicuous location," either on or at the ATM to alert the consumer that a fee may be imposed. In addition, before the consumer is committed to paying such a fee, the ATM operator is required to provide notice of the fee and its amount, either on the ATM screen, or on paper. Only after the consumer is provided these required notices, and elects to continue with the transaction or balance inquiry, may the ATM operator impose a fee.

Representative Marge Roukema, the sponsor of the ATM fee disclosure bill that was incorporated into the Gramm-Leach-Bliley Act ("GLBA"), publicly stated that "Federal Reserve regulations and industry rules already require that surcharges be disclosed. This bill simply puts existing practice into law. Since agency regulations and industry rules are subject to change,

[12] 15 U.S.C.§§ 1693b(d)(3)(A)-(B).

this sets a uniform standard that consumes will be able to count on."[13] At the time this requirement was enacted, many banks notified consumers through signage on or at the ATM machine that a fee *may* be imposed and through an ATM on-screen disclosure that specified the amount of the fee, if any, that would apply to the particular transaction before the consumer elected to proceed. Thus, it is consistent with the GLBA amendment to clarify that existing section 205.16(b)(1) of Regulation E, which states that an ATM operator that imposes a fee for a specific type of transaction shall "provide [a] notice [statement] that a fee will be imposed for providing electronic fund transfer services or a balance inquiry" (emphasis added), is satisfied by a statement that a fee may be imposed, where the ATM operator does not impose the fee in connection with all transactions.

Permitting ATM operators, who do not universally charge consumers for EFT services, to use language indicating that a fee *may* be imposed, is consistent with EFTA section 904(d)(3)(A)[14] and will serve to alert consumers to the more consumer-specific on-screen disclosures provided after card insertion. The more detailed on-screen notice, which will use the explicit language of Regulation E to notify consumers of the precise fee amount, if any, will ensure that a consumer receives adequate disclosure before he or she elects to proceed with an ATM transaction.

Although section 205.16(b)(1)-1 of the Commentary explains that an ATM operator may "specify the type of EFT for which a fee is imposed," in lieu of providing a general blanket statement that a fee will be imposed, ATM fee structures are sufficiently complex that a specific listing of every potential fee would result in a lengthy, detailed statement on or at the ATM that would be costly and would add no practical value to a more general statement. For example, ATM operators commonly apply fees to some ATM transactions, but not others. Transactions for which ATM operators may choose not to impose fees, include those for: (1) ATM operator issued cards; **(2)** foreign bank cardholders; (3) cardholders of banks that are corporately affiliated with the ATM operator; (4) cardholders issued cards under governmental electronic benefit transfer programs; and (5) cardholders whose non-affiliated card issuer has entered into a special contractual relationship with the ATM operator regarding surcharges.

In addition, we urge the FRB to make clear in the Supplemental Information that the proposed revisions merely clarify the current ATM fee disclosure requirements. The failure to make such a clarification could lead to the revisions being viewed as only prospective in nature. Visa also believes that it is important that the FRB clarify that compliance with Regulation E's ATM fee disclosure requirements can be satisfied in multiple ways. ATM operators that do not universally impose fees on consumers for EFT services should be permitted to post signs indicating that they may or that they will impose a fee.

---

[13] Press Release, Office **of** Congresswoman Marge Roukema, Banking Committee OKs Roukema ATM Fee Disclosure (Mar. 10, 1999), at **http://financialservices.house.gov/banlung/3**099rou.htm.
[14] 15 U.S.C. § 1693b(d)(3)(A).

We urge the FRB to clarify that ATM signs stating that "a fee will be imposed" and "a fee may be imposed" both comply with section 205.16(b)(1) of Regulation E in the context of an ATM operator that imposes fees in connection with some ATM transactions, but not all ATM transactions. Specifically, the FRB should make it clear that the deletion of the word "will" in the Commentary should not be construed to make the use of the term will inappropriate, even if a fee is not charged in all cases. Under such circumstances, the choice of may versus will should be a customer relations issue that is left to the ATM operator.

ELEC TRONIC CHECK SIONS

The Proposed Rule would address coverage of electronic check conversion services and clarify the rights, liabilities and responsibilities of parties engaged in such transactions. Under the Proposed Rule, a notice about covered electronic check conversions would have to be provided for each transaction. The proposed notice would inform consumers that when a check is used to initiate an EFT, funds may be debited from the consumer's account quickly, and if applicable, that the consumer's check will not be returned.

More specifically, the Proposed Rule would amend the definition of EFT to cover "a check, draft, or other paper instrument [that] is used as a source of information to initiate a one-time [EFT transaction] from a consumer's account."[15] For example, a transaction would be considered an electronic check conversion transaction covered by Regulation E if a consumer provides a check which the payee uses to initiate a one-time EFT transaction, regardless of whether the check is blank, partially completed or fully completed and signed.

The Proposed Rule does not address whether transactions completed with convenience checks or balance transfer checks would be covered by Regulation E, and banks are concerned about the coverage of such checks under Regulation E. Visa recommends that the FRB clarify that such convenience checks and balance transfer checks would not be covered by Regulation E because the funds used to complete payments with such checks are not consumer assets, but rather extensions of credit to the consumer, which are more appropriately addressed through Regulation Z.

IPL IENT TIC PERIOD

The FRB has requested comment on whether six months following the adoption of a final rule would be sufficient to enable financial institutions to implement any necessary changes to comply with the regulation.

[15] *69* **Fed.** Reg. **at 56,008.**

Visa believes that a six-month implementation period would not be sufficient. If the Proposed Rule is finalized as proposed, institutions may have to revise initial disclosures, create payroll-specific disclosures, and set up systems to facilitate the delivery of periodic statements and other disclosures.

* * *

In conclusion, we appreciate the opportunity to comment on this very important topic. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact me, at (415) 932-2178.

Sincerely,

Russell W. Schrader
Senior Vice President and
Assistant General Counsel

cc: Roger W. Ferguson, Jr.
Gary H. Stem
Patrick Barron
Christine Cummings
Michael Moscow
Louise Roseman
Jeffrey C. Marquardt