



October 7, 2005

*By Electronic Delivery*

Ms. 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-1234

Dear Ms. Johnson:

This comment letter is submitted on behalf of Visa U.S.A. Inc. in response to the Federal Reserve Board's ("FRB") notice of proposed rulemaking ("Proposed Rule") to amend Regulation E,<sup>1</sup> which implements the Electronic Fund Transfer Act ("EFTA"),<sup>2</sup> and the official staff commentary to Regulation E ("Commentary").<sup>3</sup> We appreciate the opportunity to comment on this issue.

The Visa Payment System, of which Visa U.S.A.<sup>4</sup> 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. For calendar year 2004, Visa U.S.A. card purchases exceeded a trillion dollars, with over 450 million Visa cards in circulation. Visa plays a pivotal role in advancing new payment products and technologies, including technology initiatives for protecting sensitive personal information and preventing identity theft and other fraud, for the benefit of Visa's member financial institutions and their hundreds of millions of cardholders.

Specifically, the Proposed Rule would revise Regulation E section 205.16(c)(1) to provide that an ATM operator may comply with the Regulation E requirement for fee notice on an ATM by indicating in the notice that a fee may be imposed if there are circumstances in which a fee will not be charged for transactions at the ATM. Furthermore, the Proposed Rule would revise section 205.16(b)(1)-1 of the Commentary to reflect the proposed revisions to section 205.16(c)(1) and to clarify that ATM operators that impose an ATM fee in all cases must state in the ATM fee notice that a fee will be charged.<sup>5</sup>

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<sup>1</sup> 12 C.F.R. pt. 205.

<sup>2</sup> 15 U.S.C. §§ 1693-1693r.

<sup>3</sup> 12 C.F.R. pt. 205, Supp. I.

<sup>4</sup> 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.

<sup>5</sup> 70 Fed. Reg. 49,891, 49,894 (Aug. 25, 2005).

Visa strongly supports the proposed revisions to Regulation E and the Commentary and applauds the FRB's effort to assist ATM operators in understanding and complying with the ATM fee disclosure requirements. We believe that the proposed revisions are fully consistent with sections 904(d)(3)(A) and (B) of the EFTA,<sup>6</sup> which provide that an ATM operator that charges a consumer for electronic fund transfer ("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 also urge the FRB, when it adopts a version of the Proposed Rule as a final rule, to make it clear in the Supplemental Information accompanying the final rule that the revisions do not represent a change in the ATM disclosure scheme, but merely a restatement and clarification of the requirements of existing law. Importantly, a statement that the revisions are merely a clarification of existing law clearly permits their retroactive application, whereas the failure to make such a clarification could result in arguments that the revisions are only prospective in nature.

### **ATM FEE DISCLOSURE REQUIREMENTS**

Existing section 205.16 requires a notice in a prominent location on or at an ATM "that a fee will be imposed for providing [EFT] services or a balance inquiry" (emphasis added). Similarly, existing Commentary section 205.16(b)(1)-1 states that an ATM operator "may provide a general statement that a fee will be imposed for providing EFT services or may specify the type of EFT for which a fee is imposed" (emphasis added). However, an overly literal interpretation of these statements can create significant problems for both ATM operators and consumers. That is, for many ATM operators, there is no universally applied ATM fee to all consumers. Therefore, ATM operators cannot say that they "will" impose a fee without misinforming many, if not most, consumers.

While conceptually it is possible for ATM operators to elect to impose fees in connection with all transactions or in connection with no transactions, ATM operators most commonly apply fees on some categories of their ATM users, but not on others. Although ATM operators can notify their account holders separately about their fee policies through disclosures required under Regulations E and DD, even account holders who have received such a disclosure and, thus, have been informed that there is no fee for a particular type of transaction, are likely to be confused when confronted with an ATM fee disclosure notice that incorrectly states that a fee will be imposed. Examples of categories of cardholders that ATM operators may choose not to impose surcharges on are:

1. Cardholders whose cards are issued by the ATM operator;
2. Cardholders of foreign banks;
3. Cardholders of banks that are corporately affiliated with the ATM operator;
4. Persons who carry cards that are issued under governmental electronic benefit transfer programs; and

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<sup>6</sup> 15 U.S.C. §§ 1693b(d)(3)(A)-(B) (emphasis added).

5. Cardholders whose non-affiliated card issuer has entered into a special contractual relationship with the ATM operator regarding fees.

Therefore, because many, if not most, ATM operators do not charge fees for at least some categories of consumers, the existing Regulation E ATM fee disclosure statement that a fee “will” be charged results in an ATM fee disclosure that is inaccurate and misleading. To diminish the inherent inaccuracy and misleading nature of such a disclosure, it would be necessary for an ATM operator to add qualifying language to the small ATM fee disclosure notice, such as a statement explaining: “but no fee will be charged to . . . ,” with a long list of the types of consumers that would not be charged a fee. Assuming that such additional language is even permitted by Regulation E, such a notice encumbered with detailed exceptions could be of little practical value to consumers and would be of no additional value to the short, simple and precise on-screen disclosure that the consumer would receive after inserting his or her card into the ATM card reader. Moreover, a notice that lists some, but not all, of the fee exceptions may be even more confusing.

#### **PROPOSED CLARIFICATION OF ATM FEE DISCLOSURE REQUIREMENTS**

We believe that the language of proposed section 205.16(c)(1) is consistent with section 904(d)(3)(A) of the EFTA.<sup>7</sup> Then Representative Marge Roukema (R-NJ), the sponsor of the ATM fee disclosure bill that was incorporated into the Gramm-Leach-Bliley Act (“GLBA”) and that amended section 904(d) of the EFTA, publicly stated that “Federal Reserve regulations and industry rules already require that [ATM] surcharges be disclosed. This bill simply puts existing practice into law. Since agency regulations and industry rules are subject to change, this sets a uniform standard that consumers will be able to count on.”<sup>8</sup> At the time this requirement was enacted, many banks already notified consumers, through signage on or at the ATM, that a fee may be imposed, and more precisely informed the consumer through an ATM on-screen disclosure that specified the amount of the fee, if any, that actually would apply to the particular transaction before the consumer elected to proceed. Thus, proposed section 205.16(c)(1) is consistent with section 904(d)(3)(A) of the EFTA,<sup>9</sup> as amended by the GLBA, and will serve to alert consumers of the possibility of a fee in advance of the more consumer-specific on-screen disclosures provided after a consumer inserts his or her card into the ATM card reader.

We also believe that the current ATM disclosure scheme, as clarified by the proposed revisions, adequately informs consumers of fees that may be imposed by ATM operators. Specifically, proposed section 205.16(c)(1) would provide that an ATM operator that may impose a fee on a consumer for initiating an EFT or a balance inquiry shall post on or at the ATM a notice providing that a fee “will be imposed” or a notice providing that a fee “may be imposed,” if there are some circumstances under which a fee will not be charged. In addition, under existing section 205.16(c)(2) of Regulation E, before the consumer is committed to paying

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<sup>7</sup> 15 U.S.C. § 1693b(d)(3)(A).

<sup>8</sup> Press Release, Office of Congresswoman Marge Roukema, Banking Committee OKs Roukema ATM Fee Disclosure (Mar. 10, 1999), available at <http://financialservices.house.gov/banking/31099rou.htm>.

<sup>9</sup> 15 U.S.C. § 1693b(d)(3)(A).

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an ATM fee, the ATM operator is required to provide notice that a fee will be imposed and the amount of that fee, either on the ATM screen or otherwise. Only after the consumer is provided with this combination of required notices, and the consumer elects to continue with the transaction or balance inquiry, may the ATM operator impose a fee.

In addition, we believe that it is important that the FRB make clear in the Commentary that compliance with Regulation E's ATM fee disclosure requirements can be satisfied in multiple ways. That is, the FRB should clarify that the proposed language of Commentary section 205.16(b)(1)-1, which reflects the proposed revisions to section 205.16(c)(1), should not be construed to make the use of the term "will" inappropriate, when there are some circumstances when the ATM operator does not impose a fee. Under such circumstances, we believe that the choice of may versus will should be a customer relations issue that is left to the ATM operator.

Once again, we appreciate the opportunity to comment on this important matter. 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