VISA

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Russell W. Schrader
Senior Vice President
Assistant General Counsel

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-1286; Proposed Amendments to Regulation Z

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") request for comment in connection with the proposed amendments to Regulation Z ("Proposal"). As an initial matter, Visa would like to commend the FRB for its comprehensive and well thought out Proposal. Both the magnitude of the effort and the care that went into addressing individual components of the Proposal are impressive. In addition, Visa recognizes that the Proposal was issued at a time when credit card issuer practices are coming under public scrutiny and are being addressed through numerous legislative initiatives, including Congressional hearings and proposed or discussed legislation.

Visa notes that some of the specific provisions of the Proposal address issues that have been raised in the current legislative debate. Indeed there is a strong argument that almost all of the significant issues raised in this debate would be resolved by the Proposal and that those issues that may not be fully resolved might be resolved with relative modest changes in the Proposal or are issues that have received a level of attention that is not warranted by their economic consequences. At the same time, Visa believes that some of the FRB's proposed amendments could have significant consequences for card issuers, requiring significant changes in pricing practices, disclosures and operations. These changes are likely to be both costly and disruptive and are ultimately likely to result in increased costs to many consumers, as well as have the effect of wealth transfers from consumers with lower risk profiles and who regularly meet their account obligations, to consumers with higher risk profiles or who do not always pay on time or otherwise meet their account obligations.

Because of the current legislative debate and the significant consequences that some of the proposed requirements are likely to have on credit card issuers, Visa believes that with respect to a number of issues that have also been the focus of legislative concern, it is more appropriate to let card issuers speak for themselves rather than to try to characterize a general industry position and run the risk of misstating individual issuer's views. Nevertheless a number of general observations may be helpful.

There has been concern expressed about the fact that open-end credit accounts are subject to changes-in-rates and other terms, both because of provisions in credit card agreements that provide for increases in rates upon the occurrence of certain events, and in the ability of credit card issuers to change the terms of credit card accounts with prior notice to the cardholders. Terms such as "teaser rates" and "universal default" and changes-in-terms "at any time for any reason" have been bandied about, but are without clear distinctions between changes in prices and terms that are appropriate given the nature of open-end credit and those that are viewed as objectionable. The basis of this criticism seems to be that certain, often undefined, practices are unfair because they are inconsistent with consumers' expectations. However, because so called universal default repricing and changes-in-terms are subject to existing disclosure requirements and because the credit card market is highly competitive, changes in accounts from one issuer to another are often facilitated by attractive balance transfer offers; the degree or severity of these "problems" is highly subjective.

Although the problems are difficult to quantify, the Proposal includes specific and tangible requirements that credit card issuers give 45-days prior notice before either changing terms to increase rates, such as to reflect a determination in the cardholders credit score, or increasing rates based on a consumer's failure to meet the terms of his or her current agreement, such as by making late payments. While Visa believes that the 45-day prior notice should be viewed as fully resolving concerns about repricing of credit card accounts, Visa recognizes that some would advocate going further while others would exclude from the 45-day prior notice repricing that had previously been disclosed to the consumer, and particularly repricing that was disclosed and that experience showed that consumers expected.

Visa notes that by requiring 45-day prior notice for increases in rates even when the circumstances that would trigger the increase were disclosed as part of the initial disclosures, the FRB is essentially concluding that the initial account-opening disclosures are inadequate and do not sufficiently inform consumers about the terms of the account. Nevertheless, the FRB would continue to require disclosures of penalty rates in account-opening disclosures and on periodic statements. There is a tension in these requirements that may encourage card issuers to use changes in terms instead of penalty pricing.

Visa has some specific suggestions on this issue that are discussed below; however, Visa believes that the FRB should carefully weigh the comments on this aspect of the Proposal with an eye to how the FRB's action will fit into the resolution of the public policy debate on credit card issuer practices and the potential for costs and cross subsidies between consumers when pricing options are limited.

Similarly, other issues, such as the level of fees generally, payment allocation methods, "double cycle billing" and the length of grace periods are part of the issuer practices debate and the issues on which there is a strong difference in opinion. Visa notes that the Proposal responds to these issues in different ways. For example, the Proposal would actually remove the disclosure of balance computation methods which relates to "double cycle billing" from the current "Schumer Box." While this may be appropriate given the difficulty that consumers have in understanding this disclosure and limited circumstances in which this pricing practice has a material impact, Visa recognizes that this practice, like practices related to fees, payment allocation and grace periods, has been the focus of much criticism. The FRB should carefully weigh the benefits of more aggressive regulation in other areas against inherent costs of that regulation in terms of operational costs, cross subsidies and limitations on innovation going forward. Visa appreciates the opportunity to comment on this important matter. Visa's specific comments on other important aspects of the Proposal follow.

Implementation Period Should be 24 Months

The FRB should provide, at a minimum, 24 months for implementation of the final rule. The proposed formatting revisions are all-embracing. The proposed changes would impact every aspect of credit card issuer operations, including pricing, disclosures, programming, operations, billing systems, billing error policies and procedures, advertising practices, and several other aspects of the credit card industry. Accordingly, the proposed requirements would require substantial restructuring of current credit card systems by all participants in the system, including financial institutions and merchant participants. In particular, the implementation of some proposed modifications, such as revisions to the periodic billing statements, would require significant modifications to existing software and hardware systems which will require significant lead times. In this regard, Visa believes that due to the mere number and scope of the proposed changes, a significant implementation period is essential.

If the implementation time is inadequate, many companies simply will not be able to comply with the revised requirements despite their best efforts. Such an outcome would benefit neither those companies nor their customers. Thus, the FRB should make the final rule effective upon publication, but should make compliance with the final rule optional for 24 months after publication or the effective date of the final rule.

Subsequent Disclosures

As noted above, under the Proposal, issuers would be required to send a change-in-terms notice at least 45 days, rather than 15 days as provided under the current rules, before the effective date of a change-in-terms or an increase in rates due to delinquency, default or penalty pricing. Advance notice also would be required before applying a rate increase that is triggered by a late payment, default or delinquency, even if the reason for the increase was provided in the cardholder agreement.

From a credit underwriting standpoint, the proposed revisions would limit issuers' ability to automatically respond if a consumer's creditworthiness quickly declines. Limiting the ability of issuers to automatically increase rates, for up to three months in many instances, could force issuers to increase the cost of credit for all cardholders in an effort to recoup the increased cost and to limit the risk associated with possible delinquent behavior. Thus, for all practical purposes, the proposed 45-day advance notice before repricing accounts will likely result in issuers attempting to recoup up to three billing cycles worth of increased rates from their cardholder base generally. On the other hand, some have argued that unilateral unanticipated price increases are simply unfair.

Visa is confident that the FRB will strike the appropriate balance by adopting regulations that reconcile divergent industry views and concerns about providing consumers with meaningful notices and choices. Visa believes that operational considerations also should be important components of this decision. In this regard, Visa strongly recommends that if the FRB goes forward with a change in the timeframe for providing advance notice, that the timeframe should be one billing cycle, rather than the proposed 45-day timeframe. To avoid, or at least minimize, some of the possible ill-effects of the proposed revisions, issuers will have a strong incentive to send notices outside of periodic statements or to reprice during a billing cycle. Previously, the FRB recognized the benefits of notifying consumers of changes in their billing statements. Other aspects of the Proposal enhance these benefits. The notice process could be encouraged rather than discouraged by requiring one billing cycle, rather than 45 days advance notice before the effective date of a change or an increase in the penalty rate. This one-billing-cycle advance notice would allow issuers to coordinate notices with the sending of periodic statements, thereby providing more efficient notice of changes to consumers and reducing the risk associated with a longer timeframe.

Formatting and Terminology

In Visa's comments on the advanced notice of proposed rulemaking, Visa recommended that the FRB seek to provide consumer disclosures that are meaningful while avoiding disclosures that are complicated and technical, thereby having little actual benefit to consumers. In this regard, we believe that the FRB has taken great care in revising the format, content and terminology in an effort to provide disclosures in a more meaningful way to consumers. However, in doing so, the FRB has significantly reduced the flexibility in the disclosure process. The reduced flexibility and increased rigidity of the Proposal will inevitably create operational and systems problems and unintended consequences.

For instance, under the Proposal, issuers would be required to highlight the following disclosures in a tabular format with a minimum 10-point font: (1) application, solicitation, and take-one disclosures; (2) certain account-opening disclosures; (3) disclosures for checks that access a credit card account; (4) certain change-in-terms disclosures; and (5) disclosures required when a rate is increased due to delinquency, default or as a penalty. In addition, the proposed instructions to the model form would include a *de facto* requirement that the application and solicitation disclosures and the account-opening summary be provided on 8" x 14" paper. Moreover, certain application and solicitation and account-opening disclosures would have to be segregated from other promotional material or from the cardholder agreement terms. In addition, the Proposal would dictate or limit the usage of specific terminology. For example, the Proposal would require the use of the term "grace period" to describe the date by which any credit extended for purchases may be repaid without incurring a finance charge. Similarly, the Proposal would prohibit the use of the term "fixed" in connection with disclosure of any rate, unless the rate will remain in effect unconditionally until the expiration of a specified period of time, and would dictate the use of the term "penalty APR" if a rate may increase based on a specific event.

This increased rigidity has the risk of impeding an issuer's ability to either offer credit in a manner that is meaningful to consumers or to even offer certain products. For example, by prohibiting the use of the term "fixed" in connection with what is commonly thought of as a fixed-rate plan, the Proposal may make it more difficult to market these plans despite the fact that a fixed rate that can only change in very limited circumstances may help some consumers to manage their credit. Creditors could come up with language that is less precise and less readily understood by consumers to describe fixed-rate plans. Another example includes the use of the term "penalty rate." Similarly, use of the term "penalty rate" will produce confusing results if promotional rates are discontinued and the rate moves to the standard rate on the account, but that rate must be characterized as a penalty rate.

To illustrate the difficulties of standardization, Visa notes that the FRB's own form G-18(H) in the Proposal includes both a late payment warning that a late payment will lead to a penalty APR of 28.99% and a change in rate notice that the rate is already being changed to 28.99%. The relationship between these statements is confusing at best.

In addition, under existing Regulation Z, issuers are permitted to disclose APR information in the cardholder agreement itself or include a clear reference to specific APR information. Under the Proposal, however, issuers would be required to include specific rates and fees in the account summary table along with other account specific information. As a result, issuers would be required to generate multiple versions of the account-opening summaries to implement multiple pricing strategies. This requirement has particular significance in the context of retail account openings. In a retail context, if a retailer who wishes to provide instant credit has multiple rates and/or variable rates, it appears the retailer would have to keep different account-opening tables at each cash register and require the cashier to give the correct table to the consumer. Logistically, this is impractical and it is not clear how retail account-opening transactions can be restructured to meet this requirement.

Accordingly, consistent with current industry practices, the FRB should revise the rules for providing APRs in connection with the new account-opening table to permit an issuer to include a clear and conspicuous reference to the APR in the account-opening table, rather than the actual rate. By permitting issuers to refer to another document, like a receipt or insert, in providing the specific APR, the FRB would enhance the likelihood that consumers will receive the appropriate disclosures.

In addition, the FRB proposes several significant formatting changes to periodic-statement disclosures. First, interest and fees imposed as part of the plan would be disclosed in a uniform manner and in a consistent location. Second, for the first time, the FRB has included a model form for the front of the periodic statement to facilitate compliance with the proposed revisions. Finally, the FRB proposes adding several proximity requirements. For example the Proposal would link by proximity the payment due date with the late payment fee and penalty rate that could be triggered by an untimely payment. Visa urges the FRB to retain flexibility for periodic-statement information. In the context of periodic-statement information, consumers are not typically comparison shopping and therefore there is little need for providing standardized periodic statements. In fact, by providing issuers flexibility in the placement of disclosures, a periodic statement may be more useful to consumers by recognizing their preferences, priorities, and financial habits.

More broadly, before the adoption of a final rule, the FRB will want to identify and attempt to resolve such unintended consequences and provide financial institutions with flexibility in how disclosures are provided. Although the comment period will be helpful in this regard, the magnitude of the Proposal may cause commenters to overlook a significant number of operational problems. Visa urges the FRB to make extra efforts to identify and resolve these issues in preparing the final rule. In addition, after the adoption of the final rule, Visa believes that it is critically important for the FRB to continue to monitor and address any unintended consequences that result.

Periodic Statement

Under existing section 226.5(b)(2)(1), there are a number of exceptions to a creditor's duty to send periodic statements, including for: (1) De minimis amounts; (2) uncollectible accounts; (3) accounts where collection proceedings have been instituted; and (4) workout arrangements. The FRB has proposed several clarifications and has solicited comment as to whether additional clarifications are needed.

Uncollectible accounts. Currently, the term "uncollectible" is not defined. The FRB stated in the supplemental information accompanying the Proposal that it "understands that creditors typically send statements on past-due accounts until the account is charged-off for purposes of loan-loss provisions, which is typically after 180 days of nonpayment." While the FRB did not propose regulatory or commentary provisions on when an account is deemed "uncollectible," the FRB solicited comment on whether additional guidance would be helpful. Visa believes that some issuers remain unclear concerning the meaning of "uncollectible," especially when accounts are charged off, but at the same time there are some collection activities that may continue on the account—either by the creditor itself or by a third party. We recommend that the FRB clarify that once an account is charged off in accordance with loan-loss provisions, there is no further obligation to send periodic statements.

Instituting collection proceedings. Proposed comment 226.5(b)(2)(i)-3 would interpret a collection proceeding to entail a filing of a court action or other adjudicatory process with a third party, and not assigning the debt to a debt collector. The proposed comment would require creditors to continue to send periodic statements in situations where the creditor has started the process for bringing a formal legal action against a consumer, but has yet to file a formal court action. This interpretation of "collection proceeding" is too narrow and issuers would be required to continue to send periodic statements in situations where the issuer has commenced the process for bringing a formal legal action against a consumer, but has yet to file a formal court action. Thus, Visa recommends that the FRB revise the commentary to clarify that the instituting of collection proceedings does not require the "formal filing" of a court action as long as the issuer has plans that would ultimately result in the filing of a court action.

Workout arrangements. Proposed comment 226.5(b)(2)(i)-1 would provide that when a consumer's ability to draw on an open-end account is terminated without being converted to closed-end credit under a written agreement, the creditor must continue to provide periodic statements to those consumers entitled to receive them. Under the many workout programs interest does not accrue, late fees and over-the-limit fees are waived and credit privileges are suspended. Thus, Visa recommends that the FRB eliminate the requirement to send periodic statements in these situations because providing periodic statements under these circumstances would not be meaningful to consumers.

Effective APR

The FRB should eliminate the "effective" APR in favor of the year-to-date totals of interest and fees. Under existing Regulation Z, the effective APR is the rate currently disclosed on periodic statements and includes the cost of interest and certain other finance charges imposed during the statement period. Under the Proposal, the FRB is offering two alternative approaches—either to improve the disclosure of the effective APR or to eliminate the disclosure altogether on the basis that the effective APR is not meaningful to consumers.

With respect to improving the disclosure of the effective APR, the Proposal would require an issuer to label the effective APR as the "fee-inclusive APR" and indicate that the fee-inclusive APRs are the "APRs that you paid this period when transactions or fixed fees are taken into account as well as interest." The Proposal would also require an issuer to disclose the effective APR for each feature, such as purchases, cash advances and balance transfers, in a tabular format. Lastly, the effective APR would have to appear in a table, grouped by feature, with the total interest and the total of fees included in the effective APR and include a list of finance charges used to calculate the effective APR. This proposed alternative would likely produce more complex and confusing disclosures and would not be meaningful to average consumers.

The year-to-date total of fees has been used in Truth in Savings to draw attention to overdraft fees and is a more accurate and effective tool for helping consumers to understand the fees that they may be incurring on their accounts other than the effective APR.

Billing Errors

Existing Regulation Z requires a creditor to investigate a claim and resolve the claim within two billing cycles or no later than 90 days. Under the Proposal, an issuer would have to complete its investigation of a billing error dispute and "conclusively" determine whether an error occurred within the error resolution timeframes. The supplemental information states that "once the error resolution timeframe has expired, the [issuer] may not reverse any corrections it has made related to the asserted billing error, including any previously credited amounts, even if the [issuer] subsequently obtains evidence indicating that the billing error did not occur as asserted."

The Proposal is inconsistent with the statutory forfeiture penalty provision under section 161(e) of the Truth in Lending Act ("TILA"), which provides that "Any [issuer] who fails to comply with the requirements of this section . . . forfeits any right to collect from the obligor the amount indicated . . . except that the amount required to be forfeited under this subsection may not exceed $50." That is, under the existing regulatory and statutory scheme, if an issuer made a determination within the specified regulatory timeframe that an error occurred as asserted, but later discovered evidence that the error did not occur as asserted, the issuer would be permitted to reverse the credit to the consumer's account with the exception of $50. Without explanation, the Proposal would appear to preclude issuers from reversing such a credit if the reversal would occur after the specified regulatory timeframe.

Furthermore, the Proposal is inconsistent with current industry practices and leads to the anomalous result that the incorrect resolution of a billing-error claim may lead a merchant to be unable to collect on a valid transaction. In light of the Proposal, many merchants, and therefore issuers, would likely revise their billing error resolution procedures in a manner that would be less favorable to consumers in general. For example, it is possible that issuers will make a greater number of determinations that an error did not occur as asserted by the consumer if they are forced to make a conclusive determination within the specified regulatory timeframe.

The FRB should revise the proposed billing error rules to clarify that issuers can rely on the statutory forfeiture penalty provision under section 161(e) of TILA in situations where the cardholder remains indebted to the card issuer.

Expansion of Billing Errors to include Third Party Payment Intermediaries

Under existing Regulation Z, billing errors include disputes about property or services that are not accepted by the consumer. The Proposal would significantly expand the errors that would be considered billing errors. Under section 226.13 of Regulation Z, billing-error rights would apply when a consumer uses a credit card to fund a purchase through a third-party payment intermediary, such as PayPal. The proposed commentary to this provision would state that the property or service purchased is not the payment service but the product that the consumer purchased using the payment service. This statement is legal fiction.

Practically, under the Proposal, card associations would not be able to limit card issuers' exposure to these disputes by policing chargeback rates and excluding merchants with bad records because they have no control over the merchants that are receiving payments through these third parties. Although the same issue arises with convenience checks, issuers can choose whether to issue convenience checks and can price them differently to address this risk.

In addition, many third-party payment intermediaries permit consumers to fund their accounts using several different payment methods, including credit cards, debit cards and ACH transactions from a consumer's DDA account. It is unclear how the Proposal would apply to the purchase of goods or services where the purchase results from the commingling of funds, for which only a portion of the purchase can be attributed to the credit card funds. This problem simply underscores the issuer's lack of control and the problems that might arise if the FRB considers such transactions as billing errors.

Accordingly, the Proposal should be modified to exclude from the definition of billing errors that would be covered under Regulation Z use of a credit card to fund a purchase through a third-party payment intermediary, such as PayPal.

Coverage issues

The Proposal would clarify that for a loan to be characterized as open-end credit, the plan must be replenished. Under the Proposal, repayments of an advance for any sub-account must replenish the credit line for that sub-account so that the consumer may continue to borrow and take advances for the sub-account to the extent that he or she repays the outstanding balance. The proposed open-end definition, which would require sub-accounts to replenish, would be problematic, especially in the context of promotional sub-accounts. For instance for some open-end products, replenishment is at the account level rather than sub-account level. In these circumstances, as payments are made on each sub-account, the sub-account does not replenish, but the overall credit line is replenished and could be used for additional transactions. Thus, Visa recommends that the FRB revise the proposed definition to clarify that replenishment may occur at either the account or the sub-account level.

Furthermore, the FRB should clarify that the proposed revision would not apply to a multi-featured account with varying APRs, especially if those varying APRs do not imply the existence of sub-accounts. For instance, many issuers offer discounted APRs in connection with balance transfer promotions, but do not replenish the line of credit for that balance transfer promotion as that balance transfer is repaid.

Minimum Payment Disclosures

Under the Proposal, the FRB would provide issuers the option of providing one of two periodic-statement disclosures pertaining to actual repayment periods. The FRB strongly encourages issuers to provide the actual repayment period disclosures and solicits comments on whether the FRB can take additional steps to provide incentives to issuers to do so. In this regard, the FRB should provide several months tolerance in the actual repayment period calculation and should adopt safe harbors to protect from litigation issuers that are using assumptions since it is not possible to provide customers with the "actual" repayment period because the figure will be affected by future events that cannot be predicted at the time of any repayment period calculation. In lieu of extensive explanations of these assumptions, the FRB should allow issuers to inform consumers that the actual repayment time may vary.

Regardless of the option chosen, the FRB would require the minimum-payment disclosure to be on the front of the billing statement in proximity to other payment-related information. The FRB should provide issuers flexibility in providing the minimum-payment disclosures on the billing statement. Given the amount of information that would be required on the periodic statement, it is essential that the FRB permit issuers flexibility in the location of disclosures so long as the disclosure is clearly and conspicuously presented. Furthermore, the FRB should acknowledge that there are instances where a free-standing document would be permissible. For instance, if there are system limitations that would prevent the delivery of a periodic statement, such as where an account has been sold or a product discontinued, the FRB should permit the delivery of a free-standing document.

Supplemental Credit Devices

Under the Proposal, when checks that access a credit card account are mailed more than 30 days following the delivery of account-opening disclosures, or have finance charge terms that differ from the disclosures previously provided, issuers would be required to provide the following disclosures on the front of the page containing the checks: (1) any discounted initial rate, and when the rate will expire; (2) the type of rate that will apply to the checks after expiration of any discount and any applicable APR; (3) any transaction fees applicable to the checks; and (4) whether a grace period applies and if one does not apply, that interest will be charged immediately.

Accordingly, an issuer would have to customize mailings to reflect individual rates. Operationally, it will be extremely difficult for issuers to provide disclosures that are specifically tailored to the recipient of checks as of the time the disclosures are made. It would be especially difficult to accurately disclose the APRs for variable rate accounts. Thus, Visa encourages the

FRB to consider alternatives, such as providing a reference to the type of rate that would apply or by providing a toll-free telephone number.

Advertising

The requirements for triggering terms would be revised to include both positive and negative terms, such as "no interest" and "no annual fee" as triggers for providing additional information. In addition, if a minimum monthly payment is advertised, the issuer would have to state in equal prominence to the minimum payment, the time period required to pay the balance and the total dollar amount of payments if only minimum payments are made. The time to repay and the total payment can vary significantly depending on such factors as when payments are made. The FRB should clarify that creditors are permitted to rely on assumptions in deriving the disclosure of the minimum monthly payment. For example, the creditor should be permitted to assume that consumers will make payments on time and that consumers are not currently delinquent.

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