VISA

July 18, 2008

Mark MacCarthy
Senior Vice President
Public Policy

By Electronic Delivery

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1286; Docket No. R-1315

Dear Ms. Johnson:

This letter is submitted by Visa Inc. in response to the June 2008 proposed rulemaking issued by the Federal Reserve Board ("FRB") seeking comment on a number of possible revisions to Regulation Z and Regulation DD, and related provisions of the official staff commentary. In many respects, the proposed revisions are intended to complement proposed revisions to Regulation AA concerning unfair or deceptive acts or practices ("UDAP Proposal"). Visa appreciates the opportunity to comment on this important matter. Visa supports the goal of informing consumers of the terms of their agreements and promoting safeguards for the safe and efficient operation of payment card systems.

COMMENTS ON REGULATION Z

Certain Credit Card Practices Addressed Under the UDAP Proposal Should Instead Be Addressed Under Regulation Z

Under the UDAP Proposal, the FRB, the Office of Thrift Supervision and the National Credit Union Administration ("collectively, the Agencies") would address certain credit card practices as unfair or deceptive acts or practices. In doing so, the Agencies have utilized a targeted-practices approach to prohibit or limit specific credit card practices that the Agencies believe may be unfair or deceptive.

The Truth in Lending Act ("TILA") is the primary federal law governing disclosures for consumer credit, including credit card accounts; it is also intended to protect consumers against inaccurate and unfair credit billing and credit card practices. Specifically, Section 105 of TILA[1] provides the FRB the authority to prescribe regulations to carry out the purposes of TILA and provide adjustments and exceptions for any class of transactions which in the judgment of the FRB "are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." Section 102 of TILA states that "[i]t is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer

[1] 15 U.S.C. § 1604(a).

Visa U.S.A. Inc.
1300 Connecticut Avenue, NW
Suite 900
Washington, D.C. 20036
U.S.A.

will be able to compare more readily the various credit terms . . . and . . . to protect the consumer against inaccurate and unfair credit billing and credit card practices."[2] TILA unequivocally contemplates that "unfair" credit card practices will be addressed in Regulation Z. In connection with several proposed amendments to Regulation Z, the FRB has already asserted that it was using its authority under Section 105 of TILA to prescribe regulations and exemptions. For example, the FRB has already addressed timely payments and payment allocation under Regulation Z.

The Supreme Court decision in *Household Credit Services, Inc. v. Pfennig*[3] confirmed the FRB's broad authority to prescribe rules as the FRB deems appropriate. In particular, the Supreme Court ruled that the statutory definition of "finance charge," 15 U.S.C. § 1605, is ambiguous and held that Regulation Z's exclusion of over-the-limit fees from "finance charges" is a reasonable interpretation and not manifestly contrary to the statute. The Supreme Court concluded that the FRB's regulation is in accord with the statute's broad delegation of rulemaking authority because the regulations should be upheld unless procedurally defective, arbitrary or capricious in substance or manifestly contrary to the statute.

The UDAP Proposal contemplates characterizing certain credit practices as unfair by means of the FRB's authority under the Federal Trade Commission Act ("FTC Act") instead of the FRB's authority under TILA. Visa is puzzled as to the public policy reason for this approach. Visa believes that many of the practices addressed under the UDAP Proposal do not meet the unfair or deceptive standards set forth under Section 5 of the FTC Act, and that many of the proposed prohibitions or limitations could have significant consequences for individual consumers, card issuers and the economy as a whole. Therefore, Visa believes that most practices would be more appropriately addressed under Regulation Z, or in connection with the issuance of best practices, rather than by promulgating rules under the FTC Act.

Furthermore, by addressing such credit card practices under Regulation Z, the Agencies would avoid the negative characterization of these practices as unfair or deceptive and the potential for significantly unintended consequences. For example, characterizing commonly used practices as unfair or deceptive provides an invitation to unprincipled plaintiffs' lawyers and, thereby, exposes credit card issuers to increased risk of litigation. Even if the Agencies clarify that the provisions of Regulation AA are applicable prospectively, plaintiffs' lawyers will almost certainly litigate the question of whether the Agencies have the authority to limit the rules to prospective application under state laws relating to unfair or deceptive acts or practices.

---

[2] 15 U.S.C. § 1601(a).
[3] 541 U.S. 232 (2004).

45-Day Advance Notice

Under its June 2007 proposed amendment to the credit card provisions in Regulation Z, creditors would be required to provide a consumer with 45 days' advance notice when a rate is increased as a penalty for one or more events specified in the account agreement. However, under the UDAP Proposal, creditors would be prohibited from increasing the rates on balances that are outstanding at the end of the fourteenth day after a notice is provided.

To provide guidance on the operation and timing of the 45-day notice and how it would apply to the prohibition on increasing rates on outstanding balances as proposed under the UDAP Proposal, the FRB would add under Regulation Z a model change-in-terms notice, as well as commentary provisions. Visa has several recommendations concerning the proposed model forms and commentary.

Specifically, Visa believes that the FRB should revise the proposed model form G-21 and the commentary to section 226.9(g) of Regulation Z to clarify that a second 45-day advance notice is not required if a consumer becomes 30 days late after receiving an initial 45-day advance notice. Proposed 226.9(g)-1(ii) provides that if a creditor provides a 45-day notice of rate increase due to the consumer's delinquency or default, and the creditor does not receive the consumer's minimum payment within 30 days from the due date of the payment, but before the increased rate goes into effect, the creditor may apply the increased rate to all balances when the increased rate goes into effect. However, the commentary states if the consumer becomes 30 days late with respect to a subsequent payment after the increased rate becomes effective, the creditor would be required to provide a second notice to consumers that the increased rate will now apply to all balances, and that notice must be given at least 45 days prior to the effective date of the increased rate applying to all balances.

Visa believes that the FRB should revise this comment, along with proposed illustration D, to clarify that creditors are not required to send an advance 45-day notice once again should the consumer become delinquent after the effective date of the change, so long as the initial notice informed the consumer that his rate would increase if he subsequently became 30 days late for the current or a later payment. In this regard, the initial 45-day notice specifically informing a consumer that should he become 30 days late the penalty rate would apply to existing balances provides the consumer sufficient notice concerning the increased rate.

We believe that in order to facilitate understanding of the rule, the illustrations utilized in the commentary and in the model forms should make use of the same fact pattern and dates to the extent possible. For example, consistently using the same months and dates to the extent possible would facilitate understanding of the proposed illustrations.

In addition, we believe that the model form G-21 is confusing as drafted and that the FRB should fully reconcile the revisions under Regulation AA and Regulation Z and further test the proposed model form with consumers to improve the likelihood that consumers will understand the notice.

Unsolicited Issuances

Under the proposed commentary to Regulation Z, issuers would be prohibited from issuing substitute credit cards that would change the merchant base without a specific request or application from the consumer if the account has been inactive for 24 months. That is, the proposal would prohibit a substitution of a card honored by a single merchant to a general-purpose card honored by multiple merchants without a specific request if the account has been inactive for 24 months.

Visa believes that the FRB should not adopt this revision to the commentary. The substitution of a retailer card for a general-purpose credit card is a permissible substitution under TILA and existing Regulation Z. TILA states that the unsolicited card "prohibition does not apply to the issuance of a credit card in renewal of, or in substitution for, an accepted credit card."[4] Furthermore, the existing commentary to section 226.12(a)(2) states that a substitution includes an issuer changing the merchant base so long as the new card has been honored by at least one of the persons that honored the original card. Over the years, issuers have relied on this interpretation to substitute on an unsolicited basis a general-purpose bank card that is honored at many merchants for a card originally honored by a single merchant.

The FRB indicates that "some consumers" urged the FRB to limit issuers' ability to send cards without consent or warning when the cards have been inactive for an extended period of time. Specifically, the FRB states that consumers expressed concern for cardholder security, identity theft, and confusion when a consumer receives a card from an issuer with whom the consumer may have had no previous relationship. Visa believes that any such consumer concerns have been addressed through market practices designed to prevent fraud, including the card activation process and the enhanced security required by the "Red Flag" rules and through disclosures, rather than through an outright prohibition on the ability of issuers to provide substitute cards with features desirable to consumers. For instance, in connection with the substitution of retailer cards for general-purpose cards, issuers often provide (1) the name of the original retailer or merchant; (2) an explanation of the relationship between the original retailer or merchant and the issuer; (3) an explanation of and new features associated with the card; and (4) instructions on how the consumer may reject the new card. In this regard, a majority of issuers currently permit consumers to surrender the old card and retain the new card, if they so desire.

Electronic Disclosure Requirements

The FRB proposes to clarify that disclosures under section 226.5(a) of Regulation Z may be provided in writing, orally, or in electronic form. Under the FRB's 2007 Regulation Z proposal, certain disclosures need not be written, including certain account-opening disclosures and, instead, may be provided at any time before the consumer agrees to pay or becomes obligated to pay for the charge. The FRB now proposes to clarify that if the consumer requests

[4] 15 U.S.C. § 1642.

the service in electronic form, such as on the creditor's Web site, the disclosures could be provided in electronic form without regard to the consumer consent provisions of the Electronic Signatures in Global and National Commerce Act ("E-Sign Act"). Visa supports the proposed clarification. The proposed clarification is consistent with the E-Sign Act, which only requires consumer consent for the delivery of disclosures that are required to be in writing. Since the disclosures in question can be provided orally or in writing, the E-Sign Act consent provisions should not apply.

COMMENTS ON REGULATION DD

Under the UDAP Proposal, depository institutions would be required to provide consumers with notice and an opportunity to opt out of the payment of overdrafts by the institution before any fees are assessed for paying overdrafts. To complement the UDAP Proposal, the FRB has proposed amendments to Regulation DD that would set forth rules with respect to the opt-out disclosure required to be provided, and would provide a model opt-out notice designed to facilitate compliance with the proposed requirements.

As will be discussed in detail in our comments on the UDAP Proposal, Visa has significant concerns regarding the proposed provisions dealing with overdraft services, including the requirement to provide opt-out notices in connection with non-promoted and discretionary overdraft services. In this letter, however, our comments will focus on concerns we have with the proposed model opt-out notice.

We are especially concerned with the overall tone and message of the proposed model opt-out notice. The opt-out notice implies that the benefits of opting out outweigh the harm of not having returned items paid. We believe that this message is inaccurate and misleading in many circumstances and could actually lead to unnecessary consumer injury. Specifically, a consumer could incur substantial harm, depending on the type of item returned or rejected as a result of the consumer's opt-out, whether the consumer would be charged the same amount for returning the item as paying the item, and whether there are additional costs for the bounced check or NSF fees imposed by the merchant or other payee.

Specifically, with respect to the wording of the notice, we have the following comments:

- The statement "We provide overdraft services for your account" is overly broad and can be confusing. There are several types of overdraft services, including services that cover overdrafts from a consumer's savings or credit account. Consumers will be confused about what service is being referred to in the opt-out notice.

- The statement "You have the right to opt out of this service and tell us not to pay any overdrafts" should be modified to clarify that the consumer has the right to direct the institution not to charge for the payment of an overdraft but not literally to preclude payment of the item. It is quite possible that under various circumstances, consumer

accounts will be overdrawn for various reasons, including returned checks and debit card transactions that do not receive prior authorization. Without clarification that an opt out would not literally preclude payment of an item, an institution could be viewed as technically violating Regulation DD.

- The statement "We offer less costly overdraft payment services that you may qualify for, including a line of credit" could be inaccurate and appears to be designed to encourage consumers to make choices that may not be in their best interests.

IMPLEMENTATION PERIOD SHOULD BE 24 MONTHS

While Visa recognizes the importance of protecting consumers, this protection must be balanced against the overall costs and difficulties to other participants in payment card systems of implementing the proposed rules. In this regard, Visa believes that the FRB should provide, at a minimum, 24 months for implementation of the final changes to Regulation Z under the pending proposals. The proposed changes are extensive and would have a sweeping impact on nearly every aspect of credit card issuer operations, including pricing, disclosures, programming, operations, billing systems, billing error policies and procedures, advertising practices, and many other aspects of every credit card program. Thus, 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 substantial lead times. Due to the massive scope of the proposed changes, Visa believes that an extensive implementation period is essential.

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

Once again, Visa appreciates 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 (202) 296-9230.

Sincerely,

Mark MacCarthy
Senior Vice President
Visa Inc.