VISA

March 30, 2009

By Hand Delivery

Ms. 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-1343

Dear Ms. Johnson:

This letter is submitted by Visa Inc. in response to the January 29, 2009 proposed rulemaking, issued by the Board of Governors of the Federal Reserve System ("Board"), to amend Regulation E (Electronic Fund Transfers) to limit the ability of a financial institution to assess an overdraft fee for paying automated teller machine ("ATM") withdrawals and one-time debit card transactions that overdraw a consumer's account, unless the consumer is given notice of the right to opt out of the payment of such overdrafts and the consumer does not opt out ("Proposal"). As an alternative approach, the Proposal would limit the ability of a financial institution to assess an overdraft fee for paying ATM withdrawals and one-time debit card transactions that overdraw a consumer's account, unless the consumer affirmatively consents, or opts in, to the institution's payment of overdrafts for these transactions.

In addition, the Proposal would prohibit financial institutions from assessing an overdraft fee if the overdraft would not have occurred but for a debit hold placed on funds in the consumer's account that exceed the actual amount of the transaction. The Proposal also includes alternative provisions on the pricing and terms of accounts where the consumer exercises his or her choice with respect to overdraft fees and whether that choice can be linked to the treatment of overdrafts due to the payment of checks, ACH, and other types of, transactions.

Finally, the Proposal would exempt from the notice and opt-out, or opt-in, requirements institutions that have a policy of declining to pay authorized ATM withdrawals or one-time debit card transactions if the institution has a reasonable belief that the consumer's account does not have sufficient funds to cover the transaction. This exception permits the institution to pay overdrafts for ATM withdrawals and one-time debit card transactions that were authorized against good funds, but where some or all of the funds were used for an intervening transaction, and to charge a fee for paying the transaction. A similar exception applies to the fee prohibition, notwithstanding a consumer's opt-out or opt-in choice, if a financial institution has a reasonable belief that there are sufficient funds available at the time the transaction is authorized.

Overdrafts have been an issue in the administration of checking accounts, including consumer NOW accounts, for decades. However, in recent years, the growth in direct deposit transactions to make wage, other income and third-party payments has resulted in a fundamental change in consumer practices. Many consumers no longer routinely keep an up-to-date record or running balance of all of their payments. The number and variety of payments, as well as the fact that in-hand possession of a check book is not required for an ever increasing number of transactions, has contributed to this current practice. As a result, the failure to keep such records has increasingly placed consumers in the position of wanting to make payments out of their account but not being sure at the time of the payments whether there are sufficient funds in their accounts to cover the payments.

Institutions have responded to this trend by providing means for consumers to obtain current account balances, including inquiries online and at ATMs, and by providing automated overdraft services that carry out consumers' expectations that their transactions will be paid. Indeed, the testing conducted for the Board by Macro International Inc. found that: "Few participants in either round [of consumer testing] expressed interest in a full opt-out, because they wanted to be sure that more important transactions were covered. In many cases, the transactions that participants felt were most important were those that they made by check or through a recurring debit." These overdraft services, the details of which may be disclosed to all consumers of the institution or may simply be made available and explained in response to inquiries, typically involve a fee for paying overdrafts.

In addition, due to the growing number and types of payment transactions that are posted to consumers' accounts and the differing operational procedures and legal rules that apply to these transactions, it is increasingly difficult for the account-holding institutions themselves to determine whether any given transaction will ultimately overdraw an account or will cause another contemporaneous or even prior transaction to overdraw the account. Although many assume that institutions can keep a real-time running balance of a consumer's account and therefore that overdrafts are readily avoidable, this is simply not the case.

Charges to an account initiated by means of a debit card at a point of sale or at an ATM may, or may not, be authorized in advance. Similarly, a merchant may submit multiple authorizations for a single transaction (*i.e.*, the original approval is not received) and it may be difficult for an issuer to identify such transactions as multiple authorizations at the time of processing. Further, it will be impossible for issuers to know with certainty that the authorization amount is accurate. Moreover, even if such transactions are authorized in advance, the balance used to determine whether or not to authorize the transaction may, or may not, reflect deposits of checks, electronic deposits of wages or checks or ACH debits that have been initiated but have not yet been posted to the account.

Further, once an overdraft has occurred, an institution typically encounters both operating costs and risk of loss in following up with the consumer to make sure that the overdraft is covered. Although in some cases the amounts that are involved are small, in others they are large and, even where initial amounts are small, these transactions may be an indicator of future fraud or errors that can involve a greater problem. The imposition of an overdraft fee serves both to compensate the institution for operating costs and potential losses and to discourage the overuse of a "free good" in the form of overdraft services that can result in even greater costs and losses in the future.

In this context, Visa believes that overdraft services can play an important role in enabling consumers to complete transactions that are important to them at the time those transactions are initiated, whether those transactions are for a payment that is due on a loan, a payment to a utility or an insurer to maintain continued service or coverage, a payment for groceries carefully selected and needed to feed the family, a payment for fuel to get to work or to get home or another payment that is important to the consumer at the time that the payment is being made.

Although Visa recognizes that in some cases the consumer would prefer to not go forward with a transaction, or perhaps to go forward with it by another means, such as a credit card, or to know with certainty whether the transaction would result in the assessment of an overdraft fee, based on today's technology and its practical limitations, institutions are not able to accommodate such consumer preferences on a transaction-by-transaction basis at the time of the transaction. In an attempt to provide a more practical choice to consumers as to whether their overdrafts should be paid, and a fee assessed, for ATM withdrawals and one-time debit card transactions, the Board has proposed an opt-out or opt-in choice that would be offered to consumers.

In this regard, Visa strongly believes that an opt-out, rather than opt-in, choice will provide the most benefit to consumers. Despite best efforts at disclosure by both regulators and institutions, due to time and other constraints, consumers often do not read initial disclosures and therefore do not fully evaluate and respond thoughtfully to disclosures. However, the provision of an initial opt-out notice, coupled with the provision of subsequent opt-out notices on periodic billing statements whenever an overdraft is incurred, means that consumers will be given a meaningful choice as to whether or not to incur overdrafts and have them paid for a fee and a recurring opportunity to exercise that choice at "teachable moments" in the future when the fee is incurred. In this regard, the consequences of failing to exercise the opt out are not only fully within the consumer's control, but also limited by the amount of the fees imposed before the consumer exercises that choice.

In contrast, if a consumer is required to opt in to overdraft services with a fee, the consumer may only understand the significance of that choice if he or she understands that he or she has made the choice at all, after one or more transactions has been denied. Unfortunately, this may be a recurring event as consumers struggle to learn to conduct ATM withdrawals and one-time debit card transactions in an account without overdrafts. The harm from these failed transactions to both consumers and the merchants, financial institutions and government entities that consumers are trying to pay is impossible to quantify in advance but, in many cases, is likely to be substantial. Further, the denial of routine transactions in the current economic climate of unprecedented fear and uncertainty may contribute to an already low level of consumer confidence in the financial system more broadly. For these reasons, Visa believes that the Board should adopt the opt-out alternative rather than the opt-in alternative.

Regardless of the alternative that the Board adopts, Visa believes that it is important for the Board to continue to provide exceptions and other clarifications to recognize that allowing consumers to have full use of their funds while avoiding overdrafts is simply not possible in some cases.

If consumers opt out, or fail to opt in, institutions will continue to incur risk and expense to deal with these overdrafts. While in the case of traditional consumer deposit accounts institutions may be able to spread these accounts over a broad base, if the coverage of the Proposal were to be extended in the future to more narrowly-targeted and lower-margin payment services, such as many prepaid card services, the overdraft costs and risks may make these services impractical, closing off choices for payment services.

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) 419-4100.

Sincerely,

Sarah Dumont

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