



August 4, 2008

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-1314

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2008-0004

Ms. Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428
Attention: RIN 3133-AD47

Ladies and Gentlemen:

This letter is submitted by Visa Inc. in response to the May 2008 proposed rulemaking issued by the Federal Reserve ("FRB"), the Office of Thrift Supervision and the National Credit Union Administration (collectively, the "Agencies") to address unfair or deceptive acts or practices with respect to consumer credit card accounts and overdraft services for deposit accounts ("Proposals"). Visa appreciates the opportunity to comment on this important matter.

Visa supports the goal of providing consumers clear and simple notice of the terms of their agreements, thereby equipping consumers with the tools to make informed choices. Disclosures provide information that is essential to the effective functioning of the payment system. The payment system is more efficient when accurate information is available to all participants. Information helps consumers by improving their ability to compare products and to choose those that will help them meet their personal goals.

Overdraft Proposals

The Agencies have proposed that a depository institution must not assess a fee or charge on a consumer's account in connection with an overdraft service, unless the depository institution provides the consumer with the right, and a reasonable opportunity, to opt out of the depository institution's payment of overdrafts. The Agencies have also proposed that there be a separate opt out for the payment of overdrafts at automated teller machines and for point-of-sale transactions initiated by a debit card and that a depository institution may not assess a fee or charge for an overdraft if the overdraft would not have occurred but for a "debit hold" placed on funds in the account where the hold is in excess of the actual purchase or transaction amount.

Opt Out

Visa questions whether fairness dictates that depository institutions provide the ability to selectively opt out of some transactions but not others. It is often the case that the transaction that is viewed as having caused a particular overdraft depends on the order in which transactions are posted. For example, if checks drawn on an account are posted before debit card transactions that are charged to the account, the debit card transactions will be more likely to cause overdrafts. Conversely, if debit card transactions are posted first, checks will be more likely to cause overdrafts. Providing the consumer with the ability to opt out of having overdrafts paid based on one type of transaction or another may encourage changes in the way transactions are posted but may not affect the level of overdrafts. Similarly, requiring that a consumer be able to opt out of overdrafts due to one type of transaction but not another type of transaction implies that if the consumer has opted out of one type of transaction, the depository institution is required to pay overdrafts for the other type of transaction. We are not aware of any existing duty on the part of a depository institution to pay any type of overdraft on a deposit account.

Debit Holds

In their discussion of the rationale for the debit hold provision of the opt-out proposal, the Agencies use the example of a pay-at-the-pump fuel purchase where the transaction may result in a \$75 hold on the consumer's account but where the consumer only purchases \$20 worth of gas. The Agencies note that the consumer may not understand that there is a hold on the consumer's account in the amount of \$75 and may incur overdrafts and overdraft fees due to a hold that would not have occurred if the \$20 transaction had been posted to the consumer's account instead of the \$75 hold. The Agencies also refer to hotel and restaurant transactions as other transactions that raise similar issues.

In the typical debit card transaction, the merchant accepting the card obtains an authorization from the card issuer that guarantees to the merchant that if appropriate procedures are followed, the amount of the authorized transaction will be paid. In a number of transactions the merchant will provide goods or services before the full amount of the transaction is known, but the merchant will wish to have comfort that the transaction will be paid before entering into the transaction. This is the case in car rental, hotel, restaurant, and pay-at-the-pump transactions. In car rental and hotel transactions, the merchant is allowed to submit an authorization request

based upon the per-day charge plus a good faith estimate of daily expenses associated with the service. The issuer approval of this authorization request guarantees payment. In these cases, a problem could arise if the amount authorized in advance exceeds the final amount of the transaction.

As indicated in the attached chart, car rentals and hotel transactions amount to only 1% of transactions where the authorized amount might not match the actual transaction amount. While it is possible that the amount of the authorization request in hotels and car rental debit card transactions can exceed the final amount of the transaction, it is Visa's experience that this does not normally happen. In 65% of the hotel debit card transactions, for example, the settlement amount and the authorization amount are the same. There is no excess hold at all. In another 21% of the hotel transactions, the authorized amount exceeds the final transaction amount by 10% or less. In 43% of car rental debit card transactions, there is no excess hold at all and in another 9% of these transactions, the hold is less than 10% in excess of the final transaction amount. In sum, while these two market segments, account for about 1% of all the debit card transactions where the authorized amount might differ from the settlement amount, transactions in these segments where a hold might be more than 10% of the transaction amount are only .2% (two-tenths of one percent, 20 basis points) of this total.

In restaurant transactions, conventions have evolved where an authorization is obtained for the actual amount of only one part of the transaction, the bill, but not another part, the tip. In order to accommodate these restaurant transactions, the Visa rules have provided for guarantees of transactions over and above the amount authorized to give merchants comfort in accepting payment for these transactions by means of debit cards. The guarantee is for the amount of the bill plus 20%. Because of this guarantee, in some cases issuers place holds on the guaranteed amount, although the Visa experience is that it is typically smaller issuers who use holds in these circumstances. In practice, it is Visa's experience that the authorization amount for restaurant transactions is about 86% of the settlement amount. This settlement amount suggests a tip of about 16% and, therefore, a potential for excess holds of only about 4% for restaurant transactions. Thus, the dollar amount attributed to restaurant holds is relatively small and is not likely to cause consumers to overdraw. As an illustration based on the attached chart, on a typical debit card transaction at a restaurant the settlement amount is \$32.67 and on average the amount submitted for authorization by the merchant before adding the tip in was about \$28. If an issuer placed a hold on the cardholder's account of 20% above that amount, that hold would have been for \$33.72 or about \$1 more than the actual transaction amount. The chances that such a small hold in excess of the transaction amount will cause an overdraft are miniscule.

In addition, under the Visa rules, all of these holds have been required to expire when the transaction clears, usually in a day or two, but in no cases more than three days after the date of the transaction. In the case of hotel and car rental transactions, these holds may expire before the final transaction occurs or is settled.

In pay-at-the pump transactions, the merchant sends an authorization for \$1 and the Visa rules have provided that a card issuer guarantees the amount of a pay-at-the-pump transaction up to \$75. This amount is almost double the average pay-at-the-pump transaction amount as shown

on the attached chart. Not all issuers put holds on these transactions, but some, especially smaller issuers, do. For some time Visa has recognized that this process is imperfect. For example, in a pay-at-the-pump transaction a merchant may refuse to provide more than \$75 worth of gas even though rising gas prices may cause many fill-ups to exceed that amount. The result may be an unhappy customer and cardholder whose transaction is stopped when it reaches \$75. On the other hand, a consumer buying a small amount of gas to fill a container for lawn equipment or to be able to make it home may be inconvenienced by a debit hold that far exceeds the amount of his or her purchase. To address these issues, in October 2008, Visa will be implementing real-time clearing for pay-at-the-pump transactions.

Under real-time clearing, merchants will obtain authorization based on a good faith estimate instead of a \$1 status check. Card issuers will have the option of authorizing only part of the transaction when the cardholder's account does not have sufficient funds available to cover the full amount submitted by the merchant. The merchant will be required to submit the final transaction to Visa within two hours. The card issuer will be required to remove any hold based on the authorization at the earlier of when it receives the transaction, or two hours after the authorization. For pay-at-the-pump transactions, real-time clearing will be available to merchants in October of 2008 and all Visa card issuers will be required to support real-time clearing at that time. Visa's experience with its Interlink network, which uses a process almost identical to real-time clearing, demonstrates that 99.7% of fuel transactions are actually cleared for the final amount within 30 minutes of the initial authorization. Visa believes that real-time clearing will dramatically change the cost/benefit analysis of the proposed debit hold rule.

Compliance with the debit hold rule would be difficult and costly. For example, in order to charge for overdrafts, debit card issuers would have to retroactively reconstruct account balances based on the amounts of debit card transactions that actually cleared instead of the amounts that were authorized and then determine whether overdrafts would have occurred based on the reconstructed balances. Currently, this is likely to be a manual process that simply would not work.

Visa believes that for practical purposes, real-time clearing will solve these problems for pay-at-the-pump transactions. In Visa's experience, numerically, pay-at-the-pump transactions constitute the largest number of transactions that result in debit holds. Moreover, the attached statistics from the second quarter of 2008 indicate that the value of the holds that could potentially arise from pay-at-the-pump transactions is approximately twenty-six times the value of the holds that could arise from restaurant transactions, which are the next largest category. To illustrate, based on the information in the attached chart, and the analysis that the authorization amount for restaurants is about 86% of the final settlement amount, restaurant holds could exceed the actual transaction amount by a total of approximately \$1 billion whereas gas holds could exceed the final transaction amounts by approximately \$26 billion. The value of restaurant transactions exceeds the value of all other types of debit card transactions that may give rise to debit holds. If there is a current problem with debit holds exceeding the transaction amount and thereby creating a possible overdraft situation, that problem is concentrated in the pay-at-the-pump market segment. In this context, Visa believes that real-time clearing so

dramatically reduces the likely incidence of overdrafts due to debit holds that the costs to debit card issuers of trying to avoid the few remaining overdrafts is simply not warranted.

Credit Card Proposal

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 TILA¹ 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 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 Proposals contemplate 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 Proposals 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.

¹ 15 U.S.C. § 1604(a).

² 15 U.S.C. § 1601(a).

³ 541 U.S. 232 (2004).

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 significant 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.

Safe Harbor Approach

If the Agencies nonetheless are determined to address some or all of the issues under Regulation AA, rather than under Regulation Z, it is essential to avoid implying that commonplace industry practices are "unfair" or "deceptive." Rather, adopt a safe-harbor approach with a more general statement that credit card issuers are prohibited from engaging in unfair and deceptive practices together with identified safe harbors—practices that are not considered unfair or deceptive.

In fact, the FRB has already adopted this approach under the Proposals in connection with the provisions concerning the time to pay. For example, the FRB has stated a general principle that issuers must provide consumers with a reasonable amount of time to make payments. And, in connection with that general principle, the FRB has identified a safe harbor identifying a practice that would be compliant with that general principle. Such an approach would allow the Agencies to specifically prescribe practices that would be permissible without prescribing an outright prohibition or limitation of a specific practice altogether.

In addition, the benefit of a safe harbor approach is that it would be equally as effective, or even more effective, because it would be less disruptive to the industry and to consumers, mitigate the risk of litigation and should reduce the economic impact of the Proposals.

Implementation Period and Prospective Application of Final Rule

Given the estimated overall costs and difficulties to other participants in payment card systems of implementing the Proposals, Visa believes that the FRB should provide, at a minimum, 24 months for implementation of the final changes to Regulations AA, Z and DD. The combination of 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 Proposals 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.

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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 at least 24 months after publication of the final rule in the Federal Register.

Moreover, Visa urges the FRB to include a clear statement in the regulation and commentary that the rules are prospective. Specifically, it is critically important that the Agencies make it clear and that nothing in the rules or commentary should be construed or interpreted to be a determination that acts or practices restricted or prohibited under the rules are unfair or deceptive acts or practices before the effective date of the rule.

* * * *

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 (202) 296-9230.

Sincerely,

Mark MacCarthy
Senior Vice President
Global Public Policy
Visa Inc.

Attachment

Visa Check Card Volume CYQ208

Market Segment		Visa Check Card		Share
		Transactions (MM)	Average Sale	
Authorizations Typically Match	1	4,691.1	\$ 62.51	74.3%
<i>Restaurants</i>	2	794.6	\$ 32.67	12.6%
<i>Automated Fuel Dispensers</i>	3	757.2	\$ 39.54	12.0%
<i>Lodging</i>		58.0	\$ 215.61	0.9%
<i>Car Rental</i>		11.2	\$ 195.56	0.2%
<i>Cruise Lines</i>		1.8	\$ 966.21	0.0%
Authorizations Typically Do Not Match		1,622.8		25.7%
Total		6,313.9	\$ 44.58	100.0%

1 -Authorization amounts typically match the settlement amount in the following market segments:

GAS INSIDE, OTHER RETAIL, QSR'S, SUPERMARKETS, BILL PAY, DRUG STORES & PHARMACIES, OTHER EMERGING, DISCOUNT STORES, DIRECT MARKETING, HEALTH CARE, BUSINESS TO BUSINESS, MISC. SPECIALTY RETAIL, OTHER TRAVEL & ENTERTAINM, GOVERNMENT, DEPARTMENT STORES, AIRLINES, SPORTING GOODS STORES, RADIO TV & STEREO STORES, TRAVEL AGENCIES, FURNITURE/EQUIP. STORES, WHOLESAL CLUBS, TOLL AND BRIDGE FEES

2- Ongoing efforts in merchant Operating Regulation compliance have dramatically reduced estimated holds

3 - Real Time Clearing will ensure and holds will not exceed 2 hours and many times less.