April 10, 2002

By Hand Delivery

Federal Trade Commission
Office of the Secretary
Room 159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Attn: FTC File No. R411001

Re: Telemarketing Rulemaking--Comment FTC File No. R411001

Ladies and Gentlemen:

This comment letter is submitted on behalf of Visa in response to the request for comment on the Federal Trade Commission's ("FTC") proposed amendments to the FTC's Telemarketing Sales Rule ("Proposed Rule"). We appreciate this opportunity to comment on the Proposed Rule.

The Visa Payment System, of which Visa U.S.A.[1] is a part, is the largest consumer payment system in the world, with more volume than all other major payment cards combined. Visa plays a pivotal role in advancing new payment products and technologies to benefit its 21,000 member financial institutions and their millions of cardholders worldwide.

Although Visa supports the idea of a centralized national "do-not-call" registry ("centralized national registry"), as the comments set forth in this letter demonstrate, the Proposed Rule is so fundamentally flawed both in its efforts to establish a centralized national registry and in other respects, that no final version of the Telemarketing Sales Rule ("Final Rule") should be adopted until the FTC has resolved these important issues and sought comment on its proposed solutions.

Visa strongly believes the following issues need to be resolved before the FTC adopts the Proposed Rule in final form:

[1] 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.

A. Preemption

Several states appear to be committed to pursuing and maintaining their own telemarketing statutes notwithstanding action by the FTC at the federal level. Nevertheless, the Proposed Rule does not provide for federal preemption of state-sponsored registries or other state "do-not-call" provisions. It is both expensive and operationally difficult to comply with a centralized national registry and separate lists for residents of different states. Many states maintain centralized registries with differing requirements, and others have language that mirrors the Telemarketing Sales Rule and the Federal Communications Commission's ("FCC") Restrictions on Telephone Solicitations ("FCC Rule").[2] Without a single national standard, an unworkable environment results for businesses that engage in telemarketing, as well as for companies that merely use the telephone to communicate with their existing customers. A single national standard also would provide the most effective protection to consumers by: (1) avoiding inconsistent procedures that may lead to errors; and (2) minimizing the cost of providing do-not-call protections to consumers--costs that likely will be borne by the consumers who choose not to opt out of receiving telemarketing calls.

Although a single national standard only can be achieved by federal preemption, the Proposed Rule appears to contemplate the existence of various state laws addressing the same or similar activities. Even if state laws within the scope of the Proposed Rule were preempted, it is not clear that the preemption would result in a single national standard because the Proposed Rule only applies to interstate calls. For these reasons, Visa strongly believes that the FTC should not move forward on the Proposed Rule without creating a single national standard for do-not-call telemarketing laws.

B. Scope

Visa also believes that a scope provision should be incorporated into the Final Rule to reflect the fact that the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act")[3] is limited in scope. In particular, this provision should state that, as provided in section 6(a) of the Telemarketing Act, the Proposed Rule does not apply to entities that are exempt from the coverage of the Federal Trade Commission Act ("FTC Act").[4] The exempted entities are set forth in section 5(a)(2) of the FTC Act and include banks and savings associations. In addition, this provision should clarify that entities that act on behalf of such banks and savings associations are not covered by the Final Rule. Entities acting on behalf of banks and savings associations include both subsidiaries of banks and savings associations and other companies. Bank subsidiaries are viewed by the federal bank supervisory agencies as

---

[2] 47 C.F.R. § 64.1200.

[3] 15 U.S.C. § § 6101-6108.

[4] 15 U.S.C. § 45(a)(2).

operating effectively as divisions or departments of their parent banks.[5] In addition, other companies providing these services to banks and savings associations are subject to regulation and examination by the federal bank supervisory agencies under the Bank Service Company Act[6] with respect to such services. The Final Rule should clarify that bank and savings association subsidiaries and other companies are not subject to the Final Rule when they are acting on behalf of banks or savings associations.

C. Exemption for Existing Customers of Financial Institutions

Although the Proposed Rule does not apply to banks directly, since banks rely heavily on outside contractors or affiliates to perform communication services for them, the Proposed Rule could have a significant adverse effect on the activities of banks and other financial institutions. As a result, it is essential that any Final Rule provide an exception to permit a financial institution to contact (directly or through its service providers) individuals with whom the financial institution has an existing business relationship without having to obtain prior affirmative consent from individuals who are listed on the proposed centralized national registry. The provision of financial services is, by its nature, a service business involving ongoing customer relationships and ongoing customer service, rather than the sporadic sale of isolated products. Financial institutions must anticipate customer needs and provide services that evolve to meet changing customer needs. In this context, the difference between servicing an existing customer account and providing new services is illusory in concept and impossible to implement.

The following examples illustrate this point. At the end of an automobile lease term, the lessor may call the customer to determine if the customer intends to make a payoff or return the vehicle. If the customer does not want to return the vehicle, the call naturally may flow into a discussion of loan or lease extensions, or renewal options. Because a new product or service may "technically" be offered during the call, without an exception for financial institutions, the lessor would need to place the customer on hold, consult the centralized national registry mid-call to ascertain whether the customer is listed on it, and make all required disclosures mid-call to avoid liability under the Proposed Rule. A similar situation would arise in a collection or workout scenario where a lender may be willing to offer an extension, renewal or new loan to a customer whose account has become delinquent. Such offers of alternative loan arrangements could transform a collection call into a sales call subject to the Proposed Rule.

The FTC should exempt from the centralized national registry provisions telephone calls from and on behalf of financial institutions to individuals with whom the financial institutions have existing business relationships. Without this exception, the normal servicing of consumer relationships will be undermined and consumers will suffer a lower level of service than otherwise would be provided.

---

[5] *See, e.g.*, OCC Advisory Letter, AL 2002-3, dated March 22, 2002.

[6] 12 U.S.C. § 1867.

Furthermore, this exception should apply to all affiliates and subsidiaries of a financial institution as well as the financial institution that has the existing business relationship with the customer. Financial institutions are heavily regulated and much of their corporate structure is dictated by regulatory requirements. These requirements generally permit the marketing of products and services across holding company affiliates and subsidiaries in order to permit one-stop shopping for financial services and to foster the synergies between various financial products. Accordingly, the FTC should recognize these efficiencies in the Final Rule and apply the recommended exceptions to all affiliates and subsidiaries of a financial institution, so that such affiliates may contact a customer of an affiliated financial institution without regard to a centralized national registry.

In addition, the FCC Rule excludes established business relationships from its do-not-call provisions. The FCC's do-not-call provisions apply to individual companies where a consumer has requested that he or she does not want to receive calls from that company. Consistent with the FCC, the FTC should adopt an exception to the FTC's limitation on outbound calls in section 310.4(b)(1)(iii)(A) in order to remove the conflicting regulatory regimes. In many cases, banks issue credit cards that carry the names of other parties, including other banks, generally known as agent banks. A request not to receive calls relating to an agent bank, affinity or private label partner actually may be directed to the card issuing bank. The bank may issue credit cards for a number of other partners. In such cases, the request that the consumer not receive further calls could be construed to apply to all of the partner relationships. The consumer will not understand that the request will have such broad applicability.

Finally, as noted above, this exception to section 310.4(b)(1)(iii)(A) would be particularly important for financial institutions where the lack of a meaningful distinction between servicing an account and marketing new products or services makes unworkable any rigid limitations on marketing to individuals with whom the financial institution has existing business relationships. In these circumstances, the desire to maintain the business relationship provides an adequate incentive to police the practices of financial institutions.

D. Billing Methods Provisions

Section 310.3(a)(3) of the Proposed Rule contains provisions on billing methods that are problematic and appear to be based on a misunderstanding of current law. Specifically, the Proposed Rule prohibits a telemarketer from submitting billing information for payment without first obtaining the consumer's express verifiable authorization, which can be either written or oral, when the payment method used does not: (1) impose a limit on the consumer's liability for unauthorized charges; or (2) provide for dispute resolution procedures comparable to the Truth in Lending Act as amended ("TILA"). The differing treatment of alternative means of payment is important because the procedure for obtaining express verifiable authorization will be cumbersome and costly to implement.

The billing method limitations should expressly exempt payment methods covered by Regulation Z (which implements TILA), and payment methods covered by Regulation E (which implements the Electronic Fund Transfer Act), as well as payment methods covered by the Uniform Commercial Code ("UCC"). The Supplementary Information to the Proposed Rule notes that the billing method provisions were developed out of a belief that telemarketing gives rise to unauthorized charges and that emerging payment methods do not provide adequate dispute resolution methods or limits for consumer liability for these unauthorized charges. The billing method provision should not apply to transactions covered under Regulation E because Regulation E provides for limitations on liability for unauthorized transactions and dispute resolution procedures that are, in practice, substantially similar to the limitations on liability in Regulation Z. Although Regulation E itself may provide for somewhat higher liability where lost access devices are not reported promptly, this provision is unlikely to have any application in the context of unauthorized telemarketing transactions where the individual retains control of any physical access devices and the unauthorized transaction is based on knowledge of the account number, rather than possession of the access device. Accordingly, there is no meaningful distinction between the rights of consumers with respect to unauthorized transactions using credit cards and the rights of consumers with respect to unauthorized transactions using debit cards. In addition, checks and demand drafts provide protections to consumers that go beyond federal law. For example, under state UCC provisions, a consumer generally is not be liable for the amount of a check or demand draft if the check or demand draft is used without the consumer's authorization.[7]

Further, the Final Rule should permit the use of billing information without express verifiable authorization from the customer, as defined by the Proposed Rule, in the case of transactions using payment systems, such as the Visa system, that limit customer liability by payment system rules. In practice, the Visa rules provide more protection from unauthorized transactions for customers than is provided under either Regulations Z or E because the Visa rules provide for zero customer liability. There is no reason to impose artificial restrictions on the use of a payment system that provides its users with greater protection than is otherwise provided under federal law.

Finally, it should be noted that the proposed revisions to Article 4 of the UCC provide for new transfer and presentment warranties that effectively further limit consumer liability on demand drafts that are created by telemarketers. For example, proposed section 4-208 includes a warranty that is given to a consumer's bank which provides that any item drawn on the consumer's account that does not bear a handwritten signature was authorized by the consumer in the amount in which it was drawn. This warranty enables a consumer's bank to recover from other banks in the check collection process when unauthorized drafts drawn by telemarketers have been paid out of a consumer's account. This change in the law will encourage these banks to recredit their customers' accounts promptly for unauthorized drafts. As customers already

[7] U.C.C. § 4-401A.

have zero liability on such drafts, this new warranty should effectively result in a dispute resolution procedure that is similar to the dispute resolution procedure under TILA. Thus, demand drafts covered under the proposed revisions to Article 4 of the UCC should be exempted from the requirements of section 310.3(a)(3) of the Proposed Rule when the UCC provisions are adopted because similar protection for unauthorized transactions would be available.

E. Limitations on Receipt of Billing Information

Section 310.4(a)(5) of the Proposed Rule prevents a telemarketer from receiving billing information for use in telemarketing unless that information is disclosed by the consumer and the consumer has authorized its use in payment processing. These limitations go well beyond the account number disclosure limitations set forth in the privacy provisions of the recently-enacted Title V of the Gramm-Leach-Bliley Act ("GLBA")[8] and the rules adopted to implement those provisions. For example, the Proposed Rule does not include either the exception for private label and affinity card programs, or the exception for telemarketers that are agents of the financial institution and are marketing the financial institution's own products. These exceptions were adopted by the eight federal agencies, including the FTC, that wrote rules to implement the GLBA. In the GLBA and its implementing rules, Congress and the eight agencies expressly addressed the account number issue. Moreover, Visa is concerned that since the definition of billing information appears to include encrypted account numbers contrary to the account number provisions of the GLBA, the limitation on the receipt of billing information would prevent a telemarketer from receiving an encrypted account number--a practice which is consistent with the GLBA and which discourages identity theft. The FTC should not blithely supercede the carefully considered provisions of the GLBA and its implementing rules by creating a broader limitation on the disclosure or receipt of billing information in the Proposed Rule. This broadened limitation would effectively prohibit practices that have been found to be fully consistent with the GLBA.

For example, customers often obtain credit cards through a bank that holds the customer's deposit account, where the credit card actually is issued by another bank. The customer may nevertheless look to the bank holding his or her deposit account to respond to questions related to the credit card. In such cases, the customer understands that the account number is the means by which these institutions identify the customers and, therefore, it is appropriate for the card issuing bank to provide the account number to the bank holding the deposit account. Moreover, as this type of credit card typically prominently bears the name of the deposit account holding bank, the customer will expect that the account holding bank will be able to bill charges directly to the credit card. Because of the established relationship between the customer and the account holding bank, the likelihood of abusive practices is greatly reduced. Accordingly, the FTC should defer to the GLBA and its implementing rules concerning the disclosure of billing information by financial institutions covered by the GLBA.

[8] 15 U.S.C. § § 6801-6809.

Further, the broad limitation on the disclosure or receipt of billing information would lead to requests for account numbers in telemarketing calls, contrary to the wisdom that, in order to prevent identity theft, account numbers should never be disclosed by a consumer to an inbound caller that the consumer does not know.

Finally, if the FTC chooses not to defer to its own rules under the GLBA on this use of account numbers and other nonpublic personal information, because of the significance of this issue, Visa requests that the FTC seek further comment on all aspects of the uses of billing information under the Proposed Rule so the FTC can become fully informed on this important issue.

F. Definitions

Billing Information

Section 310.2(c) sets forth a definition of "billing information" that is overly broad and that, in conjunction with section 310.4(a)(5), which limits the receipt of billing information, effectively establishes new disclosure limits on financial institutions. These disclosure limits are more restrictive than the limits established for financial institutions by Congress in the GLBA and the implementing rules adopted by eight federal agencies, including the FTC. In certain cases, the definition of billing information could include identifying information, such as name and address, so as to preclude the disclosure of even customer lists to telemarketers. Similarly, the definition of billing information provided in the Proposed Rule could be interpreted to include encrypted account numbers, which would go beyond the scope of the account number provisions in the GLBA. The FTC should defer to its own rules and the rules of the other federal agencies that are charged with implementing the GLBA concerning the disclosure of nonpublic personal information by financial institutions covered by the GLBA.

Customer

Section 310.2(*l*) sets forth a definition of "customer" that is overly broad and which, in effect, results in the creation of multiple customers in many transactions. The definition states that a customer is "any person who is or may be required to pay for goods or services offered through telemarketing." This definition not only would include the person who is party to the telemarketing call and who would be liable for the amount of a purchase as the contracting party, but also would include any person who is liable under the terms of the payment device. For example, if the party to the telemarketing call authorized a charge to a credit card on which that party was one of two account holders, the other account holder to whom the credit card also was issued would be considered a customer as well under the Proposed Rule.

<u>Express Verifiable Authorization</u>

Section 310.2(n) defines "express verifiable authorization" to mean "informed, explicit consent of a consumer . . . ." We note that the term "consumer" used within the definition is not defined within the Proposed Rule. Visa proposes that "consumer" should be defined in the Final Rule to mean "an individual acquiring goods or services for personal, family or household purposes."

<u>Outbound Telephone Call</u>

Section 310.2(t) defines an outbound telephone call to include a telephone call to "induce the purchase of goods or services . . . when such telephone call: (1) is initiated by a telemarketer; (2) is transferred to a telemarketer other than the original telemarketer; or (3) involves a single telemarketer soliciting on behalf of more than one seller . . . ." As drafted, the definition could include a call initiated by a customer that is transferred to another person to discuss a product or service, or a service call initiated by a customer in which products and services of another party may be discussed.

The Supplementary Information to the Proposed Rule identifies two fundamental concerns that formulated the basis for the Proposed Rule: (1) invasion of consumers' privacy; and (2) billing fraud. Telephone calls initiated by individuals to financial institutions should be exempt from this definition because the risks raised by these two elements are unlikely to occur. For example, during inbound calls to financial institutions, privacy issues should not be a substantial concern because the customer initiated the call and the customer is always free to terminate the call once the customer has accomplished the purpose of the call. The potential for fraud also is reduced because the call arises out of a transaction initiated by a customer to a known party as part of a continuing relationship.

The definition of outbound telephone call in the Proposed Rule is unworkable in practice because it would be impractical to consult lists of individuals who have placed their names on the centralized national registry, let alone consumers who have notified individual businesses that they do not wish to be contacted, when the financial institution or its servicing entity is in the process of responding to inbound telephone calls.

For these reasons, the definition of an outbound telephone call should in fact be limited to *outbound* telephone calls and should specifically exclude inbound telephone calls. Further, the Proposed Rule should be revised to clarify that, because of the nature of financial institutions, an inbound or an outbound call that is transferred to an affiliate or subsidiary would not be considered an outbound call.

Seller

The definition of "seller" provided in section 310.3(x) includes "any person who, in connection with a telemarketing transaction, provides, or offers to provide *or arranges* for others to provide goods or services to the customer in exchange for consideration." (emphasis added). Similar to the definition of customer, this definition may result in there being multiple sellers in a given transaction. For example, if a mortgage lender arranges for an insurance agent to call a consumer to broker insurance underwritten by a separate insurance company, there would be three "sellers." The required oral disclosure for outbound calls in section 310.4(d) could result in the person initiating the call being required to identify all of the parties. This identification process may be complicated by the fact that the actual provider of the insurance may not have been determined at the initiation of the call or, for that matter, even by the end of the call.

G. Prohibited Deceptive Telemarketing Acts or Practices

Section 310.3(a), which sets forth deceptive acts or practices that are prohibited under the Proposed Rule, contains several issues that Visa believes need to be addressed before a Final Rule is adopted. First, subsection (1) sets forth disclosures that must be made to a customer before payment is made. Because the definition of customer in the Proposed Rule actually could encompass multiple customers, Visa urges the FTC to clarify that the disclosures may be made to any customer participating in the telephone call.

In addition, subsection (2) sets forth prohibited misrepresentations. As drafted, the misrepresentations are prohibited regardless of to whom they are made. Thus, subsection (2) would create liability under the Proposed Rule for statements made to any third party. Visa urges the FTC to amend section 310.3(a)(2) to read "misrepresenting to a customer."

Finally, subsection (3) requires that a seller or telemarketer obtain "express verifiable authorization," which may be either written or oral, from the customer before submitting billing information for payment. "Express oral authorization" requires the seller or telemarketer to provide in the recorded authorization the customer's name and the customer's billing information. This information, required by subsections (D) and (E), is information that must be supplied by the customer pursuant to other provisions in the Proposed Rule. Further, as a general matter, telemarketers should not disclose billing information over the telephone because it creates the potential for fraud and identity theft.

In addition, Visa urges the FTC to delete the requirement in subsection (B) that an express oral authorization include "the date of debit(s), charges(s), or payment(s)." Such information on the timing of debits, charges, or payments may be subject to a number of variables, such as the procedures of the consumer's financial institution, that are beyond the control of the telemarketer and would not be ascertainable during the course of a telemarketing call.

H. Centralized National Registry

Section 310.4(b)(1)(iii) prohibits a telemarketer from initiating, or for a seller to cause a telemarketer to initiate, an outbound call to a person when the person has "placed his or her name and/or telephone number on a do-not-call registry . . . of persons who do not wish to receive outbound calls." While Visa supports efforts to create a centralized national registry, Visa is troubled that, as proposed, the centralized national registry does not provide consumers with effective options for exercising their choices. A consumer who wishes to avoid some types of telemarketing calls, but not telemarketing calls altogether, is left with the burden of contacting each and every telemarketer to provide his or her express verifiable authorization--an insurmountable and labor-intensive task at best. For this reason, we believe this definition should be modified to prohibit calls to persons who have placed their names on the centralized national registry unless the outbound telemarketing call comes within an exception to the list authorized by a person using the telephone number called.

Consistent with this policy, Visa also proposes that subsection (B)(1) be modified to permit a consumer to give express written authorization for calls made "on behalf of a specific seller or class or group of sellers." Further, Visa believes the signature requirement should be dropped from this provision because there are situations where a signature may not be practicable. For example, a retail store selling automobile products may wish to help arrange for customers to receive offers of automobile financing or insurance from a number of providers. The process of obtaining a signature in connection with this authorization for consumers who have placed their numbers on the national registry would so delay the sales process as to effectively preclude offering this service.

In addition, Visa urges the FTC to modify subsection (B)(2) to permit a consumer to provide express oral authorization to a class or group of sellers. The requirement to identify specific sellers imposes too great a burden on small businesses that may obtain customer consent over the telephone during a conversation with the customer or in a face-to-face meeting in a store.

Moreover, the provision requiring that a telemarketer verify that the authorization is being made from the telephone number to which the customer is authorizing access needlessly precludes consumers from exercising their choices at their convenience. The provision, as drafted, appears to require that the telemarketer be able to obtain caller identification information from the customer before an authorization is effective. Customers who have chosen to block the transmission of caller identification information from their telephone lines would be required to take affirmative steps to unblock the transmission each time he or she wished to provide express oral authorization. Furthermore, it would prohibit a customer who calls a seller from a work or mobile phone from providing express oral authorization at that time. In addition, this provision would also place a burden on businesses to acquire caller identification technology and devices.

These changes to this section are necessary in order to prevent unduly restrictive measures that run contrary to the customer's interests.

I. Privacy and List Management Considerations

The existence of a centralized national registry of names and/or telephone numbers raises privacy concerns. Identifying individuals by name and telephone number on a list that is broadly available may result in the disclosure of individuals who have unlisted telephone numbers but nevertheless receive some telemarketing calls that they wish to avoid. These individuals may include persons seeking to escape an abusive spouse or others where the disclosure of this information could affect their personal safety. On the other hand, a centralized national registry that merely discloses names would not adequately identify individuals, many of whom have the same or similar name. Finally, a centralized national registry that only includes telephone numbers will raise issues as to the accuracy of the registry. Individuals change their phone numbers and multiple individuals receive telephone calls through a single number. More generally, it will be necessary to be able to link the names of individuals to the telephone number in order to maintain an accurate centralized national registry. To the extent that the centralized national registry is maintained by a governmental entity subject to the Freedom of Information Act, the legal basis is not clear for withholding from the registry names associated with telephone numbers on the registry.

Closely related to these privacy concerns are a series of list management issues that must be addressed before a Final Rule is adopted. For example, if a list contains only telephone numbers, for a telephone number that is used by multiple consumers, whose choice to be placed on the centralized national registry controls? If the telephone subscriber's consent controls, what verification procedures would those responsible for maintaining the centralized national registry need to implement and how would these procedures affect the costs of the centralized national registry program? In this context, Visa is concerned that the Proposed Rule does not address methods for updating, verifying or removing a consumer's name from the list. If a consumer who has put his or her telephone number on the list relinquishes that telephone number, the next consumer who is assigned that telephone number might not receive telephone calls if appropriate mechanisms are not in place to assure that the centralized national registry only contains a valid and up-to-date list.

J. Review Period

Section 310.4(b)(3) of the Proposed Rule states that the FTC shall review the implementation and operation of the Final Rule within two years following the effective date. Industry efforts to comply with the Final Rule undoubtedly will be costly and expensive to implement. Adoption of a Final Rule will raise consumer expectations, and adoption of the Final Rule on an "experimental" basis may erode consumer confidence. Visa strongly urges the FTC not to move forward with a Final Rule until all aspects of the Final Rule have been fully developed for final implementation, rather than effectively promulgating a temporary rule on an interim basis.

K. Predictive Dialers

The oral disclosures required by section 310.4(d) that are required to be given during an outbound telemarketing call effectively prohibit the use of predictive dialers because an abandoned call that occurs when a predictive dialer is used would violate the disclosure requirements. This prohibition could be particularly troublesome in the context of calls initiated in the process of collection that may involve an offer of an alternate "work out" payment schedule. Because a workout may be offered, such calls may be considered outbound telemarketing calls subject to the disclosure requirements and hence the limitation on the use of predictive dealers. The Telemarketing Sales Rule should not interfere with the use of predictive dialers in the debt collection process.

Further, predictive dialers provide a valuable service by materially reducing the cost of telemarketing. Under the Proposed Rule, consumers who may wish to avoid receiving calls from predictive dialers are able to do so by putting their names on the centralized national registry. On the other hand, consumers who elect not to put their names on the centralized national registry have effectively chosen to receive calls from telemarketers, including telemarketers that may use predictive dialers. Ultimately, prohibiting the use of predictive dialers will increase the cost of goods and services that are telemarketed for those who have chosen to receive telemarketing calls without providing those consumers with any corresponding benefits.

L. Vicarious and Strict Liability

Section 310.3(c)(3) imposes vicarious liability on persons for providing substantial assistance to any seller or telemarketer when that person knows or consciously avoids knowing that a seller or telemarketer is engaged in certain violations of the Proposed Rule. Although the current Telemarketing Sales Rule incorporates a similar provision, the expanded scope of the Proposed Rule, including provisions that conflict with the GLBA privacy rules, could require financial institutions to police the activities of third parties, many of whom are themselves regulated entities, merely because they have contracts with these entities. The Final Rule should limit its coverage to direct violations of the applicable provisions.

In addition, many consumer protection statutes shield persons from liability for violations that result from bona fide errors, notwithstanding the maintenance of procedures reasonably designed to avoid such errors, and for liability for actions done in good faith in conformity with agency guidelines. The Final Rule should include both types of safe harbors, particularly because the enforcement of the Final Rule will not be in the exclusive control of the FTC.

M. Caller Identification

Section 310.4(a)(6) of the Proposed Rule prohibits the blocking or subverting of caller identification information. This provision should be revised to clarify that a telemarketer need not take affirmative steps to disclose caller identification information.

N. Calls in Response to Solicitations

Section 310.6(f) exempts from the Proposed Rule telephone calls initiated by a consumer, provided that the solicitations are clear, conspicuous and truthful. Although a similar provision is included in the current Telemarketing Sales Rule, the narrowness of this exception combined with the expanded scope of the Proposed Rule--including the definition of outbound call--raises the specter of vicarious liability for statements by others. If false statements are made to induce consumers to call sellers, those statements are the appropriate focus of sanctions, rather than the recipient of the call. For example, when a bank provides credit cards on behalf of another bank, the card issuing bank should not be compelled to police the communications between its agent bank and the cardholders to determine whether inbound telephone calls to the card issuing bank are subject to the Telemarketing Sales Rule.

* * * *

In conclusion, Visa appreciates the opportunity to comment on the Proposed Rule and urges the FTC to incorporate the views expressed in this letter before adopting a Final Rule. 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