RUSSELL W. SCHRADER
Senior Vice President
Assistant General Counsel

September 30, 2004

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-1206

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attention: EGRPRA Burden Reduction
Comments

Public Information Room
Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 1-5
Washington, DC 20219
Attention: Docket No. 04-18

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: No. 2004-35

Re: Request for Burden Reduction Recommendations

Ladies and Gentlemen:

This comment letter is submitted on behalf of Visa U.S.A. Inc. in response to the notice of regulatory review ("Notice") and request for public comment by the Federal Deposit Insurance Corporation, the Federal Reserve Board ("FRB"), the Office of the Comptroller of the Currency and the Office of Thrift Supervision (collectively, the "Agencies"), published in the Federal Register on July 20, 2004. The Notice seeks public comment concerning ways to reduce the regulatory burdens associated with certain consumer protection regulations promulgated by the Agencies. Visa appreciates the opportunity to comment on this important matter.

The Visa Payment System, of which Visa U.S.A.[1] is a part, is the largest consumer payment system, and the leading consumer e-commerce 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, including technology initiatives for protecting personal information and preventing identity theft and other fraud, for the benefit of its member financial institutions and their hundreds of millions of cardholders.

[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.

VISA U.S.A. INC.
Post Office Box 194607
San Francisco, CA 94119-4607
U.S.A.

Phone 415 932 2178
FAX 415 932 2525

Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996, the Agencies seek public comment concerning ways in which consumer protection regulations promulgated by the Agencies are outdated, unnecessary or unduly burdensome in order to assist the Agencies in proposing burden-reducing changes to these regulations. Visa is providing comments with respect to the Agencies' regulations concerning the privacy of consumer financial information ("Privacy Rule"), promulgated pursuant to the Gramm-Leach-Bliley Act ("GLBA")[2], and the FRB's Regulation E concerning electronic fund transfers ("EFT"), promulgated pursuant to the Electronic Fund Transfer Act ("EFTA")[3]. Visa believes that certain requirements under these regulations are unnecessary or unduly burdensome and impose substantial compliance costs on Visa members.

Visa believes that aspects of these regulations identified as unnecessary or unduly burdensome should be deleted or modified. In addition, the Agencies should work toward removing barriers that impede innovation, such as new technologies and new ways of doing business. Moreover, the Agencies should avoid adopting prophylactic measures to guard against potential abusive practices, which will inevitably lead to increased compliance costs and the stifling of innovation generally, and instead should use their broad enforcement authority to address such abusive practices where necessary. In this regard, the Agencies should limit regulatory requirements to remedial requirements designed to address identified problems, rather than speculating about potential problems. The Agencies also should be receptive to, and be prepared to act quickly on, requests to consider alternatives to existing regulatory structures, where those structures impede innovation.

PRIVACY OF CONSUMER FINANCIAL INFORMATION

The Privacy Rule, which implements title V, subtitle A of the GLBA, requires a financial institution to provide its customers with an initial and an annual privacy notice concerning the financial institution's privacy policies and practices.[4] Visa believes that certain aspects of the Privacy Rule concerning the content and delivery of these notices are unnecessary and unduly burdensome. In addition, Visa believes that additional statutory changes are necessary to create a uniform national standard for privacy notices.

GLBA Privacy Notices are Too Complex and Confusing and Should be Simplified

In developing the Privacy Rule, the Agencies balanced the level of detail to be included in GLBA privacy notices against the benefits of simple and clear notices. Since the adoption of the Privacy Rule, and with the benefit of actual experience with privacy notices developed and distributed since 2001, it has become clear that the notices are too detailed and complex. Although many financial institutions have used the Agencies' sample clauses, as well as focus groups and plain English drafting, to develop their privacy notices, the resulting notices still have been criticized as being too long and legalistic, and designed for compliance, rather than readability. The Agencies' current regulatory requirements governing the notices, however, stand as a bar to further simplification.

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[2] 15 U.S.C. §§ 6801-6809.
[3] 15 U.S.C. §§ 1693-1693r.
[4] 12 C.F.R. §§ 40.4, 40.5.

Visa believes that shorter and simpler privacy notices would better achieve the statutory goals of the GLBA while imposing less compliance burdens on financial institutions. Shorter and simpler privacy notices would enhance consumer understanding by making it more likely that consumers will actually read and understand privacy notices. Increased consumer understanding, in turn, would assist consumers in making informed decisions and would assist policy makers in assessing more accurately the importance that consumers attach to limiting the sharing of information by their financial institutions. In addition, the ability to provide shorter and simpler notices would reduce the costs to financial institutions of providing these notices.

Moreover, Visa believes that the Privacy Rule imposes compliance burdens that are not required by the GLBA itself. For example, the Privacy Rule provides far more detail than the GLBA requires concerning the categories of information collected, the categories of persons to whom the information is disclosed and the institution's related policies and practices.[5] The examples set forth in the Privacy Rule require financial institutions to include in their privacy notices so much detail that the resulting notices cannot possibly be meaningful to most consumers. As a result, Visa believes that the Agencies should modify the Privacy Rule to provide for a short-form privacy notice that would be simple and easy for consumers to understand.

Two-Step Privacy Notices

The Privacy Rule requires financial institutions to provide an initial privacy notice to consumers before a transaction is consummated between a consumer and a financial institution; that is, not later than when a customer relationship is established. Visa believes that this requirement can be satisfied without imposing unnecessary compliance burdens, burdens not required by the GLBA, and that a different approach would more appropriately achieve the statutory goals of the GLBA. The Agencies should permit financial institutions to provide a simplified privacy notice to new customers at the time currently specified by the Privacy Rule, if it is supplemented by the delivery of a more complete privacy notice upon request. There is no express requirement in section 503 of the GLBA that notices be delivered before a transaction is consummated. Experience has shown that there are circumstances where delivering a privacy notice not later than when a financial institution establishes a customer relationship is difficult and frustrates certain consumer transactions. In these circumstances, the ability to deliver a simplified notice could greatly facilitate many consumer transactions and reduce the burden associated with complying with the initial notice requirement with respect to these transactions, while still providing a truly meaningful privacy notice to consumers. Then, if a particular consumer wants to learn more, he or she would have the right to receive a more comprehensive privacy notice upon request and without cost. We believe that the Agencies have the authority to provide for such a two-step privacy notice approach under the existing GLBA, and that both consumers and financial institutions would benefit greatly from a change in the Privacy Rule permitting the immediate implementation of such a practice.

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[5] 12 C.F.R. § 40.6.

Uniform National Standard for Privacy Notices

Visa also believes that amendments to the GLBA should be pursued to create a uniform national standard for privacy notices. Unlike the two-step privacy approach discussed above, however, we believe that an amendment of the GLBA may be needed to achieve this result. Differing federal and state notice requirements can, and in practice do, impede the ability of institutions to develop privacy notices that are short, simple and understandable. Notices that combine federal and state requirements or the delivery of separate notices for consumers in different states inevitably result in consumer confusion. State-specific notices contain information that differs from the federal notice and may provide consumers with different choices regarding the sharing of information. While presently only a few states, such as California and Vermont, have unique, state-specific privacy notice requirements, section 507(b) of the GLBA permits states to implement greater protections than the protections provided under the GLBA with respect to information sharing with third parties.[6] States therefore have the flexibility to adopt additional notice requirements that add to the complexity of existing GLBA privacy notices. Federal regulatory efforts to provide consumers with a clear and simple notice to understand their privacy rights cannot be fully achieved as long as states are permitted to implement additional privacy notice requirements.

In order for GLBA privacy notices to fulfill the legislative intent and to make the notices truly useful, there should be a single national standard for privacy notices that financial institutions may send to their customers with confidence that the notices meet all legal requirements, both state and federal. The Agencies should exercise their authority under the GLBA to allow for shorter and simpler notices and, at the same time, report to Congress concerning the need for legislation that provides for a single national standard for privacy notices.

ELECTRONIC FUND TRANSFERS

Regulation E implements the EFTA, which provides a basic framework establishing the rights, liabilities and responsibilities of participants in EFT systems. Visa believes that certain requirements under Regulation E are unnecessary, unduly burdensome or require clarification. Moreover, Visa strongly encourages the FRB to be proactive in fostering electronic commerce and online banking in the context of Regulation E. The FRB must guard against the tendency to be suspicious of new technologies and new ways of doing business and, in particular, should avoid implementing prophylactic rules in areas where there is little evidence of actual harm. In particular, the FRB should scrutinize Regulation E to address provisions that may impede or burden the development of electronic commerce and online banking.

Telephonic Authorization for Preauthorized EFTs

Under section 907(a) of the EFTA, a consumer must authorize in writing a preauthorized EFT from a consumer account. Section 205.10(b) of Regulation E, which implements this

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[6] In addition, Massachusetts, New Hampshire, New Jersey and New York are among the states that have considered financial privacy legislation.

provision, requires that the consumer authorize the preauthorized EFT in the form of a "writing signed or similarly authenticated." Moreover, section 205.10(b)-3 of the Official Staff Commentary ("Commentary")[7] to Regulation E states that a tape-recorded telephone conversation does not constitute proper authentication for the purposes of authorizing preauthorized EFTs. As a consequence, consumers are unable to authorize EFT payments over the telephone.

Visa believes that section 205.10(b)-3 of the Commentary is no longer necessary in light of the passage of the Electronic Signatures in Global and National Commerce Act ("E-Sign Act")[8], which gives legal effect to electronic records used as substitutes for any statutory writing requirement. Proposed amendments to Regulation E and its Commentary, recently issued by the FRB, would withdraw section 205.10(b)-3 from the Commentary.[9] Visa applauds the FRB's proposed clarification to the Commentary.

Although an excellent step in the right direction, however, Visa believes that the FRB should confirm specifically that a tape-recorded authorization could satisfy the E-Sign Act and thereby would satisfy Regulation E. This clarification would reduce uncertainty and provide greater flexibility in complying with Regulation E.

Notice of Transfers Varying in Amount

Section 205.10(d) of Regulation E requires the designated payee or the consumer's financial institution to send written notice of the amount and date of an EFT at least 10 days before the scheduled date of a transfer, if the transfer falls outside a specified range or exceeds the most recent transfer by more than an agreed upon amount. Visa believes that this notice requirement is burdensome and, in particular, is not appropriate where the transfer is between accounts owned by the same consumer, even when those accounts are at different financial institutions. The FRB's proposed amendments would clarify that a financial institution need not give the consumer the option of receiving such a notice before transfers of funds where the transfer is to an account of the consumer held at another financial institution, even when the other account is a joint account and the consumer is one of the joint account holders.[10] Visa believes that this approach is appropriate in order to provide financial institutions greater flexibility in complying with the required notice for transfers varying in amount.

Replacement of Existing Debit Cards with Multiple Renewals or Substitutes

Under section 205.5 of Regulation E, financial institutions may distribute access devices to consumers on a solicited or unsolicited basis. Solicited access devices may be distributed in response to an oral or written request, or as a renewal or substitute card. Unsolicited access devices, however, only may be sent to a consumer if the access device is inactive and can only be activated in response to a consumer's oral or written request. Moreover, section 205.5(a)(2)-1 of

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[7] 12 C.F.R. part 205 (Supp. I).
[8] 15 U.S.C. §§ 7001-7006; 15 U.S.C. § 7021; 15 U.S.C. § 7031.
[9] 69 Fed. Reg. 55,996, 56,011 (Sep. 17, 2004).
[10] 69 Fed. Reg. at 56,004, 56,011.

the Commentary establishes a one-for-one rule under which a financial institution may not provide additional devices when issuing a renewal or substitute access device. Taken together, section 205.5 of Regulation E and section 205.5(a)(2)-1 of the Commentary preclude a financial institution from issuing more than one debit card as a renewal of, or substitute for, a previously accepted card.

Visa believes that Regulation E's one-for-one rule impedes the development of debit card services and reduces overall consumer convenience by artificially limiting consumer access to new advances in card technology, such as cards issued in different sizes and formats. The FRB's proposed amendments would add a comment clarifying that multiple cards may be distributed as renewals or substitutes to existing cards by complying with the validation requirements of section 205.5(b) of Regulation E.[11] Visa believes that this approach is appropriate as long as it would not preclude a single validation activating both access devices provided to a consumer as a renewal or substitute for a single access device.

Delivery of Periodic Statements

Under section 205.9(b) of Regulation E, a financial institution must send a consumer a periodic statement for each monthly cycle in which an EFT has occurred and a quarterly periodic statement if no EFT has occurred. It is unclear how the duty of a financial institution to provide such periodic statements interacts with the growing practice of providing transactional history and other account information on a daily basis online. Visa believes that the FRB should modify appropriate Regulation E requirements to permit financial institutions to meet the periodic statement requirement through online disclosure of a consumer's transaction history, and that if a financial institution provides such daily online access that financial institution need not provide monthly or quarterly statements for such accounts.

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 (415) 932-2178.

Sincerely,

Russell W. Schrader
Senior Vice President and
Assistant General Counsel

[11] 69 Fed. Reg. at 56,010.