



December 12, 2007

By Electronic Delivery

Russell W. Schrader
Senior Vice President
Assistant General Counsel

Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Docket Number R-1298

Department of the Treasury
Office of Critical Infrastructure Protection
and Compliance Policy
Room 1327
Main Treasury Building
1500 Pennsylvania Avenue, NW
Washington, DC 20220
Treas-DO
Docket Number Treas-DO-2007-0015

Re: Joint Proposed Rulemaking on Prohibition on Funding of Unlawful Internet Gambling

Dear Ladies and Gentlemen:

This comment letter is submitted on behalf of Visa U.S.A. Inc. in response to the request for comment by the Board of Governors of the Federal Reserve System (“Board”) and the Department of the Treasury (“Treasury”) (the “Agencies”) in connection with the joint proposed rulemaking (“Joint Proposal”) to implement provisions of the Unlawful Internet Gambling Enforcement Act of 2006 (the “Act”).¹ Subject to the comments discussed below, Visa generally supports the Joint Proposal as a faithful implementation of the Act with respect to card-based payment systems. Visa recognizes that the Act requires the Agencies to prescribe certain requirements in connection with the processing of “restricted transactions” and, in general, believes that the Agencies have proposed a framework that provides card payment systems appropriate flexibility to develop compliance programs that are “reasonably designed” to achieve the purposes of the Act. Nevertheless, Visa urges the Board and the Treasury to carefully weigh the comments on the Joint Proposal, particularly with respect to the difficulties in identifying restricted transactions and in distinguishing restricted transactions from transactions that are not restricted transactions on a real-time basis.

Card Systems Examples Should Conform to the Act

Under the Joint Proposal, “card systems” would be “designated payment systems” that would be required to establish written policies and procedures “reasonably designed to identify and block or otherwise prevent or prohibit restricted transactions.”² Visa believes that the Agencies have appropriately followed the language of the Act by establishing a general

¹ 31 U.S.C. §§ 5361-5367. For the sake of clarity, references to the Act are to the corresponding provisions of the United States Code.

² § __.5(a). 72 Fed. Reg. 56,680, 56,697 (Oct. 4, 2007). We follow the convention of the Joint Proposal by citing to the subsection of the common rules to be adopted by the Board, at 12 C.F.R. pt. 233, and by the Treasury, at 31 C.F.R. pt. 132. 72 Fed. Reg. at 56,695.

requirement to implement policies and procedures that are “*reasonably designed*” to achieve the statutory purposes.³ However, the Agencies have departed from the unambiguous language of the Act by proposing a compound example of how card system participants, including operators, acquirers and issuers, could fulfill their general obligation by both excluding customers who may receive restricted transactions and coding and blocking restricted transactions.⁴ Instead, consistent with the Act, the Agencies should implement separate, disjunctive examples of the reasonable policies and procedures that could be implemented to identify and block or otherwise prevent or prohibit restricted transactions.

In order to be consistent with the clear language of the Act and, as a practical matter to avoid duplicative procedures, the Agencies should revise section __.6(c)(1)(ii) of the Joint Proposal by inserting the word “or” after the semicolon. By doing so, the Agencies would appropriately establish separate, disjunctive examples of how a card system participant could implement policies and procedures reasonably designed to prevent or prohibit restricted transactions. Under the Joint Proposal, card system participants would be required to conduct due diligence in establishing or maintaining a relationship with a merchant, and establish procedures reasonably designed to prevent or prohibit restricted transactions, such as through the use of transaction and merchant/business category codes. However, either one of these procedures, if implemented appropriately, would obviate the need for the other procedure. Further, it is by no means clear that an illegal Internet gambling site that managed to avoid one procedure would be caught by the other. For example, an Internet gambling site that refuses to code properly also will be likely to mislead financial institutions as to its true business in order to establish an account. Visa believes that card system participants should be permitted to comply with the Act by implementing policies and procedures reasonably designed to prevent or prohibit restricted transactions through the use of either due diligence on merchants or coding and blocking.

Adopting separate, disjunctive examples of reasonable policies and procedures that card system operators could use as compliance methods is consistent with the express language of the Act. Section 5364(a) of the Act requires the Agencies to prescribe rules requiring, in part, covered entities to establish policies and procedures “reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of restricted transactions *in any of the following ways:*” namely, the use of (1) transaction codes for restricted transactions; or (2) policies and procedures that prevent or prohibit the payment system’s products or services in connection with a restricted transaction.⁵ Congress specifically mandated that the Agencies permit covered entities to establish reasonable policies and procedures in “any of [those] ways.” Card system participants should be deemed to comply by establishing any of those policies and procedures.

³ 31 U.S.C. § 5364(a) (emphasis added).

⁴ § __.6(c) (“The policies and procedures of a card system operator, a merchant acquirer, and a card issuer, are deemed to be reasonably designed to prevent or prohibit restricted transactions, if they— . . .”).

⁵ 31 U.S.C. § 5364(a)(1)-(2) (emphasis added).

Similarly, section 5364(b)(2) of the Act provides that the Agencies “shall . . . to the extent practical, permit any participant in a payment system to choose among alternative means of identifying and blocking, or otherwise preventing or prohibiting the acceptance of the products or services of the payment system or participant in connection with, restricted transactions.”⁶ Under proposed section __.6(c) of the Joint Proposal, card system operators, as well as merchant acquirers and card issuers, would be forced to use both types of policies and procedures in order to be deemed in compliance with the rules, rather than being permitted to “choose among alternative means” to do so. Visa urges the Agencies to adopt card system examples that would permit covered entities to choose among alternatives, consistent with section 5364(b)(2) of the Act. Finally, from a practical standpoint, internationally, and according to some, in some cases locally, Internet gambling is legal in a number of jurisdictions. There is no reason to exclude Internet gambling merchants from payment systems in those jurisdictions as long as restricted transactions can be coded and blocked.

The Agencies’ Approach to Overblocking Is Reasonable and Consistent with the Act

Visa is pleased that the Agencies recognize that there are circumstances when payment system participants may elect not to process transactions and that the Agencies have proposed including the liability shield from section 5364(d) of the Act in the Joint Proposal.⁷ The laws that determine whether payment card transactions are or are not restricted transactions are both highly dependent on the facts of a specific transaction, including the physical location of the gambler, and in dispute as to their application. Any approach to overblocking must take into account these uncertainties in the context of a wide array of transactions that are conducted under many varied circumstances.

For example, a U.S. cardholder who is temporarily located outside the U.S. may attempt to conduct a gambling transaction over the Internet that would be lawful in the local jurisdiction. But as a practical matter, the card issuer, which maintains the cardholder’s U.S.-based billing address, must be able to rely on the policies and procedures of the card system, such as the use of transaction codes and merchant/business category codes, that cannot ascertain the jurisdiction in which the cardholder is actually located (and thus confirm that the transaction is lawful), and, accordingly, identifies and blocks the transaction as a “restricted transaction.” Similarly, in many other circumstances, it is simply not practical to distinguish between restricted transactions and transactions that are not restricted on a real-time basis.

A card issuer should be deemed to have complied with the Joint Proposal by appropriately relying on the merchant/business category code reasonably designed to identify and block restricted transactions. Visa believes that the Agencies’ approach to overblocking is reasonable, and believes that the Agencies have appropriately incorporated into the Joint Proposal the Act’s liability provisions, which take into account the particular facts and circumstances surrounding a transaction and a participant in a designated payment system.

⁶ 31 U.S.C. § 5364(b)(2).

⁷ § __.5(c); 31 U.S.C. § 5364(d).

December 12, 2007

Page 4

The Agencies Should Clarify That the Rules Only Apply to United States Offices of Participants in a Designated Payment System

The Joint Proposal applies to participants in designated payment systems. The definition of a participant in a designated payment system is not limited to United States offices of such a participant, although the structure of the Joint Proposal, and particularly the examples of policies and procedures, strongly suggest that it was the contemplation of the Agencies that the prohibition in section __.5(a) be limited to United States offices of such participants. Visa believes that the Agencies should clarify that the scope of any final rule is limited to United States offices of participants in designated payment systems.

* * *

Once again, 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 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