

RUSSELL W. SCHRADER
Senior Vice President
Assistant General Counsel



March 29, 2004

Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, NW
Washington, DC 20580

Attn: Project No. P034815

Re: Interagency Proposal to Consider Alternative Forms of Privacy Notices
Under the Gramm-Leach-Bliley Act

Ladies and Gentlemen:

This comment letter is submitted on behalf of Visa in response to the Advance Notice of Proposed Rulemaking issued by the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Federal Trade Commission (collectively, the "Agencies") regarding the "Interagency Proposal to Consider Alternative Forms of Privacy Notices Under the Gramm-Leach-Bliley Act ("ANPR"). Visa appreciates the opportunity to comment on this very important issue.

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.

Current GLBA Privacy Notices Are Too Complex and Confusing

When the Agencies originally developed the rules to implement the GLBA ("Privacy Rule"), they had to balance the level of detail to be included in privacy notices against the benefits of simple and clear notices. This balancing was, of course, heavily influenced by the

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.

specific provisions of the GLBA itself, which can be read to indicate that the notices should include a significant level of detail. Since the adoption of the Privacy Rule, and with the benefit of actual experience with GLBA privacy notices since 2001, it has become clear that the notices being provided under the GLBA are too detailed and complex. Despite the fact that many financial institutions used the Agencies' sample clauses, as well as focus groups and plain English drafting to develop privacy notices, the resulting notices have been criticized as being too long and legalistic, and designed for compliance, rather than readability.

Although financial institutions have attempted to simplify their privacy notices, the current regulatory requirements governing the notices stand as a bar to further simplification. While the regulatory requirements are based on the GLBA itself, we believe that the language of the GLBA gives the Agencies discretion to simplify the notice requirements. Accordingly, Visa supports and encourages the Agencies' efforts to simplify GLBA privacy notices. Efforts to make GLBA privacy notices shorter and simpler are an important first step in making the notices more understandable. Short simple privacy notices should enhance consumer understanding by making it more likely that consumers will actually read and understand privacy notices. Increasing consumer understanding, in turn, will assist consumers in making informed decisions and assist policy makers in assessing more accurately the importance that consumers attach to limiting the sharing of information by their financial institutions.

Proposed Approaches

In the ANPR, the Agencies have outlined four approaches for the industry to consider. The first two approaches would allow the Agencies to develop and mandate a specific format and standardized language for a short notice that highlights key privacy elements. The Agencies have suggested that, like a nutrition label, a standardized notice would permit consumers to compare easily the elements of the privacy policy. The third approach to simplifying privacy notices would involve establishing a standardized format for privacy notices, but allowing financial institutions to provide their own descriptions of their privacy policies and practices. The fourth approach would focus the consumer's attention on his or her right to limit information shared. In addition, the Agencies have solicited comment on whether a short-form privacy notice should be mandatory or permissive for all financial institutions. The Agencies have also requested comment on whether short-form privacy notices should be provided to consumers as a "substitute for" or "supplement to" longer privacy notices.

Change the Regulatory Requirements to Provide for Shorter and Simpler Notices

The level of detail specified in the notice requirements of the Privacy Rule, and the sample clauses provided with the Privacy Rule, should be reduced. In particular, the Privacy Rule provides far more detail than the GLBA requires about the categories of information collected, the categories of persons to whom the information is disclosed, and the institution's policies and practices. The examples set forth in the Privacy Rule require financial institutions to include in their privacy notices so much detail that such notices are not meaningful to most consumers. Visa believes that the Agencies should, and have the authority to, modify the

Privacy Rule to provide for a short-form privacy notice that would be simple and easy for consumers to understand.

For example, even though the GLBA refers to categories of persons and categories of information, thereby implying that more than one category is required, the use of the term “categories” does not require more than two categories. Indeed, both persons and information can be categorized using the categories in the GLBA itself—affiliates and nonaffiliated third parties. Specifically, under section 503(b)(2) of the GLBA, an institution should be able to satisfy the requirement to categorize the nonpublic personal information that it collects if it lists as categories information about the consumer from the consumer’s transactions with the institution or its affiliates and information about the consumer from the consumer’s transactions with nonaffiliated third parties. These more limited categories could be implemented by a simple sample clause, such as “We collect information about you from your transactions with our companies and from third parties.”

Similarly, section 503(b)(1)(A) of the GLBA requires the notice to include the categories of persons to whom the information may be provided, and section 503(a)(1) requires the notice to include the categories of information that may be disclosed. Although the Privacy Rule provides for a laundry list of examples to describe these categories, the statutory language does not require the use of examples. These GLBA requirements could be better satisfied by providing for a sample clause, such as “We share the information that we collect with our other companies, unrelated third parties, unrelated third parties that work with us to offer you financial products or services, and third parties, as permitted by law.”

In addition, section 503(a)(3) of the GLBA requires the notice to describe the institution’s policies and practices with respect to protecting the nonpublic personal information of consumers. The Privacy Rule and the sample clauses provide that financial institutions should describe who is authorized to have access to the information and should state whether the institution has security practices and procedures in place to ensure the confidentiality of the information. The GLBA requirement, however, could be simplified by providing a sample clause that simply states “We keep customer information safe.”

In order to provide financial institutions with confidence in using such short and simple language, it must be clear that financial institutions that use privacy notices substantially similar to the sample clauses will be in compliance with the GLBA. This protection is critical to any effort to simplify the privacy notices. Simpler and more understandable language generally is less precise than more detailed explanations. In order for financial institutions to be willing to use simpler language, they must be assured that lack of precision in the language cannot form the basis of an agency action or the basis of litigation under state unfair or deceptive acts or practices laws or other federal or state statutes or common law.

Visa believes that the Agencies have the discretion to provide that the GLBA notice requirements could be satisfied by allowing financial institutions to use a short privacy notice substantially similar to the following notice. This notice achieves a Flesch reading ease score

of 75. The following notice is short, simple and understandable, and therefore is likely to help consumers make informed decisions. This simplicity is unlikely to be achieved under the current Privacy Rule because financial institutions will be concerned that the notice will not meet existing regulatory requirements or the notice could lead to claims under state law.

We collect information about you from your transactions with our companies and from third parties.

We keep this information safe.

We share this information with:

- **our other companies;**
 - **You can opt out of this sharing for information from your credit reports and your applications.**
 - **The opt out does not apply to other information.**
- **unrelated third parties;**
 - **You can opt of this sharing with unrelated third parties.**
 - **unrelated third parties that work with us to offer you financial products or services;**
 - **third parties, as permitted by law.**

This policy applies to you even if your account is closed.

If you wish to opt out, you can call us toll-free at ###-###-####. You can also give us your name and address, check the blanks that apply to you, and mail this form to us at P.O. Box ###, #####, XX #####.

I opt out of your sharing with your other companies.

I opt out of your sharing with unrelated third parties.

Permit Two-Step Privacy Notices

In addition, Visa believes that the Agencies should, and have the authority to, provide financial institutions with the option of delivering privacy notices in two steps. More specifically, the Agencies should permit institutions to provide a very short privacy notice to customers if it is supplemented by the delivery of a more complete privacy notice when a consumer requests such a longer notice. Experience has shown that there are circumstances where delivering even the relatively short privacy notice set forth above 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 very brief notice could greatly facilitate consumer transactions.

Visa believes that the Agencies have the authority to permit a two-step privacy notice under the language of section 503 of the GLBA and the rulemaking power of section 504 of the GLBA. There is no express requirement in section 503 of the GLBA that notices be delivered before the transaction is consummated. Accordingly, the Agencies could provide for a short notice at the time currently specified by the Privacy Rule and a longer notice when requested to do so. More specifically, the Agencies could establish by rule that the complete notice is “provided” as required under section 503 of the GLBA, if it is provided on request after the customer has received a short notice, together with a notice of the availability of the longer notice. We recommend that the Agencies use their rulemaking authority granted under the GLBA to modify the Privacy Rule adopted pursuant to the GLBA by including additional flexibility regarding the timing of providing initial notices to allow for a two-step privacy notice.

Flexibility of Approach

The Agencies also specifically requested comment on whether additional information should be permitted in short-form privacy notices. Visa believes that the Agencies’ efforts to provide consumers with more meaningful disclosures could prove beneficial to both consumers and financial institutions alike. However, it is important that the Agencies continue to afford institutions flexibility. The Agencies should not mandate a single approach or specific language. While some institutions may prefer the two-step approach, others may prefer to deliver a single short-form privacy notice to customers. In addition, other institutions may wish to supplement the required notice with additional information. Financial institutions often have relevant policies and procedures in addition to what is required to be included in the current GLBA notices; therefore, it is important to permit those institutions to inform customers of any additional opt-in and/or opt-out choices available to them. For example, some financial institutions may wish to provide opt outs for direct marketing or to explain their privacy policies and practices in greater detail in order to foster consumer trust and confidence. Accordingly, financial institutions should retain flexibility with respect to the format and delivery of privacy notices. Providing an institution with the ability to use the approach that best suits the institution’s goals, and that is most consistent with the institution’s business operations, product or service offerings and available resources, will result in the most meaningful disclosures to consumers.

State Privacy Notice Requirements

The Agencies specifically requested comment on whether there were any special issues to consider in developing a short-form privacy notice that may arise from potential differences between federal and state law notice requirements. We believe that 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 particular states are likely to 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 have unique state-specific privacy notice requirements, section 507(b) of the GLBA permits states, by statute or regulation, to implement greater protections than the protections provided under the GLBA. States therefore have the flexibility to adopt additional notice requirements that are likely to add to the complexity of existing GLBA privacy notices.

For example, California and Vermont require that consumers opt in to the disclosure of personal information to third parties. Currently, Vermont requires unique notices that differ from the federal requirements even if the financial institution does not disclose information to third parties outside of applicable exceptions. Financial institutions have been confronted with the choice of incorporating a Vermont notice into their GLBA privacy notice or delivering a unique notice to Vermont customers. However, this delivery process is complicated by the requirement that Vermont customers receive this notice even when accounts are applied for, and obtained outside of, Vermont, such as while visiting in New York or Massachusetts. In addition, California provides for opt outs for three separate types of information sharing—affiliate, joint marketing partners and affinity partners—thereby adding greatly to the length and complexity of privacy notices and frustrating any efforts by the Agencies to simplify GLBA privacy notices. Federal regulatory efforts to provide customers with a clear and simple notice to understand privacy rights undoubtedly will not be achieved as long as states are permitted to implement additional privacy notice requirements, such as the notice requirements of Vermont and California. Among the states that have also introduced financial privacy legislation are Massachusetts, Minnesota, New Hampshire, New Jersey, New York and Illinois. If enacted, these state requirements could complicate privacy notices even further.

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 it meets all legal requirements, both state and federal. It is only when this goal is achieved and fully implemented, so that consumers unquestionably have had an ample opportunity to understand and act on their current privacy rights, that the importance consumers attach to these rights can be fully assessed. Thus, Visa believes that a uniform short-form GLBA privacy notice is critically important in facilitating consumer understanding and usefulness of privacy notices. The Agencies should exercise their authority under the GLBA to allow for shorter and simpler notices and, at the same time, the

Agencies should support legislation that provides for a single national standard for privacy notices, just as the recently enacted Fair and Accurate Credit Transactions Act of 2003 provides for a single national standard for the affiliate sharing of information and the use of information by affiliates.

* * * *

In conclusion, Visa appreciates the opportunity to submit comments on this very important issue. 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