Russell W. Schrader
Senior Vice President and
Assistant General Counsel

ORIGINAL

January 25, 2001

Via Hand Delivery

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

Re: Proposed FCRA Affiliate Sharing Interpretations

Dear Sir/Madam:

This letter is submitted in response to the request for comment from the Federal Trade Commission ("FTC") on its proposed Interpretations of the affiliate sharing provisions of the Fair Credit Reporting Act ("FCRA"). The comments set forth in this letter address a number of issues raised in the proposed FCRA Interpretations. Visa appreciates the opportunity to comment on this very important matter.

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. In fact, there are more than 1 billion Visa-branded cards held by consumers globally, which generate over $1.7 trillion in annual volume worldwide and over $700 billion per year in the U.S. Visa is accepted at more than 19 million worldwide locations, including at more than 674,000 automated teller machines in the Visa Global ATM Network.

General Comments on the Proposed FCRA Interpretations

At the outset, it is important to recognize that under the Gramm-Leach-Bliley Act ("GLB Act") Congress authorized the federal banking agencies to promulgate regulations to interpret and facilitate compliance with the FCRA. No such authority was provided for the FTC. Therefore, one must consider the appropriateness, or at least the timing, of the FTC's FCRA affiliate sharing proposal. In this regard, for example, it is possible to argue that no such action

[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

is appropriate for the FTC given the directive of the GLB Act or that, at a minimum, the FTC should delay any action on its part until after the federal banking agencies have completed their current rulemaking on this same subject. More specifically, it would seem to be difficult to support interpretations by the FTC regarding the affiliate sharing provisions of the FCRA that were not fully consistent with regulations being promulgated by the federal banking agencies on this same subject pursuant to Congressional directive, and it simply is not possible to achieve this consistency until the banking agencies have completed their ongoing regulatory process. Not only is such consistency important to facilitate overall compliance with the FCRA, but it likely is required by the GLB Act.

Visa also believes that if the FTC determines to proceed with this interpretive process, it is imperative that any resulting FCRA Interpretations conform to the final privacy regulations promulgated by the FTC and the federal banking agencies under the GLB Act, to the maximum extent feasible, where consistent with the FCRA. Nevertheless, it also is important that any final FCRA Interpretations recognize and reflect the underlying differences in the two statutes. In addition, as indicated above, it is critical that any final FTC Interpretations be substantially the same as the final regulations issued by the federal banking agencies.

Timing of Effective Date

In light of the detailed new disclosures required under the FTC's proposed FCRA Interpretations, it is imperative for the FTC to provide an adequate period of time to implement any final FCRA Interpretations, and that the effective date be the same as that for the corresponding regulations issued by the banking agencies. Many "financial institutions," as that term is defined in the GLB Act, already are in the final stages of preparing their GLB Act privacy notices and soon will begin printing those notices. However, the FTC's GLB Act privacy regulations require the FCRA opt-out notice to be included in the GLB Act privacy notice. If the provisions in the FTC's proposed FCRA Interpretations are adopted in their final form with too short of an implementation period, it will force such companies to significantly alter their existing GLB Act compliance plans and could require companies to revise and reprint millions of GLB Act privacy notices to comply with any such final FCRA Interpretations. Providing too short of an implementation period also could prevent many such companies from providing privacy notices to existing customers before the July 1, 2001 full compliance date of the GLB Act.

The affiliate sharing provisions in the FCRA have been in effect since 1996. Thus, for several years, companies have been providing opt-out notices to consumers in order to share certain information with affiliates. The FTC's proposed FCRA Interpretations would require significant changes to the opt-out notices currently provided by such companies to their customers. There simply is no policy reason to require companies to implement these significant changes in an unfairly short time period, particularly when doing so would impair the ability of such companies to comply with the GLB Act requirement to provide privacy notices to existing customers before the July 1, 2001 full compliance date, or substantially increase their cost of doing so.

If the FTC provides an inadequate implementation time period, many companies simply will not be able to comply with the GLB Act despite their best efforts. Such an outcome would benefit neither those companies nor their consumer customers. Therefore, in order to avoid adversely affecting the ongoing efforts of companies to comply with their transitional notice requirements under the GLB Act, the FTC should make it absolutely clear that companies need not attempt to incorporate any new FCRA affiliate sharing notice requirements in the initial GLB Act privacy notices given to their existing customers. Instead, such companies should be permitted to satisfy any new FCRA affiliate sharing opt-out notice requirements in connection with the first annual GLB Act privacy notices provided by those companies to their existing customers. That is, for existing customers who must be provided with a GLB Act privacy notice before July 1, 2001, companies should not be required to change the privacy notices given to those customers to reflect the more detailed disclosures required by any FTC FCRA Interpretations. In addition, for those customers who establish account relationships with such companies on or after July 1, 2001 and prior to January 1, 2002, any FCRA Interpretations should be effective on the date by which the first annual privacy notice must be provided to those customers. This will provide sufficient time for companies to modify their GLB Act notices, while allowing companies to utilize their existing stock of forms. This approach also will enable companies to comply with both the GLB Act privacy notice requirements, and the new FCRA notice provisions, in a manner that minimizes compliance costs and burdens, and provides consumers with meaningful information in a reasonable manner.

Definition of Opt-Out Information

The proposed FCRA Interpretations introduces a new concept, "opt-out information," which is defined, in part, as information that bears on creditworthiness and that is not transaction or experience information. While the FTC has attempted to provide some clarification on what information falls under the umbrella of "opt-out information," the FTC's proposed FCRA Interpretations would grant an "opt-out" right for more types of information and for more types of "sharing" than is required under the FCRA. Specifically, as drafted, the proposed FCRA Interpretations would significantly expand the types of information covered beyond the definition of "consumer report" under the FCRA and, thus, it is imperative that the FTC narrow the scope of this definition. In particular, only information that otherwise constitutes a consumer report under the FCRA should be subject to notice and opt-out requirements. For example, the FTC should expressly provide that only information that is "communicated" by a consumer reporting agency and that otherwise meets the definition of a consumer report is covered by the opt-out notice. Under the FCRA, a company clearly may share application or other information with an affiliate without providing an opt-out notice where the purpose of the sharing is to enable that affiliate to process or evaluate information on the company's behalf. In this case, the sharing of information would not constitute the sharing of a consumer report because there has been no communication of information between the company and its service-providing affiliate within the meaning of the FCRA. Moreover, the ability of companies to share application and transaction information with such affiliates and service providers is necessary for the companies to engage in proper risk management. For example, many companies must share application information with an underwriting affiliate in order to adequately assess the credit risk associated with a consumer.

Similarly, the FTC and its staff have recognized for years that the FCRA was not intended to regulate the sharing of credit-related information between two entities that are joint users of that information or where one acts as an agent on behalf of the other. In these situations, companies may share information without providing an opt-out notice and without being viewed as a consumer reporting agency, because the information is used by both parties for the same purpose -- for example, to consider a consumer's application for credit. Furthermore, a company may transfer assets from one affiliate to another, and the related transfer of customer information does not require an opt-out notice. As these examples illustrate, it is essential for the FTC to recognize in any final FCRA Interpretations that there are many common business practices where information may be shared, without the use of the opt-out notice, and without the sharing company being viewed as a consumer reporting agency.

The FTC also should recognize and incorporate into any final FCRA Interpretations the many other circumstances where an affiliate can have access to information of another affiliate without constituting the transfer of consumer reports. For example, any final FCRA Interpretations should allow companies to provide information to an affiliate when a consumer provides consent. In addition to paralleling the FTC's GLB Act privacy regulations, this would allow companies to share, for example, a consumer's application with an affiliated party, if the consumer does not qualify for the product he or she initially applied for, as the FTC staff has recognized in the case of nonaffiliated lenders. Moreover, this would allow a consumer to instruct one affiliate to provide a copy of the application submitted by that consumer to other affiliates so that the consumer can seek additional products from those other affiliates without the burden and inconvenience of completing additional applications for those other affiliates, a practice that already is approved by existing guidance from the Office of the Comptroller of the Currency, and thus should be reflected in final regulations of the banking agencies.

In addition to correcting the overly broad scope of opt-out information, it also is important for the FTC to reflect in the definition of "opt-out information" in any final FCRA Interpretations all of the exclusions from the definition of a consumer report set forth in the FCRA itself. More specifically, it is essential that any final Interpretations recognize all of the exclusions from consumer reports in section 603(d)(2) of the FCRA.

Contents of Opt-Out Notice

The FTC requested comment on whether a company should be required to disclose how long a consumer has to respond to an opt-out notice before the company may begin disclosing such information. The FTC should not require companies to disclose how long a consumer has to respond to an opt-out notice because it is not required by the FCRA and such a disclosure would likely be confusing to customers. For example, because a consumer has an ongoing right to opt-out, stating that consumers have "X" days to respond could lead consumers to believe that they have a right to opt-out *only* during that time period. Comment was also requested on whether the Interpretations should state that companies must disclose that they will wait a specified period (such as 30 days) before sharing consumer information with affiliates. The FTC should not require companies to disclose that they will wait a specified period before sharing information. The time period should be flexible to enable companies to establish their own

reasonable procedures to implement a consumer's opt-out request. Moreover, such a requirement is not contained in the FCRA. Also, the inclusion of such disclosures would be inconsistent with the opt-out notice provided in the GLB Act privacy regulations. To make any final FCRA Interpretations consistent with the GLB Act privacy regulations and to avoid consumer confusion, any FCRA Interpretations should not impose such additional notice requirements.

Reasonable Opportunity to Opt-Out

The proposed FCRA Interpretations indicate that a company provides a reasonable opportunity to opt-out if it provides a reasonable period of time following the delivery of the opt-out notice for a consumer to opt-out. The FTC then provides several examples of what constitutes a "reasonable opportunity" to opt-out. The FTC should reduce, rather than increase, the number of examples in any final FCRA Interpretations. The numerous examples may be interpreted by companies trying to comply with the FCRA Interpretations as an exhaustive list for what is an appropriate period of time for consumers to opt-out. Also, each example provides for the same 30-day time period regardless of the method of delivery of the notice. We believe it is inappropriate for the FTC to include the 30-day standard in each of the examples. What is a "reasonable" time period should vary depending upon the medium used for the delivery of the opt-out notices. For example, the time period for notice provided in person or by electronic means should be far shorter than 30 days, since the consumer is given the immediate opportunity to exercise his or her choice.

In addition, the proposed FCRA Interpretations provide an example for electronic opt-out notices that suggests that companies must obtain acknowledgements from customers of the receipt of such electronic notices. The FTC should not require companies to obtain acknowledgements from consumers that they have received such notices. Such a requirement would be overly burdensome to companies and is inconsistent with the FCRA. Furthermore, consumer financial protection laws and regulations that require delivery of information (for example, Regulations B, E, and Z) do not require acknowledgements from consumers to meet the requirement for the delivery of individual notices or disclosures under those regulations, and such acknowledgments should not be added to any FCRA Interpretations.

Reasonable Method of Opting Out

The proposed FCRA Interpretations permit a company to require each customer to opt-out through specific means, as long as *that* means is reasonable for *that* consumer. It is important that the FTC retain this provision in any final FCRA Interpretations, with certain clarifications. This approach has been used in other consumer notice laws, including the GLB Act privacy regulations. By allowing companies to specify the specific means that a consumer must use to opt-out, companies will be able to effectively and efficiently receive and implement consumer opt-out requests. However, the FTC should modify the language in any final FCRA Interpretations. As proposed, the FCRA Interpretations could be read to suggest that an individualized determination for each consumer is needed to provide the specific means for

opting out; clearly, a company should be able to adopt a single opt-out policy that applies to all of its customers.

Delivery of Opt-Out Notice

The proposed FCRA Interpretations indicate that an oral notice of the consumer's right to opt-out would not comply with the opt-out notice requirement, and that a written or an electronic notice is required. The FTC should not incorporate such a written notice in any final FCRA Interpretations. The FCRA does not have a written notice requirement for affiliate sharing opt-out notices, and any final FCRA Interpretations should allow oral notices to remain consistent with the FCRA itself.

The proposed FCRA Interpretations also indicate that a company must provide the notice so that it can be retained or obtained by the consumer for use at a future time. If the FTC requires a written notice, the FTC should make it clear that a company has the option of providing the opt-out notice by either: (i) giving the notice in a form that a customer can retain, or (ii) allowing the customer to obtain another copy of the company's current opt-out notice at a later time. If a company provides a paper copy of a notice that can be retained by the consumer, the company should not also be required to provide an additional copy at a later time, particularly since the notice must be provided annually as part of the GLB Act privacy regulations. It is important that any final FCRA Interpretations provide companies with this flexibility, just as is the case with the GLB Act privacy regulations.

As is the case with the federal agency privacy regulations, including those of the FTC, the proposed FCRA Interpretations, as well as the federal banking agency proposed FCRA regulations, provide that an institution may deliver the opt-out notice electronically. The FTC has requested comment on how this delivery requirement should be applied in light of the Electronic Signatures in Global and National Commerce Act ("E-Sign Act"). Due to the fact that the federal banking agency proposed FCRA regulations provide that the FCRA opt-out notice may be provided electronically, the E-Sign Act does not come into play. That is, the provision in the E-Sign Act dealing with the delivery of disclosures applies only if a law requires a notice to be provided to a consumer in writing. Because the agencies' proposed FCRA regulations expressly provide that a notice may be provided electronically if certain conditions are met, the E-Sign Act is not implicated. Thus, we do not believe the FTC needs to address the E-Sign Act.

Time By Which Opt-Out Must Be Honored

The FTC has solicited comment on whether a fixed number of days should be established that would be deemed to be a reasonable period of time for a company to comply with a consumer's opt-out direction. The FTC should not set a fixed number of days for companies to comply with consumer opt-out requests. What constitutes a reasonably practicable time period will vary due to numerous factors, such as the technology used by the particular company or the delivery method of the opt-out notices. The time period should be flexible to enable companies, both large and small, to establish their own reasonable procedures for honoring customer opt-

outs. Moreover, the GLB Act privacy regulations do not have a fixed time period, and any final FCRA Interpretations should be consistent with the GLB Act privacy regulations in this respect.

Duration of Opt-Out

The proposed FCRA Interpretations provide that an opt-out continues to apply to the information described in the applicable opt-out notice until revoked by the customer in writing, or if the customer agrees, electronically, as long as the customer's relationship with the company continues. The FTC should not limit the ability of a customer to revoke an opt-out solely to the use of a written or an electronic notice. The FCRA does not have such a writing requirement, and a customer should be allowed to orally revoke his or her opt-out decision. Such a revocation method is convenient for consumers and companies alike.

We appreciate the opportunity to comment on this very important subject. If we can assist you further, or if you have any questions regarding the above, please feel free to call me at 415/932-2178.

Sincerely,

Russell W. Schrader