



March 15, 2001

*Via Hand Delivery*

Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: ESIGN Study-Comment P004102

Dear Sir or Madam:

This letter is submitted in response to the request for comment from the Federal Trade Commission ("FTC") and the National Telecommunications and Information Administration, United States Department of Commerce (collectively the "Agencies") on the benefits and burdens of Section 101(c)(1)(C)(ii) (the "Demonstration Requirement") of the Electronic Signatures in Global and National Commerce Act (the "Act"). Section 105(b) of the Act requires the Agencies to study and report to Congress on the benefits and burdens of requiring a consumer to demonstrate the consumer's ability to electronically access information that will be provided electronically to the consumer. Visa appreciates the opportunity to comment on this very important matter.

The Visa Payment System, of which Visa U.S.A.<sup>1</sup> 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 \$1.8 trillion in annual volume worldwide and over \$810 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.

The Act states that information legally required to be provided to a consumer in writing may be provided or made available electronically if the consumer "consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be

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<sup>1</sup> Visa U.S.A. is a membership organization comprised of U.S. financial institutions licensed to use the Visa service marks in connection with its payment systems.

used to provide the information that is the subject of the consent.” Section 101(c)(1)(C)(ii). Although Visa believes that the Demonstration Requirement is an unnecessary burden on electronic commerce and that it should be repealed, if the Agencies decline to recommend repeal of this provision, Visa encourages the Agencies to recommend that Congress not otherwise address the Demonstration Requirement until sufficient time has elapsed to develop more information as to how the Demonstration Requirement has worked in practice.

Visa believes that the Demonstration Requirement is unnecessary and that it is based on a premise that underestimates the ability of consumers to operate in an electronic environment. Moreover, as consumers become increasingly comfortable with the new technologies and the formats that they employ, any perceived need for consumers to demonstrate the ability to use a particular format or means for the electronic delivery of the information will diminish substantially.

For example, there is no reason that a consumer should not be able to open an account at an office of a financial institution and concurrently agree to receive his or her account statements at the institution’s Web site, or to receive the statements by e-mail in a recognized format, without having to return to their home or office, where they currently access the Internet, and demonstrate their ability to access the financial institution’s Web site or their ability to exchange e-mails with the financial institution. Indeed, the idea that such a demonstration is necessary leads to impractical results. For example, if a consumer needs to demonstrate the ability to access information initially, a similar suggestion might be made that a corresponding demonstration be required whenever the consumer changes his or her means of accessing the information electronically, including any change made in the consumer’s hardware or software. Of course, such a requirement would be wholly unworkable, and would impose an overwhelming burden on electronic commerce.

At this point in time, however, we are not aware that the Demonstration Requirement has proved to be a significant impediment to the ability of financial institutions to offer electronic products and services. Primarily, this is because the legislative history of the Demonstration Requirement clearly has afforded financial institutions the ability to address this requirement through a number of different processes. This flexibility will be even more critical going forward as new technologies and new means of communicating supplant today’s methods.

Numerous statements in the legislative history of the Act clarify that the Demonstration Requirement is to be viewed flexibly. For example, then House Energy and Commerce Committee Chairman Bliley stated that:

[t]he requirement of a reasonable demonstration is not intended to be burdensome on consumers or the person providing the electronic record, and could be accomplished in many ways. For example, the “reasonable

demonstration" requirement is satisfied if the provider of the electronic records sent the consumer an e-mail with attachments in the formats to be used in providing the records, asked the consumer to open the attachments in order to confirm that he could access the documents, and requested the consumer to indicate in an e-mailed response to the provider of the electronic records that he or she can access information in the attachments. Similarly, the "reasonable demonstration" requirement is satisfied if it is shown that in response to such an e-mail the consumer actually accesses records in the relevant electronic format. 146 Cong. Rec. H4,352 (daily ed. June 14, 2000) (statement of Rep. Bliley).

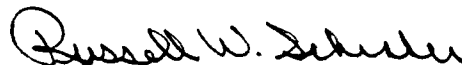
This general view was repeated in a colloquy between Congressmen Bliley and Markey, 146 Cong. Rec. H4,360 (daily ed. June 14, 2000) (colloquy among Rep. Bliley and Rep. Markey), in a statement by Senators Hollings, Wyden and Sarbanes, 146 Cong. Rec. S5,230 (daily ed. June 15, 2000) (statement of Sen. Hollings, Sen. Wyden and Sen. Sarbanes), and in a colloquy between Senators McCain and Abraham, 146 Cong. Rec. S5,282 (daily ed. June 16, 2000) (colloquy among Sen. McCain and Sen. Abraham). These statements individually and collectively indicate the clear intention of Congress that the Demonstration Requirement be interpreted flexibly.

As a result, if the Demonstration Requirement is not to be repealed entirely, it is essential that the financial services industry have the opportunity to experiment with different approaches to satisfying this requirement as it exists today. The temptation to refine or clarify the requirement should be resisted in the absence of clearly demonstrated problems, lest those refinements or clarifications needlessly disrupt existing and future programs for providing information to consumers. In this regard, we believe it simply is not possible to demonstrate such problems at this time.

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Visa appreciates this opportunity to comment on this very important issue. If you have any questions concerning these comments, or if we can otherwise be of assistance in connection with this matter, please do not hesitate to contact me at (415) 932-2178.

Sincerely yours,



Russell W. Schrader