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Senior Vice President and
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November 30, 2000



Via Hand Delivery and Electronic Mail

Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th and C Streets, NW
Washington, DC 20551
Docket No. R-1082

Communications Division
Office of the Comptroller
of the Currency
250 E Street, SW
Washington, DC 20219
Docket No. 00-20

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

Manager, Dissemination Branch
Information Management &
Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: Docket No. 2000-81

Re: Proposed FCRA Affiliate Sharing Rule

Dear Sirs and Madams:

This letter is submitted in response to the request for comment from the Federal Reserve Board ("FRB"), the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC") and the Office of Thrift Supervision ("OTS") (collectively, the "Agencies") on their proposed rule implementing 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 regulations. 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.

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 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 970 million Visa-branded cards held by consumers globally, which generate over \$1.5 trillion in annual volume worldwide and over \$700 billion per year in the U.S. Visa is accepted at more than 18 million worldwide locations, including at more than 550,000 automated teller machines in the Visa Global ATM Network.

General Comments on the Proposed FCRA Rule

Visa commends the Agencies for their efforts to conform the proposed FCRA rule with the Agencies' final privacy regulations under the Gramm-Leach-Bliley Act ("GLB Act"), where feasible and consistent with the FCRA. The Agencies recognize the need for conformity between the FCRA regulations and the Agencies' final GLB Act privacy regulations, where it is appropriate to do so. Nevertheless, as indicated below, it also is important that the final FCRA rule recognize and reflect the underlying differences in the two statutes.

Timing of Effective Date

In light of the detailed new disclosures required under the Agencies' proposed FCRA rule, it is imperative for the Agencies to provide an adequate period of time to implement the final FCRA rule. We also believe that it is important for the Agencies to provide guidance to financial institutions on the effective date of the FCRA rule prior to the issuance of a final rule because many institutions are already finalizing their GLB Act privacy notices. Encouraged by the Agencies to comply with the GLB Act notice requirement as soon as they can do so, many financial institutions already are in the final stages of preparing their GLB Act privacy notices and soon will begin printing those notices. However, the Agencies' GLB Act privacy regulations require the FCRA opt-out notice to be included in the GLB Act privacy notice. If the provisions in the proposed FCRA rule are adopted in their final form with too short of an implementation period, it will force financial institutions to significantly alter their existing GLB Act compliance plans and could require institutions to revise and reprint millions of GLB Act privacy notices to comply with such a final FCRA rule. Providing too short of an implementation period also could prevent many financial institutions 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, institutions have been providing opt-out notices to consumers in order to share certain information with affiliates. The Agencies' proposed FCRA rule would require significant changes to the opt-out notices currently provided by institutions to their customers. There simply is no policy reason to require institutions to implement these significant changes in an unfairly short time period, particularly when doing so would impair the ability of financial institutions to comply with the GLB Act requirement

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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 Agencies provide an inadequate implementation time period, many institutions simply will not be able to comply with the GLB Act despite their best efforts. Such an outcome would benefit neither consumers nor financial institutions. Therefore, in order to avoid adversely affecting the ongoing efforts of financial institutions to comply with their transitional notice requirements under the GLB Act, the Agencies should make it absolutely clear that financial institutions 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, financial institutions 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 institutions to their existing customers. That is, for existing customers who must be provided with a GLB Act privacy notice before July 1, 2001, institutions should not be required to change the privacy notices given to those customers to reflect the more detailed disclosures required by the Agencies' FCRA rule. In addition, for those customers who establish account relationships with financial institutions on or after July 1, 2001 and prior to January 1, 2002, the FCRA rule 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 institutions to modify their notices, while allowing institutions to utilize their existing stock of forms. This approach also will enable financial institutions 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.

Purpose and Scope

Amendments to the FCRA made by the GLB Act clearly provide that the FRB's FCRA rule also applies to bank holding companies and their affiliates. Therefore, the FRB should make it clear that its version of the new FCRA affiliate sharing rule and any other FCRA rules it adopts apply to bank holding companies and their nonbank affiliates, and that those entities are subject solely to those FRB FCRA rules, as contemplated by the statute. This clarification will ensure, to the extent possible, that all institutions within the same corporate family are governed by identical rules; this also will minimize the burden on such affiliated companies and will help avoid customer confusion by allowing institutions to provide a single notice for affiliated companies, should institutions choose to do so.

Definition of Opt-Out Information

The proposed FCRA rule 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 Agencies have attempted to provide some clarification on what information falls under the umbrella of "opt-out information," the Agencies' proposed FCRA rule would grant an "opt-out" right for more types of information and for more types of "sharing" than is provided for under the FCRA. Specifically, as drafted, the proposed FCRA rule would significantly expand the type of information covered beyond the definition of "consumer report" under the FCRA and, thus, it is imperative that Agencies 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 Agencies 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 financial institution 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 financial institution'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 institution and its service providing affiliate within the meaning of the FCRA. Moreover, the ability of financial institutions to share application and transaction information with these affiliates and service providers is necessary for the institutions to engage in proper risk management. For example, many financial institutions must share application information with an underwriting affiliate in order to adequately assess the credit risk associated with a consumer.

Similarly, the Federal Trade Commission ("FTC") and its Staff have recognized 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, the financial institutions 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, an institution 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 Agencies to recognize in the final FCRA rule that there are many common business practices where information may be shared, without the use of the opt-out notice, and without the sharing institution being viewed as a consumer reporting agency.

The Agencies also should recognize and incorporate into the final FCRA rule the many other circumstances where an affiliate can have access to information of another affiliate without constituting the transfer of consumer reports. For example, the final FCRA rule should allow financial institutions to provide information to an affiliate when a consumer provides consent. In addition to paralleling the Agencies' GLB Act privacy regulations, this would allow institutions 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 permitted 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 OCC.

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

Contents of Opt-Out Notice

The Agencies request comment on whether financial institutions should be required to disclose how long a consumer has to respond to an opt-out notice before financial institutions may begin disclosing such information. The Agencies should not require financial institutions 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. Also, the inclusion of such a disclosure would be inconsistent with the opt-out notice provided in the GLB Act privacy regulations. To make the final FCRA rule consistent with the GLB Act privacy regulations and to avoid consumer confusion, the FCRA rule should not impose such an additional notice requirement.

Reasonable Opportunity To Opt Out

The proposed FCRA rule indicates that a financial institution 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 Agencies then provide several examples of what constitutes a "reasonable opportunity" to opt out. The Agencies should reduce, rather than increase, the number of examples in the final FCRA rule. The numerous examples may be interpreted by financial institutions trying to comply with the FCRA rule 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 Agencies 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 rule provides an example for electronic opt-out notices which suggests that financial institutions must obtain acknowledgements from customers of the receipt of such electronic notices. The Agencies should not require financial institutions to obtain acknowledgements from consumers that they have received such notices. Such a requirement would be overly burdensome to financial institutions and is inconsistent with the FCRA and with the opt-out rules adopted by the Agencies in the GLB Act privacy regulations. In addition, 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 the FCRA rule.

Reasonable Method of Opting Out

The proposed FCRA rule permits an institution to require each customer to opt out through specific means, as long as *that* means is reasonable within the meaning of the FCRA rule. It is important that the Agencies retain this provision in the final FCRA rule, with certain clarifications. This approach has been used in other consumer notice laws, including the GLB Act privacy regulations. By allowing financial institutions to specify the specific means that a consumer must use to opt out, financial institutions will be able to effectively and efficiently receive and implement consumer opt-out requests. However, the Agencies should modify the language in the final FCRA rule. As proposed, the FCRA rule could be read to suggest that an individualized determination for each consumer is needed to provide the specific means for opting out; clearly, a financial institution 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 rule indicates 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 Agencies should not incorporate such a written notice in the final FCRA rule. The FCRA does not have a written notice requirement for affiliate sharing opt-out notices, and the final FCRA rule should allow oral notices to remain consistent with the FCRA itself.

The proposed FCRA rule also indicates that a financial institution must provide the notice so that it can be retained or obtained by the consumer for use at a future time. If the Agencies require a written notice, the Agencies should make it clear that a financial institution has the option to provide 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 institution's current opt-out notice at a later time. If an institution provides a paper copy of a notice that can be retained by the consumer, the institution 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 the final FCRA rule provide financial institutions with this flexibility, just as is the case with the GLB Act privacy regulations.

Time By Which Opt Out Must Be Honored

The Agencies have 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 financial institution to comply with a consumer's opt-out direction. The Agencies should not set a fixed number of days for financial institutions 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 financial institution or the delivery method of the opt-out notices. The time period should be flexible to enable institutions, 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 the final FCRA rule should be consistent with the GLB Act privacy regulations in this respect.

Duration of Opt Out

The proposed FCRA rule provides 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 institution continues. The Agencies 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 financial institutions alike.

Prohibition Against Discrimination

The proposed FCRA rule indicates that if a consumer is an applicant for credit, the financial institution must not discriminate against the consumer if the consumer opts out of the institution's information sharing with affiliates. We believe the Agencies should not provide guidance on these discrimination issues in the FCRA rule. Rather, all of the discussion regarding discrimination should be addressed solely in Regulation B and should not be included in the FCRA rule. As the Agencies recognize, the Equal Credit Opportunity Act ("ECOA") and implementing Regulation B address the discrimination issue. The FCRA does not address discrimination, thus, any interpretation of what a "prohibited basis" is under the ECOA and Regulation B should be discussed under that regulation and not the FCRA rule. Therefore, we believe that the Agencies should delete the discrimination discussion from the FCRA rule and address the issue in Regulation B.

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To the extent that the discrimination issue is addressed in Regulation B, the Agencies should provide clarification on the following issues. The Agencies should make it clear in Regulation B that financial institutions can still provide additional benefits, such as special credit offers and other credit services, to customers who decide not to opt out. Financial institutions should be able to reward those customers who allow the sharing of information without being concerned that the granting of such additional benefits may somehow violate the ECOA and Regulation B.

In addition, the sharing of information is an integral part of certain credit programs, and an institution should not be viewed as violating the ECOA if a consumer does not qualify for a particular account because he or she decides not to allow the sharing of information which is an element of that type of account. For example, co-branded credit card programs may provide points or other rewards to consumers who use such cards and may contemplate the offering of coupons or early notice of sales or new product offerings by that co-brand partner whose name appears on the card. Under such a program, information is shared to implement the very elements of the program. If a consumer chooses to opt out of such sharing, the institution should be able to offer a non-cobrand card that does not involve such information sharing.

Furthermore, by sharing consumer information with affiliates, financial institutions are able to achieve, and pass on to customers, cost savings and efficiencies that accompany the sharing of information. For example, an institution that uses a consumer report for multiple purposes rather than having to purchase multiple copies of a report, or affiliated financial institutions that are able to share information and thus combine several accounts onto a single statement or into a single envelope, should be able to pass on the resulting cost savings to consumers. Regulation B should make clear that passing on cost savings to those consumers who allow information to be shared, does not violate the ECOA and Regulation B.

We appreciate the opportunity to comment on this important subject. If we can assist you further, or if you have any questions regarding the above, please feel free to call me at 650/432-3111.

Sincerely,

Russell W. Schrader