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August 6, 2004

FEDERAL TRADE COMMISSION  
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Federal Trade Commission  
Office of the Secretary  
Room H-159 (Annex S)  
600 Pennsylvania Avenue  
Washington, DC 20580



Re: FACTA Notices, Matter No. R411013

Ladies and Gentlemen:

This comment letter is submitted on behalf of Visa U.S.A. Inc. in response to the Federal Trade Commission's ("FTC") publication of proposed guidance for forms and request for public comment, published in the July 16, 2004 Federal Register. In particular, the FTC has requested comment on two summaries of rights and two notices of duties under the Fair Credit Reporting Act ("FCRA").<sup>1</sup> Visa appreciates the opportunity to comment on this very important issue. The proposed summaries of rights include: (1) a summary of rights of identity theft victims required by section 609(d) of the FCRA; and (2) a general summary of consumer rights under the FCRA. The proposed notices of duties include: (1) a notice of responsibilities under the FCRA of persons that furnish information to consumer reporting agencies; and (2) a notice of responsibilities under the FCRA of persons that obtain consumer reports from consumer reporting agencies.

The Visa Payment System, of which Visa U.S.A.<sup>2</sup> 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.

Visa generally supports the FTC's proposed summaries of rights and notices of duties as required by FCRA sections 609 and 607 respectively. However, we believe that minor changes to the proposed summaries and notices would enhance their overall clarity and accuracy.

<sup>1</sup> 69 Fed. Reg. 42,616 (July 16, 2004).

<sup>2</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 payment systems.

## **Proposed Summaries of Rights**

### ***Summary of Rights of Identity Theft Victims***

The FTC's proposed summary of rights of identity theft victims would be implemented as Appendix E to 16 C.F.R. part 698. We believe that numbered paragraph two of this summary should be modified in order to improve its clarity. Specifically, the third full sentence of paragraph two, which reads, "It also may delay your ability to obtain credit," does not adequately define the potential cause of consumer delay in obtaining credit in conjunction with the use of fraud alerts. We believe that the sentence should be made more definite by substituting "But a fraud alert" for the word "It." The modified sentence, which would read, "But a fraud alert also may delay your ability to obtain credit," would sufficiently clarify that a potential delay in credit might be caused by the imposition of the fraud alert itself, rather than by the action(s) of a creditor.

### ***General Summary of Consumer Rights***

The FTC's proposed general summary of consumer rights would be implemented as Appendix F to 16 C.F.R. part 698. We believe that three textual modifications are necessary in order to more accurately reflect the requirements of the FCRA. First, we believe that the section entitled, "You can find out what is in your file," contains an inaccurate statement as to the right of a consumer to request and receive a free credit report from a consumer reporting agency ("CRA").<sup>3</sup> As proposed, the fourth sentence of this section states, in part, that, "You are entitled to free reports if a person has taken adverse action against you because of information in a report; if you are the victim of identity theft; if you are the victim of fraud; if you are on public assistance; or if you are unemployed but expect to apply for employment within 60 days."<sup>4</sup> FCRA section 612(c) specifically includes the right of a consumer to receive a free credit report if that consumer "has reason to believe that the file on the consumer at the agency contains inaccurate information due to fraud." Therefore, because FCRA section 612(c) provides a right to a free report based on a consumer's belief that his or her file contains inaccurate information due to fraud and does not create a separate right for a "victim of fraud" to receive a free report, we believe that the portion of this section that reads "if you are the victim of fraud" should be deleted. Alternatively, the language should be changed to read specifically that a consumer may receive a free report "if you have reason to believe that your report contains inaccurate information due to fraud."

Second, we believe that the section entitled, "Inaccurate information must be corrected or deleted," should be modified to reflect that both CRAs and furnishers may continue to report negative data that they verify as being accurate.<sup>5</sup> Therefore, the second sentence of this section should read, "However, a consumer reporting agency or furnisher may continue to report negative data that these entities verify as being accurate."

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<sup>3</sup> 69 Fed. Reg. at 42,622.

<sup>4</sup> *Id.*

<sup>5</sup> 69 Fed. Reg. at 42,623.

Finally, we believe that the section entitled, “You may seek damages from violators,” is overbroad in its application of FCRA sections 616 and 617 in conjunction with the potential liability of users of consumer reports.<sup>6</sup> As proposed, this section states that, “If a consumer reporting agency, a user of consumer reports, or, in some cases, a furnisher of information to a consumer reporting agency violates the FCRA, you may sue them in State or Federal court.”<sup>7</sup> While it is true that there are instances in which FCRA sections 616 and 617 do not apply to a furnisher of information, there also are circumstances in which sections 616 and 617 do not apply to users of consumer reports. For example, users of consumer reports are not liable under sections 616 and 617 for violation of risk-based pricing notices.<sup>8</sup> Therefore, we believe that this section should be revised to read, “If a consumer reporting agency or, in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may sue them in State or Federal court.”

### **Proposed Notices of Duties**

#### ***Notice of Duties of Furnishers***

The FTC’s proposed notice of duties of furnishers would be implemented as Appendix G to 16 C.F.R. part 698. We believe that four textual modifications are necessary to more accurately reflect and clarify the requirements of the FCRA. First, we believe that the language of the introductory section, which indicates that, “State law may impose additional requirements” on all persons who furnish information to CRAs, is misleading and potentially confusing.<sup>9</sup> Pursuant to FCRA section 625(b)(1)(F)(i) and (ii), state law is preempted except for the grandfathered provisions of Massachusetts and California. Thus, we believe that this clause should be modified to read, “California and Massachusetts law impose additional requirements.”

Second, we believe that the section entitled, “Duties After Notice of Dispute from Consumer,” does not accurately reflect the time period in which a furnisher must complete a dispute investigation.<sup>10</sup> As proposed, the second sentence of this section states that, “Once these regulations are issued, furnishers must comply with them and complete an investigation within 30 days (or 45 days, if the consumer later provides relevant additional information) unless the dispute is frivolous or irrelevant or comes from a ‘credit repair’ organization.”<sup>11</sup> Under FCRA section 623(a)(8)(E)(iii), a furnisher must complete an investigation within the same time period as a CRA, which is 45 days (rather than 30 days) if the error is on a consumer report obtained through the CRA’s central source.<sup>12</sup> Accordingly, the second sentence of this section should read, in part, “Once these regulations are issued, furnishers must comply with them and complete an investigation within 30 to 45 days (or an additional 15 days, if the consumer later provides relevant additional information). . . .”

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> FCRA § 615(h)(8)(A).

<sup>9</sup> 69 Fed. at 42,623.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> FCRA § 623(a)(8)(E)(iii); FCRA § 612(a)(3).

Third, we believe that the section entitled, “Duties of Financial Institutions When Reporting Negative Information,” does not adequately reflect the Federal Reserve Board’s (“FRB”) prescribed model notices for the reporting of negative information under 12 C.F.R. part 222, Appendix B.<sup>13</sup> As proposed, this section indicates that furnishers must notify consumers in writing if they “furnish negative information to a CRA,” and that the FRB has “prescribed a model disclosure.”<sup>14</sup> Pursuant to the FRB’s final rule on negative information model notices, furnishers have the option of providing a one-time notice in advance of providing negative information to a CRA or within 30 days after providing negative information.<sup>15</sup> Therefore, to accurately reflect this information, we believe this section should read, “Furnishers who are financial institutions must notify consumers in writing if they may furnish or have furnished negative information to a CRA.” In addition, we believe this section should indicate that, “The Federal Reserve Board has prescribed two model notices for this purpose.”

Finally, we believe that the section entitled, “Duties When ID Theft Occurs,” does not reflect exceptions included in FCRA section 615(f).<sup>16</sup> As proposed, the third sentence of this section states that, “When any furnisher of information is notified . . . that a debt has resulted from identity theft, the furnisher may not sell, transfer, or place for collection the debt.”<sup>17</sup> In contrast to this statement, however, the FCRA contains exceptions in section 615(f) including: (1) “the repurchase of a debt in any case in which the assignee of the debt requires such repurchase because the debt has resulted from identity theft;”<sup>18</sup> (2) “the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing;”<sup>19</sup> or (3) “the transfer of debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the assets of an entity.”<sup>20</sup> Consequently, we believe the third sentence of this section should be modified to read, “When any furnisher of information is notified . . . that a debt has resulted from identity theft, the furnisher may not sell, transfer, or place for collection the debt, except where permitted under the FCRA.”

### *Notice of Duties of Users*

The FTC’s proposed notice of duties of users would be implemented as Appendix H to 16 C.F.R. part 698. We have identified four areas of text that we believe require revision in order to more accurately reflect the requirements of the FCRA. The first three revisions are located in section I of the notice, which sets forth the responsibilities imposed by the FCRA on users of consumer reports generally. The fourth revision is located in section II of the notice, which addresses additional disclosures required by creditors.

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<sup>13</sup> 69 Fed. Reg. at 42,624.

<sup>14</sup> *Id.*

<sup>15</sup> 69 Fed. Reg. 33,281 (June 15, 2004).

<sup>16</sup> 69 Fed. Reg. 42,616, 42,624 (July 16, 2004).

<sup>17</sup> *Id.*

<sup>18</sup> FCRA § 615(f)(3)(A).

<sup>19</sup> FCRA § 615(f)(3)(B).

<sup>20</sup> FCRA § 615(f)(3)(C).

### Section I: Obligations Of All Users of Consumer Reports

First, under subsection A entitled, “Users Must Have a Permissible Purpose,” we believe the list of permissible purposes listed in the notice is not complete.<sup>21</sup> As proposed, the notice indicates that one such permissible purpose includes “the extension of credit as a result of an application from a consumer, or the review or collection of a consumer’s account.”<sup>22</sup> However, FCRA section 604(a)(3)(A) is not limited to only those credit transactions where a consumer applies for credit but, rather, includes credit transactions that simply involve a consumer. Accordingly, we believe the third bullet under subsection A should be revised to read, “For the extension of credit as a result of an application from a consumer, a credit transaction involving the consumer, or the review or collection of a consumer’s account.”

Second, under subsection C entitled, “Users Must Notify Consumers When Adverse Actions are Taken,” we believe that the notice’s definition of “adverse action” is overbroad.<sup>23</sup> Specifically, the notice defines adverse action as “includ[ing] all business, credit, and employment actions affecting consumers that can be considered to have a negative impact” (emphasis added).<sup>24</sup> To the contrary, FCRA section 603 does not include all credit-related actions that could be considered to have a negative impact. For example, FCRA section 603 does not include a counter offer accepted by the consumer as provided under section 701(d)(6) of the Equal Credit Opportunity Act. Instead, such negative impact actions are covered by the new risk-based pricing provisions of section 615(h).

As a result, we believe that this section should be revised to read, “‘Adverse actions’ include business, credit, and employment actions affecting consumers that can be considered to have a negative impact, as defined by the FCRA, . . . .” Similarly, under subsection 1, the proposed notice states, “If a user takes any type of adverse action that is based at least in part on information contained in a consumer report, the user is required . . . to notify the consumer.”<sup>25</sup> Accordingly, this section should be revised to read, “If a user takes adverse action, as defined by the FCRA, that is based at least in part on information contained in a consumer report, the user is required . . . to notify the consumer.”

Third, under subsection D entitled, “Users Have Obligations When Fraud and Active Duty Military Alerts Are in Files,” we believe that the textual description describing the means by which a user may contact a consumer requires clarification.<sup>26</sup> As proposed, the notice states that “in the case of extended fraud alerts, the user must contact the consumer in accordance with the contact information provided in the consumer’s alert.”<sup>27</sup> However, because a consumer may not

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<sup>21</sup> 69 Fed. Reg. at 42,624.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 69 Fed. Reg. at 42,625.

<sup>27</sup> *Id.*

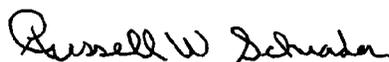
provide any contact information, the notice should be amended to read, "in the case of extended fraud alerts, the user must contact the consumer using any contact information provided in the consumer's alert."

## **Section II: Creditors Must Make Additional Disclosures**

Finally, under Section II of the notice entitled, "Creditors Must Make Additional Disclosures," we believe that the proposed language presumes an outcome with respect to the risk-based pricing rules that have not yet been jointly promulgated by the FTC and the FRB.<sup>28</sup> As proposed, the notice states that if a creditor makes an offer to a consumer on materially less favorable terms than the most favorable terms offered to a substantial proportion of consumers, section 615(h) of the FCRA requires the credit grantor to "disclose this fact to the consumer and to provide certain information. Consumers who receive a notice will be entitled to a free copy of their consumer report."<sup>29</sup> First, the FTC and FRB are still considering the ability of creditors to provide the required notice in advance of the final credit decision and such a notice could not "disclose this fact" because the event leading to "this fact" will not yet have occurred. In addition, we do not believe that consumers who receive a notice under section 615(h) are entitled to an additional free credit report because of their receipt of that notice. Therefore, until the FTC and FRB jointly release their final rule regarding risk-based pricing, we believe that this section should be revised to read, ". . . Section 615(h) of the FCRA requires the credit grantor to comply with the notice requirements jointly prescribed by the Federal Trade Commission and the Federal Reserve Board. These regulations will be available at [www.ftc.gov/credit](http://www.ftc.gov/credit)."

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 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

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*