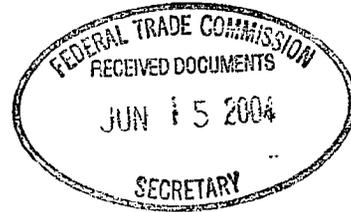


RUSSELL W. SCHRADER  
Senior Vice President  
Assistant General Counsel



June 15, 2004



*By Hand Delivery*

Federal Trade Commission  
Office of the Secretary  
Room 159-H (Annex H)  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

Re: The FACT Act Disposal Rule, R-411007

Ladies and Gentlemen:

This comment letter is submitted on behalf of Visa U.S.A. Inc. in response to the notice of proposed rulemaking ("Proposed Rule") and request for public comment by the Federal Trade Commission ("FTC"), published in the Federal Register on April 20, 2004. The Proposed Rule would require entities under FTC jurisdiction to take reasonable measures to protect against unauthorized access to, or use of, consumer information in connection with its disposal. Visa supports the FTC's Proposed Rule and appreciates the opportunity to comment on this important matter.

The Visa Payment System, of which Visa U.S.A.<sup>1</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.

Section 628 of the Fair Credit Reporting Act ("FCRA"), as added by section 216 of the Fair and Accurate Credit Transactions Act of 2003, requires the FTC, the federal banking agencies, the National Credit Union Administration and the Securities and Exchange Commission to prescribe consistent and comparable regulations that require "any person that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived from consumer reports" to properly dispose of the information or compilation.<sup>2</sup> Section 628 also directs the agencies to ensure that these regulations are consistent with the requirements and regulations issued under the Gramm-Leach Bliley Act ("GLBA") and other federal law.<sup>3</sup> The Proposed Rule clarifies that the purpose of the disposal requirement is

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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 payment systems.

<sup>2</sup> FCRA §§ 628(a)(1)-(2).

<sup>3</sup> FCRA § 628(a)(2)(B).

“to reduce the risk of consumer fraud and related harms, including identity theft, created by improper disposal of consumer information.”<sup>4</sup>

**“CONSUMER INFORMATION” SHOULD IDENTIFY A PARTICULAR CONSUMER**

The Proposed Rule would define “consumer information” as “any record about an individual, whether in paper, electronic, or other form, that is a consumer report or is derived from a consumer report.”<sup>5</sup> The Supplementary Information to the Proposed Rule (“Supplementary Information”) indicates that records that are “derived from consumer reports” would include any “information about a consumer that is taken from a consumer report.”<sup>6</sup> The Supplementary Information also states that a record that does not identify a particular consumer would not qualify as “consumer information” because it would not be a “record about an individual.”<sup>7</sup> Visa supports the FTC’s proposed, broad definition of “consumer information.” A broad definition of “consumer information” in the section 628 disposal rules will allow financial institutions and companies providing services to financial institutions to apply consistent disposal procedures and, therefore, a consistent level of protection for all consumer information nationwide.

However, Visa is concerned that the proposed definition of “consumer information” itself provides little guidance as to the coverage of information that may identify a particular consumer. Visa believes that the text of the final rule should expressly state that information that does not identify a particular consumer would not qualify as “consumer information.” This express statement would promote clarity and would eliminate any ambiguity surrounding the phrase “any record about an individual.” Information that does not identify a particular consumer poses little or no risk of consumer fraud or identity theft and, as a result, covered entities should not be required to take “reasonable measures” to dispose of such information.

**“REASONABLE MEASURES” IS THE APPROPRIATE DISPOSAL STANDARD**

The Proposed Rule would require any entity under FTC jurisdiction “who maintains or otherwise possesses consumer information, or any compilation of consumer information, for a business purpose [to] properly dispose of such information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.”<sup>8</sup>

Visa supports the FTC’s determination that “reasonable measures” is the appropriate disposal standard. A disposal standard based on “reasonable measures” would allow covered entities to employ different standards based on the individual entity’s risk assessment and circumstances in order to ensure appropriate disposal of consumer information. This standard would promote flexibility and would allow financial institutions to avoid disrupting existing practices under their information security programs, required by FTC regulations promulgated

<sup>4</sup> 69 Fed. Reg. 21,388, 21,392 (Apr. 20, 2004).

<sup>5</sup> *Id.*

<sup>6</sup> 69 Fed. Reg. at 21,389.

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

<sup>8</sup> 69 Fed. Reg. at 21,392.

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pursuant to section 501(b) of the GLBA ("Safeguards Rule"), except where necessary to do so. As a result, this approach would respond to the statutory mandate that the regulations issued be consistent with those issued under the GLBA.

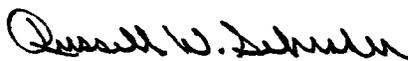
The Supplementary Information indicates that the FTC expects that covered entities, in determining what measures are "reasonable," will consider "the sensitivity of the consumer information, the nature and size of the entity's operations, the costs and benefits of different disposal methods, and relevant technological changes."<sup>9</sup> Visa believes that these "factors to consider" are appropriate. Financial institutions will be familiar with this risk-based approach as a result of the analysis that they use currently in developing their information security programs under the Safeguards Rule.<sup>10</sup> Moreover, Visa believes that harmonization of the final rule with the Safeguards Rule is essential; inconsistent requirements would be confusing and lead to uneven results. Visa recommends that the final rule expressly state that, for an entity that is covered by both rules, the disposal requirement is part of the entity's larger information security program.

#### **EXAMPLES OF "REASONABLE MEASURES"**

The Proposed Rule includes examples of what policies and procedures would qualify as "reasonable measures." For example, the Proposed Rule indicates that "reasonable measures" would include implementing and monitoring compliance with policies and procedures requiring that consumer information be shredded or burned, or that electronic media be destroyed or erased, so that consumer information cannot practicably be read or reconstructed.<sup>11</sup> In addition, for covered entities that will hire another party to accomplish their record destruction, reasonable measures would include entering into and monitoring compliance with a written contract that requires the other party to dispose of consumer information in a manner consistent with the disposal standard. Visa recommends that the final rule clarify that a written contract would not be required in all instances in which a covered entity hires another party to dispose of consumer information, provided that the policies of the party doing the destruction meet the standards of the disposal requirement.

Visa appreciates 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>9</sup> *Id.* at 21,389.

<sup>10</sup> 16 C.F.R. § 314.3(a).

<sup>11</sup> 69 Fed. Reg. at 21,392.