



October 28, 2004

By Hand Delivery

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

Re: FACTA Prescreen Rule, Project No. R411010

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 October 1, 2004. Pursuant to the Fair Credit Reporting Act ("FCRA"), as amended by the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), the Proposed Rule would provide requirements concerning the format, manner and type size of the disclosure ("opt-out notice") that must be provided along with prescreened offers of credit or insurance. Visa appreciates the opportunity to comment on this important matter.

The Visa Payment System, of which Visa U.S.A.¹ 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.

BACKGROUND ON PRESCREENING

In 1996, Congress amended the FCRA, in part, to clarify the permissibility of prescreening.² These amendments established an independent permissible purpose for furnishing and obtaining consumer reports for the purpose of providing prescreened solicitations. Specifically, a consumer reporting agency ("CRA") may furnish a consumer report to a person who the CRA has reason to believe intends to use the information in connection with a credit

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.

² Pub. L. No. 104-208, §§ 2401-2422, 110 Stat. 3009, 3009-426-3009-454 (1996).

transaction “that is not initiated by the consumer,” if the transaction consists of a “firm offer of credit,” the CRA has complied with its obligations to establish and maintain an opt-out notification system and the consumer has not opted out.³ A “firm offer of credit” is defined as an offer of credit that the lender will honor if, based on information in a consumer report, the consumer meets specific criteria established in advance of, and used to select the consumer for, the offer.⁴ A lender may impose one or more additional conditions on the firm offer of credit, such as verification that the consumer continues to meet the criteria used to select the consumer for the offer.⁵

The FCRA requires a lender to provide a clear and conspicuous opt-out notice with each written solicitation made to consumers. The notice must indicate that information contained in the consumer report was used in connection with the firm offer of credit and that the consumer received the offer because the consumer satisfied the lender’s initial credit worthiness criteria.⁶ In addition, the notice must indicate, if applicable, that credit may not actually be extended to the consumer “if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer,” does not meet any applicable additional credit worthiness criteria established by the lender in advance or does not furnish required collateral.⁷ The notice also must state the consumer’s right to prevent the use of consumer report information in connection with prescreened solicitations in the future and must include the address and toll-free telephone number of the appropriate opt-out notification system.⁸ In addition, the FCRA, as amended by the FACT Act, requires the opt-out notice to “be presented and in such format and in such type size and manner as to be simple and easy to understand, as established by the [FTC], by rule.”⁹

THE PROPOSED RULE

The Proposed Rule would specify baseline requirements for the content and the form of the opt-out notice, including requiring that the notice be provided twice, in a “layered” form comprised of a short and a long notice. The Proposed Rule would require that the short notice be a “simple and easy to understand statement” informing consumers of the right to opt out of receiving prescreened solicitations, the toll-free number that can be called to exercise this right and the existence and location of the long notice.¹⁰ The Proposed Rule also would provide detailed requirements concerning the form of the short notice, including that the notice be: (1) prominent, clear and conspicuous; (2) in a type size of at least 12-point that is larger than the type size of the principal text on the same page; (3) on the front of the first page of the principal

³ FCRA § 604(c)(1). The requirements relating to credit prescreening discussed in this letter also apply to certain insurance prescreenings.

⁴ FCRA § 603(l).

⁵ FCRA §§ 603(l)(2)(A)-(B).

⁶ FCRA §§ 615(d)(1)(A)-(B).

⁷ FCRA § 615(d)(1)(C).

⁸ FCRA §§ 615(d)(1)(D)-(E); 615(d)(2)(A).

⁹ FCRA § 615(d)(2)(B).

¹⁰ Proposed 16 C.F.R. § 642.3(a)(1).

promotional document; (4) located on the page and in a format so the statement is distinct from other text, such as inside a border; and (5) in a typeface distinct from other typeface used on the same page, such as bolding, italicizing, underlining and/or using a different color.¹¹ The Proposed Rule would provide a model short notice that states: “To stop receiving ‘prescreened’ offers of [credit or insurance] from this and other companies, call toll-free, [toll-free number]. See OPT-OUT NOTICE on other side [or other location] for details.”¹²

In addition, the Proposed Rule would require that the long notice be a “simple and easy to understand statement” informing consumers of all other information required to be disclosed by section 615(d) of the FCRA.¹³ The Proposed Rule would provide detailed requirements concerning the form of the long notice, including that the notice: (1) be clear and conspicuous; (2) appear in the solicitation; (3) be in a type size of at least 8-point that is not smaller than the type size of the principal text on the same page; (4) include a heading, in capital letters and underlined, that reads “OPT-OUT NOTICE;” (5) be in a typeface distinct from other typeface used on the same page; and (6) be set apart from other text on the page with the left and right margins indented.¹⁴ In addition, the Proposed Rule would provide a model long notice that states: “This ‘prescreened’ offer of [credit or insurance] is based on information in your credit report indicating that you meet certain criteria. This offer is not guaranteed if you do not meet our criteria. If you do not want to receive prescreened offers of [credit or insurance] from this and other companies, call toll-free, [toll-free number]; or write: [consumer reporting agency name and mailing address].”¹⁵

The Proposed Rule also provides a definition of the term “simple and easy to understand.” Specifically, the Proposed Rule would define this term as “plain language designed to be understood by ordinary consumers.”¹⁶ In determining whether a statement is “simple and easy to understand,” the Proposed Rule would provide factors to be considered, such as the use of clear and concise sentences, use of active voice and avoidance of multiple negatives.¹⁷

THE PROPOSED RULE IS INCONSISTENT WITH CONGRESSIONAL INTENT

As noted above, the FCRA requires lenders making prescreened solicitations to provide “a clear and conspicuous statement” concerning, among other things, the consumer’s right to opt out of receiving future prescreenings.¹⁸ Further, the FCRA, as amended by the FACT Act, directs the FTC to prescribe regulations concerning the presentation, format, type size and manner of disclosure of this clear and conspicuous statement.¹⁹ The Proposed Rule suggests that

¹¹ Proposed 16 C.F.R. §§ 642.3(a)(2)(i)-(v).

¹² Proposed 16 C.F.R. pt. 698, App. A.

¹³ Proposed 16 C.F.R. § 642.3(b)(1).

¹⁴ Proposed 16 C.F.R. §§ 642.3(b)(2)(i)-(vi).

¹⁵ Proposed 16 C.F.R. pt. 698, App. A.

¹⁶ Proposed 16 C.F.R. § 642.2(a).

¹⁷ Proposed 16 C.F.R. §§ 642.2(a)(1)-(8).

¹⁸ FCRA § 615(d)(1).

¹⁹ FCRA § 615(d)(2)(B).

the FTC believes that the format, type size and manner of disclosure includes the separate statutory requirement that the notice be clear and conspicuous. The Proposed Rule, however, would impose requirements concerning not only the clearness and conspicuousness of the opt-out notice, but also the prominence of the notice. For instance, the Proposed Rule would require the short notice to be “[p]rominent, clear, and conspicuous.”²⁰ In addition, as discussed further below, the Proposed Rule would make the opt-out notice the most prominent information presented in the entire prescreened solicitation. Visa does not believe that the FCRA contemplates that the FTC will address the prominence of the opt-out notice in the context of this rulemaking.

The FCRA is one statute that makes up the Consumer Credit Protection Act (“CCPA”), which also includes, among others, the Truth in Lending Act (“TILA”) and the Electronic Fund Transfer Act. Unlike other statutes in the CCPA, the FCRA does not require prominent disclosures. The FCRA requires only that the opt-out notice be clear and conspicuous and does not address prominence of the notice. Other statutes in the CCPA, however, require certain disclosures to be prominent. For instance, under TILA, certain disclosures must be clear and conspicuous and also “placed in a . . . prominent location.”²¹ Clearly, Congress’ use of the term “prominent” in the CCPA indicates that prominence is different from conspicuousness. Moreover, where Congress intended a disclosure to be prominent in the CCPA, Congress used clear and specific terms, such as “prominent location,” “prominent notice,” “equal prominence,” and “prominent and conspicuous location.”²²

Given the context of the CCPA, the FCRA should not be read to require that the opt-out notice be displayed prominently. The absence of any reference in the FCRA concerning the prominence of the opt-out notice clearly reflects congressional intent not to impose any requirements of this nature. Visa believes that requiring the opt-out notice to be prominent conflicts with the congressional intent to make other disclosures, required by the CCPA, prominent. For example, the Proposed Rule would require the opt-out notice to be displayed more prominently than the so-called “Schumer Box, which TILA and the Federal Reserve Board’s Regulation Z require to be displayed in a prominent location on or with the solicitation.”²³ The FTC, however, is specifying not only location, but also type and other requirements for the opt-out notice, including that it appear not once, but twice, in the solicitation. To the extent the FTC believes it is necessary to make the opt-out notice conspicuous, Visa believes that the FTC should not provide narrow and rigid requirements concerning the presentation of the notice in the prescreened solicitation.

The FTC states in the Supplementary Information to the Proposed Rule (“Supplementary Information”) that there are two components to making a notice simple and easy to understand: (1) language and syntax that effectively communicates the intended message; and

²⁰ Proposed 16 C.F.R. § 642.3(a)(2)(i) (emphasis added).

²¹ 15 U.S.C. § 1632(c)(1)(B) (emphasis added). *See also* 15 U.S.C. §§ 1641(d)(4), 1665b(d)(1), 1693b(d)(3)(B)(i).

²² 15 U.S.C. §§ 1632(c)(1)(B), 1641(d)(4), 1665b(d)(1), 1693b(d)(3)(B)(i).

²³ 15 U.S.C. § 1632(c); 12 C.F.R. § 226.5a(a)(2).

(2) presentation and format that “call attention to the notice and enhance its readability.”²⁴ Visa agrees that one component of making information easy to understand is calling attention to that information. At the same time, however, emphasizing particular information in contrast to other information in the same message can distort the reader’s understanding, making the overall message, including the emphasized information, more difficult to understand. For example, making the information that a consumer has the ability to opt out more prominent than an appropriately balanced explanation of the effects of the opt out is likely to lead consumers to believe that they should opt out even though doing so will eliminate their access to important information about the terms of credit for which they are qualified.

The Proposed Rule repeatedly focuses on calling attention to the opt-out notice. The Proposed Rule specifies in great detail how the notice must be presented and how it must appear in the prescreened solicitation. For instance, in addition to requiring that the short notice be prominently and conspicuously displayed on the front side of the first page of the principal promotional document, the Proposed Rule would require the short and long notices to be in type sizes and typeface that are larger and more distinct than other information presented in the solicitation and be prominently displayed, such as by placing a border around the short notice and by setting apart and indenting the long notice. Visa believes that these detailed requirements are not an appropriate approach to make the notices simple and easy to understand, and are not consistent with the scope of the statutory directive to the FTC.

The FTC states in the Supplementary Information that the Proposed Rule would provide “flexibility to those making prescreened offers in designing their specific disclosures [and that the] determination of whether a notice meets the ‘simple and easy to understand’ standard [would be] based on the totality of the disclosure and the manner in which it is presented, not on any single factor.”²⁵ To the contrary, however, Visa believes that the Proposed Rule would severely limit flexibility in providing the opt-out notice. As discussed earlier, the Proposed Rule would require the short and long notices to meet numerous requirements. Rather than providing flexibility or adopting a “totality” of the disclosure approach, the Proposed Rule would provide a checklist of requirements concerning the form and manner of disclosure. These rigid requirements would impose significant compliance costs on lenders who would have to radically redesign current solicitations without a corresponding level of benefit for consumers.

THE PROPOSED RULE WOULD ADVERSELY AFFECT CONSUMERS

The Proposed Rule would result in the short notice being the most prominent information displayed on the first page of the principal promotional document. The FTC states in the Supplementary Information that the principal promotional document would be the cover letter of the solicitation or the first page that consumers see when they open the solicitation.²⁶ As a result, any consumer opening a prescreened solicitation would be drawn first to the short notice, thereby

²⁴ 69 Fed. Reg. 58,861, 58,862 (Oct. 1, 2004).

²⁵ *Id.*

²⁶ 69 Fed. Reg. at 58,863.

making this notice the most prominent information displayed in the entire solicitation. When any information in a document is displayed more prominently than other information, the result is to detract from, and may reduce the likelihood that the consumer will read, the other information in the document. The prominence of the short notice, in conjunction with the model language of this notice, would detract from, and may reduce the likelihood that consumers would read, any other information in the prescreened solicitation, including the offer of credit itself and other disclosures required by law. Indeed the short notice is likely to function as a “cigarette” warning and to suggest that the consumer should be avoiding the solicitation. Thus, the notice may lead many consumers simply to discard the solicitation without considering it, even where the solicitation provides terms more beneficial to the consumer than the consumer’s current credit account.

Even if the consumer does not discard the solicitation, the short notice will detract from the credit terms of the prescreened offer, including those disclosures required by law. As noted above, Regulation Z, which implements TILA, requires a lender providing a consumer a prescreened offer for a credit card to prominently display in the solicitation the Schumer Box, which must include the annual percentage rate, annual or periodic fees and the minimum finance charge.²⁷ Regardless of whether a lender would provide the Schumer Box on the same page as the short notice, the short notice clearly would be displayed more prominently than the Schumer Box even though the Schumer Box itself is required by statute to be in a prominent location. By distracting consumers from the Schumer Box, the short notice would frustrate the purpose of Regulation Z “to promote the informed use of consumer credit by requiring disclosures about its terms and cost.”²⁸

Moreover, the prominence of the short notice, in conjunction with the model language for this notice, is likely to encourage consumers to opt out of future prescreenings instead of encouraging them to make informed decisions whether to opt out. The model language for the short notice is not neutral, but it encourages consumers “[t]o stop receiving ‘prescreened’ offers.” In addition, this language would be larger than all other information on the first page, distinctly displayed and in a distinct typeface. The notice also would include the toll-free, opt-out telephone number. As a result, the consumer likely would never read the long notice but would simply call to opt out. The likely effect of these factors would be to lure consumers to opt out regardless of whether receiving prescreened solicitations is beneficial to them and regardless of whether the decision to opt out is truly informed. Simply put, consumers likely would opt out not because they have carefully weighed the pros and cons of this decision, but because of the prominent display of the short notice, including the toll-free, opt-out telephone number, and the tone of the model language.

²⁷ 12 C.F.R. § 226.5a(b).

²⁸ 12 C.F.R. § 226.1(b).

THE PROPOSED RULE IGNORES THE BENEFITS OF PRESCREENING

Visa believes that the Proposed Rule does not take a balanced approach to prescreening, simply ignores the benefits to consumers of prescreened offers of credit and, therefore, is not simple and easy to understand. As noted earlier, the prominence of the short notice, as well as the model language of this notice, would lead more consumers to opt out. In determining the appropriate approach to make opt-out notices simple and easy to understand, Visa believes that the FTC should take into account the benefits to consumers of prescreening. Moreover, Visa believes that the FTC should not adopt a rule that will lead more consumers to opt out simply because of the prominent display and language of a notice. Consumers must make a decision concerning the pros and cons of prescreening and should not be lured into this decision.

Prescreening confers significant benefits on consumers. Prescreening allows consumers to compare the prices and terms, as well as other features, of prescreened offers and then select the offer that they believe best fits their needs with confidence that they will qualify for the offer. Without prescreening, consumers would be far less certain about whether or not they would qualify for various credit products available in the marketplace. In classic economic terms, prescreening increases market transparency for the consumer and the consumer enjoys all of the benefits that increased transparency brings, including lower prices and more favorable terms than he or she otherwise is likely to obtain on a trial-and-error basis.

Increased transparency for the consumer translates into more competition among suppliers of credit. Lenders know that consumers can compare prescreened offers effectively and must make their offers as attractive as possible in order to meet the competition. This competition leads to lower rates and innovative ways to attract consumers. In addition, lenders have the ability to make credit available to a wide range of consumers with a greater geographic distribution; this, in turn, increases competition in the market by enabling small and medium size lenders to offer their products to consumers who otherwise would be accessible only to the largest lenders. As a result, a large segment of all existing credit card accounts were originally established for consumers responding to prescreened offers.

Prescreening also reduces marketing costs for lenders. By using prescreened lists, lenders avoid the costs of sending solicitations to large numbers of consumers who ultimately would not qualify for the credit products being offered. At the same time, prescreening reduces the number of responses that the lender must reject and the attendant costs of providing adverse action notices and dealing with dissatisfied applicants. Reduced costs in the competitive environment fostered by prescreening lead to lower prices for consumers.

In addition, prescreening reduces the unwanted mail that consumers receive. Lenders can make more targeted solicitations through use of prescreening. Without prescreening, lenders must solicit consumers more broadly because they are unable to identify the subset of consumers that will likely qualify for their credit products. As a result, consumers actually would receive more solicitations, not fewer solicitations.

Congress recognized the benefits of prescreening when it amended the FCRA in 1996. In order to preserve these benefits, Congress clarified the permissibility of prescreening. Moreover, in amending the FCRA in 2003, Congress directed the FTC to increase the public awareness of not only the right to opt out, but also of the benefits and consequences of this decision. Specifically, Congress recognized that a consumer's decision to opt out of receiving prescreened offers of credit has greater consequences than "simply deciding to limit the number of direct mail pieces delivered to the" consumer.²⁹ For instance, Congress recognized that many consumers only will become aware of their eligibility for better credit terms after receiving prescreened credit offers.³⁰ As a result, Congress sought to ensure that a consumer's decision to opt out was made in an informed manner because of the possible consequences of this decision.

ALTERNATIVE APPROACH THAT THE FTC SHOULD ADOPT

The FCRA contemplates that the opt-out notice will be provided in a single notice. More specifically, the FCRA requires lenders to provide "a clear and conspicuous statement." The plain language of "statement" envisions a single disclosure. The Proposed Rule, however, would require that lenders provide the opt-out notice in a layered form comprised of two notices. The FTC indicates in the Supplementary Information that "[r]esearch in the area of consumer notices shows that disclosures tend to be more effective if they are written in a clear and concise manner that is easily understandable by the average consumer, and convey a limited amount of information."³¹ The FTC further concludes that "[o]ne way to accomplish this . . . is through a layered approach."³² While Visa agrees that repetition of information is one way to bring that information to consumer's attention, repetition is not necessary in order to make a notice clear, concise and easily understandable. Visa believes that mandating that lenders provide the notice in a layered form is not only arbitrary and unnecessarily rigid, but also inconsistent with the statute itself.

Visa believes that the FTC should prescribe a rule that requires a balanced, neutral opt-out notice that is easy to find and easy to understand and that provides lenders flexibility by allowing multiple options to provide the notice. More specifically, Visa believes that the FTC should permit lenders to provide either: (1) a short notice on the first page of the solicitation that directs consumers to a longer notice; or (2) a single, but easy to find, longer notice.

Visa believes that the FTC should permit lenders, as one option, to adopt a layered approach in providing the opt-out notice. Specifically, the FTC should permit lenders to provide a short notice that is a simple and easy to understand statement that the consumer has the right to opt out and that directs the consumer to the existence of a longer notice. It would be appropriate to require that such a notice appear in the text of the front side of the first page of the principal promotional document in a type size that is the same as the principal text on this page. For

²⁹ Letter from Representatives Bachus and Kanjorski to Chairman Majoras, FTC (Oct. 12, 2004).

³⁰ *Id.*

³¹ 69 Fed. Reg. at 58,862.

³² *Id.*

instance, the short notice could be provided as a separate paragraph in the cover letter. This would permit the short notice to flow within the context of the prescreened solicitation in a manner that the consumer can easily find, while not detracting from the other information being provided to the consumer.

Visa believes that the following language would be more appropriate for the short notice: “You may choose to opt out of getting this type of credit offer from us and other lenders. See the other side for details [or see below for details].” This model language is simpler and should be easier for consumers to understand in comparison to the FTC’s proposed language. This language scores an 81.8 [or an 80.3] on the Flesch reading ease scale.³³ In comparison, the FTC’s proposed language scores a 57.2 on the same scale.³⁴

In addition, the long notice should be a simple and easy to understand statement concerning how a consumer may opt out and also informing the consumer of the other information required by section 615(d). Any rule should require this notice to be placed in the location described in the short notice. This would permit consumers who wish to learn additional information concerning the right to opt out to easily find this information. Any rule also should permit lenders to include a statement of the benefits of prescreening, so long as this statement does not detract from the purpose of the notice. Including a statement concerning the benefits of prescreening would allow consumers to make a truly informed decision, and would be consistent with the congressional directive to the FTC.

Visa believes that the following language would be more appropriate for the long notice: “We sent you this offer of credit based on your credit report. This offer of credit shows that you meet certain criteria. You may not be approved if you do not continue to meet these criteria. You may choose to opt out of getting this type of offer from us and other lenders by: (1) calling toll-free, ###-###-####; or (2) by writing, CRA, Address. If you opt out, you may not know if you qualify for the offers of credit that you get.” This language scores a 75.3 on the Flesch reading scale, while the FTC’s proposed language scores a 56.1.³⁵

In addition, Visa believes that lenders should be permitted to provide one long opt-out notice, so long as this notice is simple and easy to understand. This notice could be provided in any part of the solicitation, so long as it is easy to find. The notice would be considered easy to find if it: (1) is in a type size of at least 8 point that is no smaller than the principal text on the

³³ The Flesch reading ease scale measures textual difficulty on a scale ranging from 0 to 100. The higher the score, the easier the text is to understand. Accordingly, a text scoring 0 correlates to an extremely difficult text to read, whereas a score of 100 correlates to a very easy text to read.

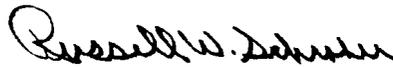
³⁴ The FTC’s model language was revised to account for a prescreened credit offer. The scored version of this language reads: “To stop receiving ‘prescreened’ offers of credit from this and other companies, call toll-free, ###-###-####. See OPT-OUT NOTICE on other side for details.”

³⁵ The scored version of the FTC’s model language reads: “This ‘prescreened’ offer of credit is based on information in your credit report indicating that you meet certain criteria. This offer is not guaranteed if you do not meet our criteria. If you do not want to receive prescreened offers of credit from this and other companies, call toll-free, ###-###-####; or write: CRA, Address.”

page on which it appears; or (2) begins with a heading in capital, underlined letters that reads "OPT-OUT NOTICE;" or (3) is in a distinct typeface from other information on the page and, in any case, is set apart from other text on the page or is otherwise presented in a way that calls attention to the notice. In addition, Visa believes that the model language of the long notice discussed above would be appropriate.

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,

A handwritten signature in black ink, appearing to read "Russell W. Schrader". The signature is written in a cursive style with a large initial 'R'.

Russell W. Schrader
Senior Vice President and
Assistant General Counsel