

RUSSELL W. SCHRADER
Senior Vice President
Assistant General Counsel



July 16, 2004



By Hand Delivery

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex M)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: FACT Act Section 318(a)(2)(C) Study, Matter No. P044804

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") notice and request ("Request") for public comment to aid the FTC in preparing a study ("Study") on the effects of requiring that a consumer who has experienced an adverse action based on a credit report receives a copy of the same credit report that the creditor relied on in taking the adverse action. Visa appreciates the opportunity to comment on this important Study.

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.

DEFINITION OF "SAME REPORT THAT THE CREDITOR RELIED ON"

As a threshold matter, you have asked parties to explain how they define "the same report that the creditor relied on." We believe "the same report" should be viewed narrowly. If the creditor took an adverse action based solely on a credit score, the credit score would be the "same report" rather than the underlying file information that was used to generate the credit score. If a summary was relied on, we believe that summary, and not the information it summarizes, should be considered the "same report."

DEFINITION OF "ADVERSE ACTION"

The FTC has also requested parties to comment on the impact of a more expansive definition of "adverse action" than that provided under the Fair Credit Reporting Act

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.

("FCRA"); in particular, how a definition of adverse action that includes situations that would trigger a risk-based pricing notice would impact scenarios in the Request. Section 311(a) of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), which added section 615(h) to the FCRA,² requires that a lender, "in connection with an application for, or a grant, extension, or other provision of, credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers" from that lender, based in whole or in part on a consumer report, provide an oral, written or electronic notice to the consumer. The notice may be provided at the time of the application for credit, the time of the extension of credit, or the time of communication of an approval of an application, except as provided in the rules prescribed by the agencies. This notice is not required if the consumer applied for specific material terms and was granted those terms. Among other things, the notice must inform the consumer of his or her right to receive a copy of his or her credit report. This notice does not create a new right to receive a consumer report, rather it notifies the consumer of his or her right to receive an annual copy of his or her consumer report. Particularly in light of section 311, we believe it is critical that the distinction between adverse action and risk-based pricing decisions be maintained. To expand the definition of adverse action to include instances where the risk-based pricing notice provisions are triggered would be to inappropriately expand the scope of the obligation to provide free consumer reports. The focus of the Study, as well as the definition of adverse action, should not go beyond the scope of the FCRA's definition of adverse action.

EXTENT TO WHICH THE PROPOSED REQUIREMENT WOULD AFFECT CONSUMERS

Under current practices, when a consumer receives a copy of his or her credit report due to an adverse action, the consumer is provided an up-to-date copy of his or her credit report that contains file information in a consumer readable format. The creditor may have received only a portion of the file information that the consumer receives, or may have received a credit score based on a proprietary formula. We believe that there is little to gain and much to lose by providing applicants who have been denied credit a copy of the same credit report relied on by the creditor.

The logistics of providing copies of such credit reports would be both difficult and costly and would require the resolution of numerous issues that are identified in the Request, as well as other issues. Moreover, requiring creditors to provide copies of such credit reports could harm consumers by facilitating identity theft. Finally, the benefits of providing copies of reports relied on for risk-based pricing decisions would be even smaller and the attendant costs and difficulties even greater.

The FACT Act requires the FTC to study the effects of requiring that a consumer who has received an adverse action based on a credit report be given the same copy that was used to make the decision, including: (1) the extent to which providing the same credit report relied on by the creditor would increase consumers' ability to identify errors; and (2) the extent to which providing such credit reports to consumers would increase consumers' ability to remove fraudulent information. Neither of these purposes would be

² Citations in this comment letter generally will be to the FCRA, as amended by the FACT Act.

advanced by requiring disclosure of copies of the actual credit report relied on by the creditor; in fact, both purposes would be impeded by doing so because the consumer would be given a credit report that likely would no longer reflect the information currently contained in the consumer's file.

Section 615 of the FCRA currently requires parties who take an adverse action based on information in a credit report to provide consumers with an adverse action notice that contains the name and contact information of the consumer reporting agency that furnished the report on which the adverse action was taken, and notice that the consumer has a right to receive a free copy of his or her credit report from that consumer reporting agency and a right to dispute with the consumer reporting agency the accuracy or completeness of any information in that report.³ This notice, right to a free report and right to dispute information enables consumers to identify errors in reports, including those resulting from identity theft, and to correct errors currently reflected in the credit report, rather than information that may have been reflected in the consumer's file at some prior point in history.

Credit bureau files are dynamic. Millions of furnishers provide information monthly, if not more often. The purpose of supplying a consumer with an adverse action notice and opportunity to obtain a copy of the credit report upon which the adverse action was based under the FCRA is not to encourage the consumer to challenge the creditor's decision. The creditor's decision is history. The notice provides the consumer with the opportunity to determine the accuracy of the information in the consumer's file at a time when it can be corrected for consideration by creditors in the future. Because the purpose of providing the notice and access to the credit report is to provide a means for checking the accuracy of the credit reporting system, the only relevant inquiry is whether the consumer's file is presently accurate. Therefore, the most current credit report is the most relevant and useful report. To provide the consumer with a credit report that is likely outdated by the time the consumer receives it creates vulnerabilities. Incorrect or fraudulent information may have been added to the consumer's file subsequent to the original adverse action, and the consumer in his or her review of the dated credit report would miss the opportunity to dispute this information. At the same time, the consumer may feel a false sense of security because he or she has reviewed the credit report. Accordingly, providing consumers with dated reports relied on in making a credit decision instead of a current report may actually foster errors in credit reports and inhibit discovery of identity theft.

This harm could not possibly be outweighed by countervailing benefits. In the Request, the FTC states that creditors may receive multiple reports relating to an individual consumer from a single consumer reporting agency, while the consumer may receive only one credit report when requesting a copy. In reality, however, creditors rarely receive multiple credit reports on an individual from the same consumer reporting agency. In practice, the creditor would receive, at most, a credit report and a consumer's score based on a proprietary scoring system. Under current practice, the consumer receives a credit report in a format that is designed for the consumer to understand. On the other hand,

³ 15 U.S.C. § 1681m(a).

creditors may get the information in a condensed, proprietary or otherwise customized format using industry shorthand that makes good business sense to the creditor, but would make no sense to a consumer were it to be sent to the consumer. No purpose would be served by giving consumers copies of credit reports identical to those used by the creditor.

Credit Scoring

In addition, the credit report that may be used as the basis for an adverse action may, in fact, be a credit score. When the information that the creditor relied on in making a credit decision is a credit score, providing and explaining a credit score could increase credit fraud by threatening proprietary credit scoring systems and is unnecessary in this context. The score would be of little use to the consumer in detecting errors, including those resulting from identity theft. Section 212 of the FACT Act already addresses disclosure of credit scores. We believe it would not be beneficial to have two separate provisions that address disclosures of credit scores, which would be the result were it to be required that a consumer be given a copy of the same credit report that was the basis for an adverse action.

Reports for Employment Purposes

The FTC also notes in the Request that currently a consumer who experiences an adverse action regarding employment is provided a copy of the same report that the potential employer is relying on before the action is taken under section 604(b)(3)(A) of the FCRA. The employment rule is separate from the rules for credit and applying the employment rule to credit decisions would create substantial problems. An extension of the employment rule to credit transactions would require changes to the entire credit granting process that could significantly impede the availability of credit in the near term. For example, it could greatly delay the credit process and increase the costs of applications for credit, potentially resulting in the imposition of application fees on consumers. The employment rule is the result of special policy issues and should not be extended to credit.

WHO SHOULD SEND A REPORT

The Request also raises the possibility that a creditor would be required to send a copy of the credit report along with the adverse action notice. We believe such a requirement would substantially increase, rather than mitigate, the risk of identity theft. When an account has been established by a financial institution and, therefore, a new customer relationship has been established, financial institutions are required to identify their customers pursuant to rules adopted under section 326 of the USA PATRIOT Act.⁴ These customer identification requirements do not apply to an applicant who is declined. An application may be declined for numerous reasons, including suspicion of fraud or identity theft, or a lack of sufficient information to identify the consumer. To require a creditor to send a credit report with the adverse action notice could provide perpetrators of identity theft with additional information about the consumer that may enable the perpetrator to be more successful on the next application for credit in the victim's name. Any person obtaining a credit report must be required to go through adequate identification

⁴ 31 U.S.C. § 5318(l).

procedures, such as those employed by consumer reporting agencies or other central sources for free reports.

Even if reports are only obtained from the consumer reporting agencies after adequate identification, obtaining old credit reports would not increase a consumer's ability to identify identity theft because the information is old and would not reflect the most recent additions to a consumer's file—which may include corrections to the old information. Old information can only distract the consumer from focusing on the information that is truly important—his or her current credit file.

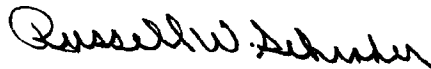
COST OF IMPLEMENTATION

Finally, providing the credit reports that were actually used to make credit decisions would be very expensive to implement. It would involve both the costs of supplying old records and increased customer service costs in educating consumers on the information that is contained in customized reports for particular creditors. In addition, if the requirement to provide the credit report is imposed on the creditor, it would involve the cost to the creditor of explaining information that was collected and organized by a consumer reporting agency or other third-party processor. That task should fall to consumer reporting agencies and furnishers, but only as to current information.

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Visa appreciates the opportunity to submit comments 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