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VISA

July 11, 2005

By Electronic Delivery

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attention: Comments
RIN 3064-AC81

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal
Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1188

Public Information Room
Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 1-5
Washington, DC 20219
Attention: Docket No. 05-10

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: No. 2005-16

Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Re: Interim Final Rule—Fair Credit Reporting Medical Information Regulations

Ladies and Gentlemen:

This comment letter is submitted on behalf of Visa U.S.A. Inc. in response to the request for public comment issued by the Federal Deposit Insurance Corporation, Federal Reserve Board ("Board"), Office of the Comptroller of the Currency ("OCC"), Office of Thrift Supervision and the National Credit Union Administration ("NCUA") (collectively, the "Agencies") regarding the Interim Fair Credit Reporting Medical Information Regulations ("Interim Final Rule") under the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"). 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, and the leading consumer e-commerce payment system, in the world, with more volume than all other major payment cards combined. For calendar year 2004, Visa U.S.A.

[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.

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card purchases exceeded a trillion dollars, with over 450 million Visa cards in circulation. 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 Visa's member financial institutions and their hundreds of millions of cardholders.

Visa supports the Agencies in their promulgation of the Interim Final Rule, which largely incorporates comments received in response to the notice and request for comment on the proposed rule ("Proposed Rule"). Visa believes that key aspects of the Interim Final Rule recognize the day-to-day realities of the uses of medical information in the provision of financial services, including credit.

Scope

Section 604(g)(2) of the Fair Credit Reporting Act ("FCRA") provides that "[e]xcept as permitted pursuant to paragraph (3)(C) or regulations prescribed under paragraph (5)(A), a creditor shall not obtain or use medical information ... pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit." Under section 603(r)(5) of the FCRA, the terms credit and creditor have the same meaning as in section 702 of the Equal Credit Opportunity Act ("ECOA"). The ECOA defines the term creditor to mean "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.[2] Section 604(g)(5)(A) of the FCRA, as added by the FACT Act ("Credit Granting Exceptions"), provides that "[e]ach Federal banking agency and the [NCUA] shall . . . prescribe regulations that permit transactions under paragraph (2) that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs."

Section 603(d)(3) of the FCRA provides that the exception for the sharing of information with affiliates to the definition of "consumer report" in the FCRA does not apply to medical information unless an exception in section 604(g)(3) of the FCRA applies. Section 604(g)(3)(C) of the FCRA, as added by the FACT Act ("Affiliate Sharing Exceptions"), provides for exceptions to the limitations on affiliate sharing of medical information in section 604(d)(3), including if the information is disclosed "as otherwise determined to be necessary and appropriate, by regulation or order . . . by the Commission, any Federal banking agency or the [NCUA] (with respect to any financial institution subject to the jurisdiction of such agency or Administration under paragraph (1), (2), or (3) of section 621(b))." Thus, unlike the Credit Granting Exceptions, the Affiliate Sharing Exceptions are limited to entities subject to the jurisdiction of the respective rule writing agencies.

Scope of Section 604(g)(2)

With respect to the Proposed Rule, both the Agencies' individual rules themselves and the exceptions created by those rules applied to creditors subject to the jurisdiction of the respective Agencies. In response to the many comments received on the Proposed Rule, the

[2] 15 U.S.C. § 1691a(e).

applicability of the section of each Agency's rule addressing the prohibition on—and exceptions for—creditors obtaining or using medical information in connection with credit eligibility determinations covers transactions in which enumerated entities participate as creditors. This change extends the benefits of the exceptions in the Interim Final Rule to persons such as doctors who help their patients obtain credit from banks. Other entities that participate as creditors in transactions also benefit from these exceptions. By way of a separate rule, codified in part 232 of the Board's regulations, the exceptions to the prohibition against obtaining and using medical information for credit eligibility determinations apply to all creditors that would otherwise be outside of the scope of each Agency's Interim Final Rule. This separate rule carries out the Congressional intent in providing uniform coverage in the exceptions to any creditor subject to the prohibitions set forth in section 603(g)(2). Visa strongly supports the addition of the separate rule within the Board's chapter of the Code of Federal Regulations.

Scope of Section 604(d)(3)

As noted above, section 603(d)(3) of the Fair Credit Reporting Act eliminates the exclusion in the definition of "consumer report" that permits sharing of information among affiliates when the information to be shared involves "medical information" as defined under section 603(i). Section 604(g)(3) establishes statutory exceptions in which the exclusion for information sharing with affiliates is retained. For example, a key exception states "for any purpose . . . described in section 502(e)" of the Gramm-Leach-Bliley Act ("GLBA"). This section of the GLBA permits information sharing under an extensive list of exceptions.

Section 604(g)(3)(C) of the FCRA also permits the Agencies and the Federal Trade Commission ("FTC") to establish additional exceptions that permit the sharing of medical information with affiliates. The jurisdiction of the Agencies under section 604(g)(3)(C) is limited to institutions under their regulatory jurisdiction. Thus, the OCC's exceptions under section 604(g)(3)(C) in the Interim Final Rule are limited to national banks and their operating subsidiaries and do not apply to financial subsidiaries. Under section 604(g)(3)(C), the FTC has jurisdiction over financial subsidiaries of national banks. Visa respectfully requests the Agencies to urge the FTC to issue a rule applying the exceptions established by the Agencies to financial subsidiaries so that there is no question on the issue of coverage.

The limitation of the OCC's Interim Final Rule to operating subsidiaries, and thus the exclusion of financial subsidiaries, means that a national bank cannot share medical information with a financial subsidiary, such as a broker-dealer or a person providing insurance without that information becoming a consumer report unless the information fits within one of the statutory exceptions in section 604(g)(3)(A) or (B) of the FCRA. Thus, the sharing between a national bank and a financial subsidiary does not benefit from any exception adopted by the Agencies under section 604(g)(3)(C). Further, the FTC, which has the authority to adopt exceptions under section 604(g)(3)(C), has not adopted any such exceptions. Accordingly, the exceptions adopted by the OCC in 12 C.F.R. § 41.32(c)(5) for the sharing of eligibility information consistent with § 41.30 does not apply to national banks and their operating subsidiaries.[3] Although arguably, medical eligibility information could be shared with a financial subsidiary under the statutory

[3] Thus, the same concern applies to financial subsidiaries of state member banks.

exception in section 604(g)(3)(B), particularly by virtue of the reference to section 502(e) of the GLBA, the existence of an express regulatory exception that applies to operating subsidiaries, but which does not apply to financial subsidiaries, raises the specter that such sharing could be found to be outside of the statutory exceptions in private litigation. In order to avoid this result, Visa urges the Agencies to encourage the FTC to adopt exceptions under section 604(g)(3)(C) that are the same as those adopted by the Agencies.

Exceptions to the Limitations on Obtaining or Using Medical Information

The FCRA, as amended by section 411 of the FACT Act, provides a broad prohibition against creditors obtaining or using medical information in connection with credit eligibility determinations, except as provided by Agency regulations. Section ___.30 reiterates the general prohibition against creditors obtaining or using medical information in connection with any determination of a consumer's eligibility for credit, subject to the exclusions set forth in the Interim Final Rule. Visa strongly supports the exceptions to the broad prohibition set forth in the Interim Final Rule; however, a few issues remain.

Visa suggested in its comments on the Proposed Rule that the Agencies should clarify that "similar forbearance practice or program" includes informal forbearance practices by creditors. For example, consumers may request that a creditor defer collecting on a loan because of a health condition. Consumers would be disadvantaged if creditors could not take this information into account in exercising discretion on whether to provide additional credit or defer debt collection, absent formal procedures with respect to these requests. We do not believe the Interim Final Rule addresses this concern and respectfully submit that such clarification should be made.

Credit and Creditor

The Interim Final Rule incorporates the meanings of "credit" and "creditor" under the ECOA. It is unclear from sections __.30(b)(2)(i) and (ii) whether these definitions would be limited to the text of the relevant sections of the ECOA or also would include its implementing regulation (Regulation B). Visa believes that the Final Rule should clarify that the meanings of "credit" and "creditor" also would include the regulatory interpretation of these terms set forth in Regulation B, and the commentary to Regulation B.

Redisclosure of Medical Information

Section __.31(b) prohibits a creditor that receives medical information about a consumer from a consumer reporting agency or from an affiliate from redisclosing that information "except as necessary to carry out the purpose for which the information was initially disclosed." We believe the creditor should be able to redisclose medical information to regulators, attorneys, accountants and others for limited purposes, such as fraud prevention. Visa believes the Interim Final Rule should clarify that a redisclosure made for any purpose described in section 502(e) of the GLBA is a disclosure necessary to carry out the purpose for which the information was initially disclosed.

Flexible Spending Accounts/Healthcare Reimbursement Accounts

The supplementary information to the Interim Final Rule states that the Agencies believe an additional exception for flexible spending programs tied to credit cards is not necessary because such concerns are adequately addressed in the interpretation of "eligibility, or continued eligibility, for credit." Visa appreciates this clarification, but believes it would be more appropriately addressed in the text of an exception. Visa believes that the Final Rule should exclude from the prohibition on using or obtaining medical information employers, plan administrators and card issuers who participate in medical flexible spending account or healthcare reimbursement account programs that utilize cards with credit features.

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In conclusion, Visa appreciates the opportunity to comment on this very important topic. 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