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November 4, 2011

Via Electronic Mail

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street N.W.
Washington, DC 20581

**Re: RIN 3038-AD60, Swap Transaction Compliance and Implementation
Schedule: Clearing and Trade Execution Requirements under Section 2(h) of
the CEA**

RIN 3038-AD10, End-User Exception to Mandatory Clearing of Swaps

Dear Mr. Stawick:

This letter is submitted by MasterCard Worldwide (“MasterCard”)¹ in response to two Commodity Futures Trading Commission (“Commission”) Notices of Proposed Rulemaking: (1) Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA (the “Implementation Proposal”)² and (2) End-User Exception to Mandatory Clearing of Swaps (the “End-User Proposal”).³ Although the original comment period for the End-User Proposal expired on February 22, 2011 (this was subsequently

¹ MasterCard advances global commerce by providing a critical link among financial institutions and millions of businesses, cardholders and merchants worldwide. In the company’s roles as a franchisor, processor and advisor, MasterCard develops and markets secure convenient and rewarding payment solutions, seamlessly processes more than 23 billion payments each year, and provides analysis and consulting services that drive business growth for its banking customers and merchants. MasterCard has more than one billion cards issued through its family of brands, including MasterCard®, Maestro® and Cirrus®. With more than 32.9 million acceptance locations worldwide, no payment card is more widely accepted than MasterCard.

² 76 Fed. Reg. 58186 (September 20, 2011).

³ 75 Fed. Reg. 80747 (December 23, 2010).

extended to June 3, 2011),⁴ we believe that subsequent proposals, in particular the Commission's Implementation Proposal, for which the comment period is currently open, shed additional light on the potential implications of the End-User Proposal and we ask that the Commission consider the comments provided in connection with finalizing the End-User Proposal and Implementation Proposal, or as part of a separate process to provide appropriate relief from the clearing mandate imposed by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") for entities that may be "financial entities" within the meaning of Dodd-Frank Title VII, but which we believe should nevertheless be allowed to rely on the end-user exemption.⁵

We appreciate the Commission taking the time to address our comments and look forward to working with the Commission in whatever way we can to ensure that the end-user exemption ultimately adopted by the Commission is appropriate for the protection of the public and the markets, but does not impose excessive and unnecessary costs on derivatives end users, their customers, or the general public.

About MasterCard

It may be useful to provide some basic information at the outset about MasterCard. MasterCard's main activities consist of: (1) operating a variety of global payment systems, and setting and administering the rules to enable its customers to complete MasterCard payment card transactions; and (2) licensing its customers around the world to use the MasterCard service marks in connection with those payment systems. MasterCard neither issues payment cards to cardholders, nor does it contract with merchants to accept payment cards. Rather, MasterCard's customers issue payment cards to cardholders and/or contract with merchants to accept the cards. The card-issuing customers are known as "issuers." Those customers that contract with merchants for card acceptance are commonly called "acquirers." Each cardholder's account relationship is with the issuer that issued the card to the cardholder, and each merchant's acceptance relationship is with its acquirer. In short, MasterCard is a technology company that primarily enables the issuers and acquirers (and, ultimately, their customers) to complete payment card transactions. MasterCard is not a bank, and it does not engage in lending, deposit taking or trust services, which are the basic activities in which banks engage. MasterCard is not a securities firm or an insurance company. MasterCard also does not engage in derivatives trading for others and does not engage in derivatives trading for profit. As discussed below, MasterCard engages in derivatives transactions solely and exclusively for the purpose of hedging foreign currency exchange risk that affects its business.

MasterCard has approximately 21,000 customers, and processes payment card transactions from more than 210 countries and territories and in more than 150 currencies. MasterCard derives roughly 62% of its revenue from outside of the U.S. Given the global reach of our company, we are deeply impacted by movements in foreign currency exchange rates in the operation of our business.

⁴ See Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 25274 (May 4, 2011).

⁵ Pub. L. 111-203.

MasterCard generates revenues and incurs expenses that are either transacted in, or valued based on, currencies other than the U.S. Dollar. For example, MasterCard charges its customers assessment fees for various services it provides to its customers, including the use of the MasterCard brand globally. These assessment fees are typically a percentage charge on a customer's total volume of transactions incurred on MasterCard-branded cards. Because of MasterCard's global presence, transactions effected in foreign currencies are converted into U.S. Dollars and the percentage charge (*i.e.*, assessment fee) is calculated on this converted U.S. Dollar volume. Hence, fluctuations in foreign exchange rates impact the amount of U.S. Dollar assessment revenue that MasterCard collects. Similarly, given our global footprint, we also make significant expenditures in countries around the world for commercial activities, such as marketing and advertising, payroll, and operations, and these expenditures may be denominated in currencies other than the U.S. Dollar. This once again exposes MasterCard to movements in foreign exchange rates. Besides the above transactional exposures, we also hedge balance sheet assets and liabilities held in foreign currencies. Also, from time to time, MasterCard is exposed to foreign exchange risks arising from acquisitions in countries other than the U.S.

Similar to companies in other commercial industries, such as airlines, agricultural exporters and manufacturers, we manage the above-discussed foreign currency exchange rate risks by engaging in foreign currency hedging activities with highly creditworthy counterparties in the over-the-counter markets using both deliverable and non-deliverable forwards and options. MasterCard's hedging techniques are very similar to the hedging techniques used by entities in these other industries (*i.e.*, entities that are allowed to rely on the end-user exemption pursuant to the Commodity Exchange Act ("CEA")) to protect their cash flow, balance sheet and other foreign exchange exposures.

The Dodd-Frank Clearing Mandate and the End-User Exemption

Dodd-Frank amended the CEA to require persons engaging in "swaps" that are subject to a Commission-issued clearing mandate to submit those swaps to a derivatives clearing organization ("DCO") for clearing.⁶ An exemption in Dodd-Frank also expressly preserved the right of end users to continue to enter into non-cleared bilateral swaps, unless the end user elects to have its swaps cleared.⁷ This end-user exemption is available with respect to a swap that would otherwise be subject to mandatory clearing if one of the counterparties to the swap (1) is not a "financial entity," (2) is using swaps to hedge or mitigate commercial risk, and (3) notifies the Commission, in such manner as the Commission determines, of how the entity generally meets its financial obligations associated with entering into non-cleared swaps. It is the first prong of the end-user exemption (the requirement that the end user not be a "financial entity") that principally concerns us and that is the reason for this comment letter. The definition of a "financial entity" includes any "person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in section 4(k)" of the Bank Holding Company Act of 1956 ("BHCA").⁸ As described in further detail below, Section

⁶ See CEA § 2(h)(1)(A).

⁷ See CEA § 2(h)(7).

⁸ CEA § 2(h)(7)(C)(i)(VIII).

4(k) of the BHCA captures a broad range of entities that are not banks, insurance companies or securities firms, that do not engage in futures or swaps trading for profit and that were not the types of entities that contributed to the recent financial crisis.

Implementation of the End-User Exemption

The end-user exemption is centrally important to commercial derivatives users because it will allow them to continue to hedge the risks they incur in operating their businesses without the additional expense of submitting such transactions to a DCO for clearing. Cleared trades will require the posting of substantial margin and such trades are unlikely to allow end users to precisely match the cash flows or assets being hedged with the cash flows generated under the derivative contract.

On June 30, 2010, Senators Dodd and Lincoln, the Chairmen of the Senate Committees on Banking, Housing and Urban Affairs, and on Agriculture, Nutrition and Forestry, respectively, sent a letter to Representatives Frank and Peterson, the Chairmen of the House Committees on Financial Services and Agriculture, respectively, providing additional background on the legislative intent regarding the end-user exemption (the “Dodd-Lincoln Letter”).⁹ In that letter, the Senators argued that “it is imperative that the regulators do not unnecessarily divert working capital from our economy into margin accounts in a way that would discourage hedging by end users or impair economic growth.” Furthermore, the Dodd-Lincoln Letter noted that a consistent directive through various versions of Dodd-Frank “has been to protect end users from burdensome costs associated with margin requirements and mandatory clearing.”

Senators Dodd and Lincoln also noted that Congress “may not have the expertise to set specific standards.” We agree with that statement and believe that Congress intended the Commission, as the expert agency, to carefully consider the contours of the end-user exemption in order to ensure that it appropriately protects derivatives users from the additional costs involved with clearing.

Application of the “Financial Entity” Definition to Entities Like MasterCard

Section 2(h)(7)(A)(i) of the CEA, as amended by Dodd-Frank, precludes “financial entities” from relying on the end-user exemption. Section 2(h)(7)(C)(VIII) includes within the definition of a “financial entity” any “person *predominately engaged* ... in activities that are financial in nature, as defined in Section 4(k) of the Bank Holding Company Act of 1956.” (emphasis added) Section 4(k)(4) of the BHCA, through implementing regulations, includes among the activities that are financial in nature providing data processing, data storage and data transmission services, facilities, databases or advice for financial, banking or economic data.¹⁰

Regardless of whether MasterCard does or does not meet the technical definition of an entity predominantly engaged in activities that are “financial in nature” within the meaning of the BHCA, we believe that MasterCard and similarly situated payment card networks and data

⁹ See 156 Cong. Rec. 56192 (daily ed. July 22, 2010).

¹⁰ 12 C.F.R. § 225.28(b)(14).

processors should be excluded by the Commission from the definition of a “financial entity” under Section 2(h)(7)(C) of the CEA. MasterCard engages in none of the activities that the mandatory clearing provisions of Dodd-Frank were intended to address. We do not engage in the business of making loans, taking deposits or providing trust services; the insurance business; managing financial assets; acting as a broker or dealer in the financial markets; or entering into swaps or futures-related trading activities for our own profit or that of our customers. MasterCard is a technology company that is *predominantly engaged* in operating a data processing system for use by our customers. The fact that our customers may be banks and other financial institutions instead of other commercial entities seems to be of little relevance in determining whether we should be allowed to rely on the end-user exemption. While the services we provide are centrally important to financial institutions that are issuers and acquirers, the manner in which we use derivatives for hedging purposes in our business is indistinguishable from the manner in which any global commercial enterprise that is exposed to currency exchange fluctuations uses derivatives.

If Section 4(k) of the BHCA is literally construed, the companies that it would capture include payment card networks (such as MasterCard) and other data processing firms; companies that engage in so-called “finder” activities, such as providers of online auction sites; companies that provide management consulting on any financial, economic, accounting or audit matter; companies that provide ATM hardware and software; check printers; and many other companies that have no connection to the risks associated with derivatives trading for profit.¹¹ We doubt very much that Congress intended to preclude such entities from relying on the end-user exemption merely because the services provided by such entities are provided to customers in the financial services industry or are for other reasons caught in the broad net of BHCA Section 4(k). As the Commission lacks any direct authority to issue binding interpretations of the BHCA, we ask that the Commission expressly exclude entities like MasterCard from the definition of “financial entity.”

Commission Authority to Provide Appropriate Relief

Congress gave the Commission broad rulemaking and exemptive authority to implement Dodd-Frank as well as to give effect to the CEA generally. Section 4(c)(1) of the CEA gives the Commission broad authority to provide public interest exemptions. Although Congress carefully constrained the Commission’s authority to exempt persons from specific provisions of Dodd-Frank under Section 4(c)(1), the mandatory clearing provision of Section 2(h)(1) and the end-user exemption of Section 2(h)(7) are not among the provisions for which the Commission’s authority to issue public interest exemptions was constrained by Congress. This evidences the view of Congress that mandatory clearing and the end-user exemption are areas in which the Commission likely will need to provide exemptions in order to fulfill the intent underlying the provisions, as suggested by the Dodd-Lincoln Letter. Section 8a(5) of the CEA also provides the Commission with authority “to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of [the CEA].” The Commission has relied on this broad grant

¹¹ 12 C.F.R. § 225.28(b); 225.86(d)(1).

of rulemaking authority where it deemed doing so necessary to effectuate the purposes of the CEA.

We believe excluding entities like MasterCard from the definition of a “financial entity” for the purpose of Section 2(h)(7) would be an appropriate use of the Commission’s authority.

Timing of the Clearing Mandate

Even if the Commission determines not to exclude entities like MasterCard from the definition of a “financial entity” under Section 2(h)(7) of the CEA, we believe it is appropriate to provide such entities ample time to come into compliance with any clearing mandate that the Commission may issue. We see little to be gained by rushing payment card networks and other data processors to clear foreign currency transactions until the costs of clearing and the impact on such companies are better understood. In the Implementation Proposal, the Commission exercised its discretion and created a three-phase implementation period that requires certain accounts to begin clearing their swaps within 90, 180 or 270 days after the Commission issues a clearing requirement, depending on the type of entity. If the Commission determines not to exempt payment card networks such as MasterCard from the mandatory clearing requirement at this time, we request that the Commission establish an additional implementation phase under which it delays implementation with respect to such entities until the Commission has an opportunity to develop a full and proper understanding of the benefits and consequences of application to such entities of the mandatory clearing requirement. At a minimum, however, the Commission should include these entities in the 270 day implementation category in order to allow these entities to transition their foreign currency hedging activities to the clearing regime in an orderly fashion.

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In conclusion, we appreciate the opportunity to provide the foregoing comments to the Commission. We would be pleased to provide the Commission with any additional information or analysis that may be useful in determining the scope of the final rules implementing the end-user exemption and the timing of the Commission’s clearing mandates with respect to foreign currency swap transactions. If you have any questions regarding our comments, please do not hesitate to contact the undersigned at (914) 249-6715 or randi_adelstein@mastercard.com, or our counsel at Sidley Austin LLP in this matter, Joel D. Feinberg, at (202) 736-8473.

Sincerely,



Randi D. Adelstein
Vice President
U.S. Public Policy and Regulatory Counsel

CC: Commodity Futures Trading Commission

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