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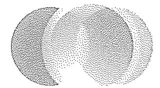

MasterCard Worldwide
Law Department
2000 Purchase Street
Purchase, NY 10577-2509
tel 1-914-249-2000
www.mastercard.com

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November 26, 2012

Office of the
Secretariat

Via Federal Express

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

COMMENT

Re: RIN 3038-AC97, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

Dear Mr. Stawick:

This letter is submitted by MasterCard Worldwide ("MasterCard")[1] in response to the Notice of Proposed Rulemaking on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants[2] issued on April 28, 2011 by the Commodity Futures Trading Commission ("Commission"). While we understand that the comment period has closed, we believe it is important that the Commission consider the unintended adverse effects that the Proposed Rules will have on MasterCard and other similarly situated entities. We note that the Commission has twice extended the comment period,[3] and hope that in a similar spirit the Commission will include this comment letter in the public record that the Commission will review as it prepares to draft the final rules.

We appreciate this opportunity to comment on the Proposed Rules and we welcome the opportunity to provide the Commission with information concerning our use of over-the-counter ("OTC") foreign currency derivatives in the operation of our global business. Requiring MasterCard and similar entities to post initial and variation margin in connection with uncleared OTC foreign currency derivatives will have an adverse effect on our ability to manage the foreign currency risks we incur in our operations, while providing little, if any, benefit to the

[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 27 billion payments each year, and provides analysis and consulting services that drive business growth for its banking customers and merchants. With more than one billion cards issued through its family of brands, including MasterCard®, Maestro® and Cirrus®, MasterCard serves consumers and businesses in more than 210 countries and territories, and is a partner to more than 20,000 of the world's leading financial institutions. With more than 33.3 million acceptance locations worldwide, no payment card is more widely accepted than MasterCard.
[2] 76 Fed. Reg. 23732 (April 28, 2011) (the "Proposed Rules").
[3] 76 Fed. Reg. 27621 (May 12, 2011); 77 Fed. Reg. 41109 (July 12, 2012).

safety and soundness of the financial system. While we greatly appreciate the efforts of the Commission and of other financial regulators to implement Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")[4] and to strive to improve the safety and soundness of the U.S. financial markets, we believe strongly that the treatment of payment card networks, such as MasterCard, under the Proposed Rules is inappropriate and inconsistent with Congressional intent. As the Commission notes in its proposing release,[5] Congress, in enacting Title VII of Dodd-Frank, sought to ensure that end users using the OTC derivatives markets for risk-management purposes in the operations of their businesses were not unduly disrupted in doing so. We believe certain aspects of the Proposed Rules are inconsistent with this Congressional intent and will be unduly disruptive to our business. We urge the Commission to change the Proposed Rules in order to address the issues discussed below.

Background

Under the Proposed Rules, swap dealers and major swap participants for which there is no prudential regulator ("covered swap entities") would be required to collect initial and variation margin from their counterparties with respect to uncleared swaps if their exposure to the counterparties exceeds the applicable initial and variation margin thresholds. Thresholds would be required to be set at zero except for financial entities that: (i) are subject to regulatory capital requirements; (ii) do not have significant swaps exposure; and (iii) predominantly use swaps to hedge or mitigate the risks of their business activities. For these lower risk financial entities, covered swap entities would be permitted to establish minimum thresholds at the lesser of $15 to $45 million and 0.1% to 0.3% of the covered swap entity's regulatory capital.[6] The Proposed Rules would not impose any margin requirements on non-financial entities.

The Definition of "Financial Entity" under the Proposed Rules is Overly Broad

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 does not issue 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 effectively a technology company that enables the issuers and acquirers (and, ultimately, their customers) to complete payment card transactions.

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[4] Pub. L. 111-203 (2010).

[5] *See* 76 Fed. Reg. 23736 (April 28, 2011) ("The Commission believes that such entities, which are using swaps to hedge commercial risk, pose less risk to [covered swap entities] than financial entities. Consistent with Congressional intent, the proposal would not impose margin requirements on such positions.").

[6] The dollar or percentage of regulatory capital have not yet been set by the Commission, but are proposed to be within these broad ranges.

MasterCard is not a bank and does not own or control a bank. MasterCard does not engage in lending, deposit taking or trust services—the basic activities in which banks engage. MasterCard is not a securities firm or an insurance company. MasterCard enters into transactions in derivative financial instruments, typically in the form of foreign currency forward contracts, to manage risk associated with anticipated receipts and disbursements which are either transacted in a non-functional currency or valued based on a currency other than its functional currencies. MasterCard also enters into foreign currency forward contracts to offset possible changes in value of assets and liabilities denominated in foreign currencies due to foreign exchange rate fluctuations. MasterCard does not engage in proprietary trading of derivatives. Its objective for entering into transactions in derivative financial instruments is to reduce exposure to transaction gains and losses resulting from fluctuations of foreign currencies against its functional currencies. MasterCard engages in derivatives transactions solely and exclusively for the purpose of hedging foreign currency exchange risk incurred in the operation of its business.

As noted above, MasterCard has approximately 20,000 customers, and processes payment card transactions from more than 210 countries and territories. MasterCard derives approximately 60% of its revenue from outside of the United States. Given the global reach of our company, we are deeply impacted by fluctuations in foreign currency exchange rates in the operation of our business. 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 MasterCard collects. Similarly, given our global footprint, we make significant expenditures and incur significant contractual obligations to make future expenditures in countries around the world for commercial activities, such as marketing, advertising, payroll and operations. These expenditures and obligations may be denominated in currencies other than the U.S. Dollar. This exposes MasterCard to fluctuations in foreign exchange rates. In addition to our transactional exposures, we also hedge balance sheet assets and liabilities denominated in foreign currencies. From time to time, MasterCard is also exposed to foreign exchange risks arising from overseas acquisitions.

The Proposed Rules would define a "financial entity" to include, among others, 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 [(the "BHCA").]"[7] 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. If Section 4(k) of the BHCA and its implementing regulations were to be construed literally, the companies that it would capture would include payment card networks (such as MasterCard) and other technology and data processing firms; as well as companies that engage in so-called "finder" activities, such as providers of online auction sites; companies that provide management consulting on any

[7] Proposed Rules §23.150.

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 or the risks that led to the financial crisis. While the breadth of Section 4(k)(4) of the BHCA may be appropriate for purposes of establishing the boundaries of permissible activities for financial holding companies, it is not appropriate for purposes of establishing the scope of derivatives-related regulations.

Payment card networks were not responsible for the financial crisis and pose very little risk to the financial system. They should not be treated in a manner identical to hedge funds and others that may pose heightened risks to the financial system. Imposing margin requirements for uncleared OTC derivatives that are not closely aligned with the risk posed by the relevant positions will increase the cost of hedging. In the case of payment card networks, any broad increase in the cost of doing business will ultimately be born by merchants and the consuming public.

Congress did not Intend for Entities Like MasterCard to be Subject to Mandatory Margin in Connection with Uncleared Swaps

Although Dodd-Frank did not expressly include an end-user exemption in its margin provisions, legislative history indicates that Congress did not intend to impose margin requirements on end users like MasterCard, who use swaps to hedge or mitigate commercial risk. During the final conference report discussions pertaining to the passage of Dodd-Frank, Representative Peterson, a principal House author of Title VII, stated that "[there is] a misinterpretation of the conference report's language regarding capital and margin requirements by some who want to portray these requirements as applying to end users of derivatives. This is patently false."[8] Representative Peterson continued: "Nowhere in this section do we give regulators any authority to impose capital and margin requirements on end users."[9] Other statements by members of Congress clearly indicate that the margin requirements were not intended to apply to end users like MasterCard, who use OTC derivatives only to hedge legitimate business risks. For example, Representative Peterson stated: "because commercial end users, who are those who use derivatives to hedge legitimate business risks, do not pose systemic risk and because they solely use these contracts as a way to provide consumers with lower cost goods, they are exempted from clearing and margin requirements."[10] Similarly, Representative Perlmutter noted: "These end-user companies pose little or no systemic risk to our economy, and this bill protects them from unnecessary and burdensome margin and clearing requirements."[11]

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 margin requirements (the "Dodd-Lincoln

[8] 156 Cong. Rec. H5245 (June 30, 2010).
[9] 156 Cong. Rec. H5245 (June 30, 2010).
[10] 156 Cong. Rec. H5244 (June 30, 2010).
[11] 156 Cong. Rec. H5230 (June 30, 2010).

Letter").[12] 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." The Dodd-Lincoln Letter stated unequivocally that Dodd-Frank "does not authorize the regulators to impose margin on end users, those exempt entities that use swaps to hedge or mitigate commercial risk." Senators Dodd and Lincoln also stated that Congress "may not have the expertise to set specific standards." We agree with that statement and believe that Congress intended for the Commission, as the expert agency, to carefully consider the contours of the margin requirement for uncleared swaps in order to ensure that they appropriately protect OTC derivatives end users like MasterCard from unnecessary costs imposed by margin requirements.

The Commission Should Treat Payment Card Networks as Non-Financial Entities

We believe Congress did not intend to impose margin requirements on payment card networks merely because they provide services to customers in the financial services industry or are for other reasons caught in the broad net of Section 4(k) of the BHCA. We therefore ask that the Commission expressly exclude such payment card networks from the definition of "financial entity" under the Proposed Rules. MasterCard engages in none of the activities that the margin 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 subject to punitive margin treatment. While the services we provide are 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 rate fluctuations uses derivatives.

If the Commission Treats Payment Card Networks as Financial Entities, It Should Deem Them to be Lower Risk

Under the Proposed Rules, covered swap entities would only be permitted to establish non-zero initial and variation margin thresholds for a financial entity that (1) is subject to capital requirements established by a prudential regulator or a State insurance regulator; (2) does not have a significant uncleared swaps exposure; and (3) predominantly uses uncleared swaps to hedge or mitigate the risks of its business activities. Thresholds would be required to be set at zero for all other financial entities.

We agree that a central tenet of whether an entity should be considered higher risk and therefore be subjected to more stringent margin requirements for uncleared swaps should be whether the entity is using swaps for hedging purposes. Such entities, due to the inherent nature of hedging, do not pose a heightened risk of defaulting to their counterparties because losses on

[12] *See* 156 Cong. Rec. S6192 (July 22, 2010).

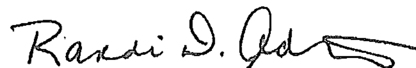
swap positions are offset internally by gains elsewhere in the operations or on the balance sheet of the relevant entity. The Proposed Rules inappropriately focus on regulatory capital requirements to differentiate between higher risk and lower risk financial entities. This criterion is inadequate in evaluating the risk which an entity poses to the financial system. Such risk would be better evaluated by focusing on the nature of an entity's derivatives use (*i.e.*, whether it uses derivatives to hedge commercial risk) and its uncollateralized exposure to other market participants (*e.g.*, by looking to whether the entity has a "substantial position" in swaps). We believe the determination of whether a financial entity is lower risk should be made based on whether the entity is predominately using swaps for hedging purposes.

Many entities like MasterCard that predominantly use derivatives to hedge commercial risk are not subject to regulatory capital requirements for the precise reason that their business models introduce little risk to the financial system. For this same reason, the Commission should adopt an approach that does not treat such entities as posing heightened risk to the financial system.

* * *

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 Commission's final rules implementing margin requirements for uncleared swaps. 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 outside counsel at Sidley Austin LLP in this matter, Joel D. Feinberg, at (202) 736-8473 or jfeinberg@sidley.com.

Sincerely,



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

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