December 2, 2014

*Via Electronic Mail*

Mr. Christopher Kirkpatrick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street N.W.  
Washington, D.C. 20581

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

Dear Mr. Kirkpatrick:

This letter is submitted by the Corporate Treasury teams from MasterCard International Incorporated (“MasterCard”), First Data Corporation (“First Data”) and Vantiv, Inc. (“Vantiv”) (collectively, the “Companies”). Together, we represent a diverse cross-section of payment processing companies based in the United States. Additional background information about our Companies is provided below. This joint letter is in response to the Notice of Proposed Rulemaking on Margin Requirements for uncleared Swaps for Swap Dealers and Major Swap Participants[[1]](#footnote-1) (“Proposed Margin Rules”) issued on October 3, 2014 by the Commodity Futures Trading Commission (“Commission”). We commend the Commission for the Proposed Margin Rules and for its continuing efforts to implement Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)[[2]](#footnote-2) in a manner that strives to improve the safety and soundness of the U.S. financial markets, while maintaining sensitivity to the costs such regulatory efforts may impose on end users, like our Companies, that utilize the OTC derivatives markets for risk-management purposes related to the operations of their businesses. In particular, we strongly support the Commission’s proposed definition of “financial end user,” which effectively excludes payment card networks and payment solution providers from being subject to mandatory margin for uncleared swaps activity. We believe this approach strikes an appropriate balance between ensuring that financial counterparties that pose significant risk to the financial system are collateralizing that risk by posting margin and avoiding imposing those requirements on entities whose uncleared swaps activities do not create such systemic risk. The collateral that would otherwise be used by commercial parties like our Companies to margin their uncleared swaps can now be put to productive use. We thank the Commission and the other federal regulatory agencies for choosing a balanced approach. As discussed below, we also urge the Commission to reconsider its approach to its mandatory clearing rules, and we look forward to discussing those rules with Commission staff in the near future.

**About Our Companies**

The Companies are not banks, and do not engage in lending, deposit taking or trust services, *i.e.*, the basic activities in which banks engage. Nor are the Companies securities firms, and nor do the Companies engage in derivatives trading for customers or with the goal of generating a profit. The Companies engage in derivatives transactions solely and exclusively for the purpose of hedging risks we incur in the conduct of our businesses. The Companies’ hedging techniques are aligned with hedging techniques commonly used by commercial entities across all sectors of the economy.

**MasterCard International Incorporated**

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. MasterCard, like other similarly situated payment networks, is a technology company that primarily enables payment transactions.

**First Data**

First Data Corporation provides electronic commerce and payment solutions for merchants, financial institutions and card issuers. Its range of services for merchants include authorizing, capturing and settling card and electronic transactions, providing point of sale and other equipment to capture transactions, electronic payroll distribution solutions, and check verification, settlement and guarantee services through its TeleCheck subsidiary. First Data also provides card processing and output services for card issuers, debit network services through the STAR network, ATM processing, acquiring and switching services, and payment management solutions for recurring bill payment and services to improve customer communications, billing, online banking and consumer bill payment.

**Vantiv**

Vantiv, Inc. is a leading, integrated payment processor differentiated by a single, proprietary technology platform. Vantiv offers a comprehensive suite of traditional and innovative payment processing and technology solutions to merchants and financial institutions of all sizes in the United States, enabling them to address their payment processing needs through a single provider. Vantiv builds strong relationships with its customers, helping them become more efficient, more secure and more successful. Vantiv is the third largest merchant acquirer and the largest PIN debit acquirer based on number of transactions in the United States. The company’s growth strategy includes expanding further into high growth payment segments, such as ecommerce, payment facilitation (PayFacTM), mobile, prepaid and information solutions, and attractive industry verticals such as business-to-business, ecommerce, healthcare, gaming, government and education.

**“Financial End Users” versus “Financial Entities”**

Under the Proposed Margin Rules, swap dealers and major swap participants for which there is no prudential regulator (“covered swap entities”) would be required to pay and/or 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, with the particular margin requirement varying based on whether the counterparty is a swap dealer, major swap participant or a “financial end user.” The Proposed Margin Rules would not impose any margin requirements on a “non-financial end user,” which is defined as a counterparty that is not a swap dealer, major swap participant or financial end user.

The Proposed Margin Rules define a “financial end user” to include, among others, banks, insurance companies and securities firms. The defined term “financial end user” was also used by the prudential regulators in their final rules regarding uncleared swaps margin.[[3]](#footnote-3) “Financial end user” is, in certain respects, defined more narrowly than “financial entity,” which is the term used under the End-User Exception Rules, because 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”).[[4]](#footnote-4) As described in further detail below, Section 4(k) captures a broad range of entities that are not banks, insurance companies or securities firms, that do not engage in derivatives trading for profit and that were not the types of entities that contributed to the financial crisis. We commend the Commission for proposing a narrower “financial end user” definition in the Proposed Margin Rules, as it avoids the over-inclusiveness of the “financial entity” definition.

In light of the Proposed Margin Rules, we also urge the Commission to revisit Commission Rule 50.50 regarding the end-user exception to the clearing requirement for swaps (the “End-User Exception Rules”)[[5]](#footnote-5) so that the end-user exception to mandatory clearing is made available to entities that would not be “financial end users” as defined in the Proposed Margin Rules. Revising the End-User Exception Rules in a manner that would permit an entity that is not a “financial end user” to rely on the end-user exception would bring the clearing rules and the uncleared swaps margin rules into harmony. The mandatory clearing rules and the uncleared swaps margin rules should work together hand-in-glove and it is difficult to justify differing treatment for end-users under the two sets of rules, particularly given the substantial costs associated with mandatory clearing. We intend to seek no-action relief in the near future pursuant to which we would ask for confirmation by the Commission staff that the staff would not recommend enforcement action against entities that are not defined as “financial end users” in the Proposed Margin Rules, if such entities do not submit swaps for clearing that would otherwise be mandated to be cleared under Commission rules. While we do appreciate that the definition of “financial entity” is hard-wired into the Commodity Exchange Act (“CEA”) (via amendment under Dodd-Frank) and that the definition of “financial end user” is entirely a regulatory creation, we do not believe it would be consistent with Congressional intent for the scope of the mandatory clearing rules and the uncleared swaps margin rules to differ.

**Application of the “Financial Entity” Definition**

Section 2(h)(7)(A)(i) of the CEA,[[6]](#footnote-6) as amended by Dodd-Frank, precludes “financial entities” from relying on the end-user exception. 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.” In thinking about Section 4(k) of the BHCA[[7]](#footnote-7), it is important to remember that Section 4(k) is a permissive provision of the BHCA—*i.e.*, it describes activities in which a bank *may engage*. However, under the CEA, Section 4(k) has been used in a manner that is prohibitive—*i.e.*, to describe activities (entering into non-cleared swaps) in which entities *may not engage*. Section 4(k) is broadly permissive and, through implementing regulations, includes among the permitted activities the provision of data processing, data storage and data transmission services, facilities, databases or advice for financial, banking or economic data.[[8]](#footnote-8) However, relying on Section 4(k) as a prohibitive provision, turns the intent of the provision on its head.

Regardless of whether a payment card network or payment solutions provider is construed as being “predominantly engaged” in activities that are “financial in nature” within the meaning of the BHCA, we believe such an entity should be allowed to rely on the end-user clearing exception as long as it is not also a “financial end user.” Payment card networks, payment solution providers and data processors are not engaged in any of the activities that the mandatory clearing provisions of Dodd-Frank were intended to address. They do not engage in any of the following: the business of making loans, taking deposits or providing trust services; 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. Our Companies are technology companies predominantly engaged in operating data processing systems for use by our customers. The fact that our customers may be banks and other financial institutions instead of other commercial entities should be of no relevance in determining whether we should be allowed to rely on the end-user exception.

If Section 4(k) of the BHCA[[9]](#footnote-9) is literally construed, the companies that it captures could include payment card networks, payment solution providers 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 point-of-sale and ATM hardware and software; check printers; and many other companies that have no connection to the risks associated with speculative derivatives trading addressed by the Dodd-Frank clearing mandate. We doubt that Congress intended to preclude such entities from relying on the end-user exception 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).[[10]](#footnote-10) As indicated above, we intend to seek no-action relief from the Commission staff in the near future to address this issue. We believe that one of the main purposes of the CEA was, as described in the Dodd-Lincoln Letter, to “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.” Allowing entities that are not “financial end users” to rely on the end-user exception from mandatory clearing would further that purpose.

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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 Roger Griffith of MasterCard at (914) 249-3194 or roger\_griffith@mastercard.com, or MasterCard’s outside counsel in this matter at Sidley Austin LLP, Nathan Howell at (312) 853-2655 or nhowell@sidley.com or Michael Sackheim at (212) 839-5503 or msackheim@sidley.com.

Sincerely,





cc: Randi Adelstein, MasterCard International Incorporated, Senior Managing Counsel, U.S. Regulatory and Public Policy

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1. 1 79 Fed. Reg. 59898 (October 3, 2014). [↑](#footnote-ref-1)
2. Pub. L. 111-203 (2010). [↑](#footnote-ref-2)
3. 79 Fed. Reg. 57348 (Sept. 24, 2014). [↑](#footnote-ref-3)
4. 7 U.S.C. § 2(h)(7)(C)(i)(VIII) (emphasis added). [↑](#footnote-ref-4)
5. 77 Fed. Reg. 42560 (July 19, 2012; 17 C.F.R. § 50.50. [↑](#footnote-ref-5)
6. 7 U.S.C. § 2(h)(7)(A)(i). [↑](#footnote-ref-6)
7. 12 U.S.C. § 1843(k). [↑](#footnote-ref-7)
8. 12 C.F.R. § 225.28(b)(14). [↑](#footnote-ref-8)
9. 12 C.F.R. § 225.28(b); 225.86(d)(1). [↑](#footnote-ref-9)
10. 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 exception (the “Dodd-Lincoln Letter”). *See* 156 Cong. Rec. 56192 (daily ed. July 22, 2010). 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 exception in order to ensure that it appropriately protects derivatives users from the additional costs involved with clearing. [↑](#footnote-ref-10)