June 28, 2019

Via Email (regs.comments@federalreserve.gov)

Ms. Ann Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

RE: Docket No. R-1661, RIN 7100-AF 48

Dear Ms. Misback:

Mastercard International Incorporated ("Mastercard") submits this comment letter to the Board of Governors of the Federal Reserve System (the "Board") in response to its notice of proposed rulemaking on netting eligibility for financial institutions under Regulation EE[1] (the "Proposal").[2] We support the Proposal and encourage the Board to adopt it as a final rule with one addition that we discuss herein.

Background on Mastercard

Mastercard is a technology company in the global payments industry. Mastercard operates the world's fastest payments processing network, connecting consumers, financial institutions, merchants, governments and businesses in more than 210 countries and territories. Mastercard does not issue payment cards of any type, nor does it contract with merchants to accept those cards. In the Mastercard network, those functions are performed by U.S. depository institutions, foreign banks and non-bank financial institutions that are licensed and regulated by foreign governments ("other foreign financial institutions"). Mastercard refers to the financial institutions that issue payment cards bearing the Mastercard brands to cardholders as "issuers." Mastercard refers to the financial institutions that enter into contracts with merchants to accept Mastercard-branded payment cards as "acquirers."

When a cardholder presents a Mastercard-branded payment card to a merchant to purchase goods or services, the merchant sends an authorization request to its acquirer, the acquirer routes the request to Mastercard, and Mastercard routes the request to the issuer. The issuer either approves or declines the authorization request and routes its decision back to the merchant through the same channels. Mastercard's role in the transaction is to facilitate the

[1] 12 C.F.R. part 231.

[2] 84 *Fed. Reg.* 18,741 (May 2, 2019).

payment instructions between the parties to the transaction–the cardholder, the merchant, the acquirer, and the issuer and to facilitate the clearing and settlement of the payment transaction between the issuer and acquirer.

Comments

Sections 401-407 of the Federal Deposit Insurance Corporation Improvement Act of 1991, as amended ("FDICIA"), provide certainty that agreements between parties to pay or receive net amounts will be enforced even in the event of the insolvency of one of the parties. The purpose of these sections of FDICIA, as explained in FDICIA Section 401 and discussed further in the supplementary information in the Proposal, is to promote efficiency within the financial system.[3] Of particular relevance to Mastercard, Section 404 of FDICIA establishes the primacy of netting agreements between members of clearing organizations, including the clearing organization itself.[4]

To achieve the purpose of FDICIA Sections 401-407, the definition of "clearing organization" should include networks such as Mastercard. We have over 20,000 regulated financial institution participants, process many billions of transactions per year and our efficient execution of settlement transactions benefits the U.S. financial system. The statutory definition of "clearing organization" includes duly registered clearing agencies and derivatives clearing organization. Mastercard is not such an entity. It also includes entities that operate payment networks such as Mastercard's, if all of the members other than the operator itself are *financial institutions* or other clearing organizations.[5]

Mastercard believes that the Proposal would make an important clarification to Regulation EE by expressly including all foreign banks within the scope of "financial institutions" for purposes of Sections 401-407 of FDICIA. In this regard, the Proposal will address the risk of a court narrowly reading the FDICIA definitions of "financial institution" and "depository institution," with the effect that a foreign bank does not qualify as a "depository institution"—and thus does not meet FDICIA's statutory definition of "financial institution"—unless the foreign bank has a U.S. branch or agency. We welcome this aspect of the Proposal.

However, we also urge the Board to add other foreign financial institutions to the scope of "financial institutions." The FDICIA Section 401 definition of "financial institutions" does not expressly include other foreign financial institutions, but it does authorize the Board to include other foreign financial institutions within the definition by regulation. In some countries, we are prohibited by law from excluding other foreign financial institutions from the Mastercard network. For example, in the European Union, under the Payment Services Directive (2015/2366) ("PSD2"), our rules on participation in our network must be "objective, non-discriminatory and proportionate" for EU banks, electronic money institutions and payment

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[3] 12 U.S.C. § 4401; 84 *Fed. Reg.* at 18,741.

[4] 12 U.S.C. § 4404. A "member" of a clearing organization includes a member or participant in the clearing organization and the clearing organization itself. 12 U.S.C. § 4402(11).

[5] 12 U.S.C. § 4402(2)(A)(i).

institutions and must not inhibit access to our network unless this is necessary to safeguard against specific risks.[6] [7] EU member states are required to transpose these requirements into their national laws.[8] In effect, the PSD2 prevents Mastercard from denying membership to other foreign financial institutions—electronic money institutions and payment institutions.

The inclusion of all foreign banks and other foreign financial institutions in the scope of "financial institutions" for purposes of Sections 401-407 of FDICIA is highly unlikely to increase risk in the banking system but is likely to promote efficiency. Foreign banks and other foreign financial institutions are subject to regulation and supervision in their home countries of the type that applies to U.S. financial institutions expressly set forth in the FDICIA definitions of "financial institution" and "depository institution." In the EU example discussed above, electronic money institutions and payment institutions are supervised and regulated by the national authorities in their respective EU member states of establishment and by the national authorities in any other EU member states in which they provide regulated services through local branches or agents. Moreover, inclusion of all foreign banks and other foreign financial institutions would ensure efficiencies in settlement in global multi-institution networks such as Mastercard that would inure to the benefit of the U.S. financial system. Thus, we urge the Board to expand proposed § 231.3(e)(7) in Regulation EE to read, in full, as follows (our addition is underlined):

> A foreign bank as defined in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101), including a foreign bridge bank, <u>or any credit, payment, electronic money or comparable institution authorized or licensed by any foreign national government, or an agency, authority or instrumentality thereof</u>.

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[6] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, art. 35.

[7] An "electronic money institution" is a person, other than a bank, that is authorized by a competent authority in an EU member state to issue electronically stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions, and which is accepted by a natural or legal person other than the electronic money issuer, and to provide and execute certain regulated payment services. Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, at Title 1, art. 2(1)-(2).

A "payment institution" is a person, other than a bank or an electronic money institution, that is authorized by a competent authority in an EU member state to provide and execute certain regulated payment services. Directive (EU) 2015/2366, at art. 4(4).

[8] *Id.* at art. 115.

Mastercard appreciates the opportunity to provide comments to the Proposal. If there are any questions regarding our comments, please do not hesitate to contact the undersigned at (914) 249-1582 or Tina.Woo@mastercard.com, or our counsel at Sidley Austin LLP in this matter, Joel D. Feinberg, at (202) 736-8473.

Sincerely,

Tina Woo
Senior Managing Counsel
Regulatory Affairs

cc: Joel D. Feinberg