



DIVISION OF
CORPORATION FINANCE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

April 25, 2023

Ning Chiu
Davis Polk & Wardwell LLP

Re: Mastercard Incorporated (the "Company")
Incoming letter dated February 7, 2023

Dear Ning Chiu:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by the New York City Retirement Systems for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests that the board issue a report concerning its oversight of management's decision-making regarding any application to the International Standards Organization to establish a merchant category code for standalone gun and ammunition stores.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal transcends ordinary business matters.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(10). Based on the information you have presented, it appears that the Company's public disclosures do not substantially implement the Proposal.

Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2022-2023-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: Michael Garland
City of New York Office of the Comptroller

February 7, 2023

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Ladies and Gentlemen:

On behalf of Mastercard Incorporated, a Delaware corporation (the “**Company**”), and in accordance with Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”), we are filing this letter with respect to the shareholder proposal (the “**Proposal**”) submitted by the Comptroller of the City of New York on behalf of the New York City Employees’ Retirement System, the New York City Teachers’ Retirement System and the New York City Board of Education Retirement System (the “**Proponent**”) for inclusion in the proxy materials the Company intends to distribute in connection with its 2023 Annual Meeting of Shareholders (the “**2023 Proxy Materials**”). The Proposal is attached hereto as Exhibit A.

Pursuant to Staff Legal Bulletin No. 14D (CF), Shareholder Proposals (Nov. 7, 2008), Question C, we have submitted this letter via email to shareholderproposals@sec.gov. Also, in accordance with Rule 14a-8(j), a copy of this submission is being sent simultaneously to the Proponent as notification of the Company’s intention with respect to the Proposal. This letter constitutes the Company’s statement of the reasons set forth herein. We have been advised by the Company as to factual matters set forth herein.

THE PROPOSAL

The Proposal states:

RESOLVED: Shareholders request the Mastercard Incorporated Board of Directors issue a public report, omitting proprietary and privileged information, concerning its oversight of management’s decision-making regarding any application to the International Standards Organization (ISO) to establish a merchant category code (MCC) for standalone gun and ammunition stores. This report should cover Mastercard’s governance of MCC standards, as well as disclose and explain the justification for its position on any applications to create an MCC for gun and ammunition stores.

BACKGROUND

The Company is a technology company in the global payments industry that connects consumers, financial institutions, merchants, governments, digital partners, businesses and other organizations worldwide. The Company offers payments products and services across this complex network with different players and providers who may be involved in transactions, including financial institutions; merchants; network enablement providers; affiliate or reseller programs; technology partners involved in specific types of activities (e.g., digital wallets); and so forth. Each participant may also have various lines of business and operate across different geographies or show up in the Company’s network in multiple ways.

The Company's core network, across which transaction data about a particular transaction ("transaction data") flows, supports what is often referred to as a "four-party payments network" and for each transaction includes the following participants:

- "account holder" (a person or entity who holds a card or uses another device enabled for payment);
- "issuer" (the account holder's financial institution);
- "merchant" (the entity from who an account holder makes a purchase); and
- "acquirer" (the merchant's financial institution).

The Company does not issue cards, extend credit, determine or receive revenue from interest rates or other fees charged to account holders by issuers, or establish the rates charged by acquirers in connection with merchants' acceptance of the Company's products. In the case of core network transactions, account holder relationships belong to, and are managed by, the issuers. The issuers and acquirers are the Company's customers. Accordingly, transaction data, as well as data pertaining to the identity of the account holders making such purchases, is owned and controlled by the issuers who are the Company's customers, and not the Company itself.

In short, when account holders use their cards, the Company does not know who they are or what they purchased. For each transaction processed over the Company's network, the Company only sees the card number, the merchant's name and location, the date and amount of the transaction, the merchant category code (the "MCC") and other technical data elements relating to transaction processing technology. The MCC only identifies the primary business of the merchant and does not identify what items the account holder purchased. There is no other data available through the MCC. In practical terms, the Company has no way of ascertaining from transaction data what items account holders have purchased in a transaction.

REASONS FOR EXCLUSION OF THE PROPOSAL

The Company believes that the Proposal may be properly omitted from the 2023 Proxy Materials pursuant to:

- Rule 14a-8(i)(7) because the Proposal deals with matters related to the Company's ordinary business operations; and
- Rule 14a-8(i)(10) because the Company has already substantially implemented the Proposal.

I. **The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(7) Because the Proposal Deals with Matters Related to the Company's Ordinary Business.**

Rule 14a-8(i)(7) allows a company to omit a shareholder proposal from its proxy materials if such proposal deals with a matter relating to the company's ordinary business operations. The policy underlying the ordinary business exception is based on two central considerations: (i) that "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight" and (ii) the "degree to which the proposal seeks to 'micromanage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." See Exchange Act Release No. 34-40018 (May 21, 1998, n.30) (the "1998 Release"); see also Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("SLB 14L").

A. The Proposal Relates to the Company's Policies and Procedures Around the Products and Services That It Offers.

With respect to this first policy consideration, the Staff has repeatedly concurred that proposals related to a company's decisions around the sale or distribution of specific products or services that it offers are generally excludable under Rule 14a-8(i)(7), even if such products or services are deemed controversial. In *Wal-Mart Stores, Inc.* (Mar. 20, 2014, aff'd and cited in *Trinity Wall Street v. Wal-Mart Stores, Inc.* 792 F.3d 323 (3d Cir. 2015)), the Staff permitted the exclusion of a proposal requesting board oversight to determine whether the company should sell certain products, namely guns equipped with high-capacity magazines, noting that "[p]roposals concerning the sale of particular products and services are generally excludable under [R]ule 14a-8(i)(7)." In *Kroger* (Apr. 7, 2016), the Staff provided the same rationale in permitting exclusion of a proposal requesting a board policy to ban the sale of semi-automatic firearms and accessories at all company owned and operated stores. See also *The Home Depot, Inc.* (Mar. 21, 2018) (permitting exclusion of a proposal requesting that the company stop selling glue traps because of their harm to mice and danger to other wildlife and human health); *Walgreens Boots Alliance, Inc.* (Nov. 7, 2016, recon. denied November 22, 2016) (permitting exclusion of a proposal requesting that the board prepare a report assessing the financial risk of continued sales of tobacco products); *Amazon.com, Inc.* (Mar. 27, 2015) (permitting exclusion of a proposal requesting the company disclose reputational and financial risk arising from the sale of products that implicated mistreatment of animals); *Rite Aid Corp.* (Mar. 24, 2015) (permitting exclusion of a proposal requesting board oversight to determine whether the company should sell certain products that may endanger public safety); *Dillard's, Inc.* (Feb. 27, 2012) (permitting exclusion of a proposal requesting the board develop a plan to phase out the sale of fur from raccoon dogs).

The proposals in *Wal-Mart* and *Kroger* each requested that a general retailer adopt a policy related to its decision-making process around the sale of particular kinds of guns. For such retail stores that sell hundreds of thousands of products throughout the United States, decisions relating to the products and services offered for sale are matters central to their ordinary business operations.

Similarly, the Proposal requests that the Company prepare a report describing board oversight of management's decision-making around the process to establish an MCC for purchases made at standalone gun and ammunition stores. As part of overseeing the Company's day-to-day business, management regularly makes strategic decisions around the hundreds of MCCs that it uses to categorize the broad range of merchants that participate in commerce on its network. MCCs only identify the primary business of the merchant. There is no other data available to the Company through the MCC. By focusing on the Company's governance of these MCCs, the Proposal's underlying subject matter is the manner in which the Company operates its payment processing services, as they relate to particular types of merchants who participate in the Company's four-party payments network. Like the topics of the proposals in *Wal-Mart* and *Kroger*, the decision-making around MCC standards is fundamental to the Company's ordinary business operations.

The Proposal's request for a report appears to be primarily focused on the Company's decision-making to adopt a particular MCC for standalone gun and ammunition stores, as well the Company's "governance of MCC standards" more generally. On October 19, 2022, the Company formally published an announcement to its customers classified as AN 7002 Revised Standards for a New Card Acceptor Business Code. The announcement included a new "MCC Description," specifically for "Retailers primarily engaged in the sale of firearms and ammunition," which is part of the broader management of the numerous MCCs it utilizes as part of the provision of payment products and services, and is fundamental to the ordinary business of the Company in facilitating commerce across its network. Given the Company's complex payment processing business, decisions around the categorization of the different types of merchants that may use its products and services are essential to management's ability to run the Company.

For example, the Company publishes a detailed guide (the “**Quick Reference Booklet**”) that lists all of the MCCs that the Company currently implements and provides an overview on their criteria and required use, as determined by management in its discretion.¹ The Quick Reference Booklet makes clear that the Company’s choices related to the management of its MCCs play a critical role in organizing the Company’s offerings throughout its broad payments network. The Company also provides a description on its website of the principles it has adopted to manage its MCC standards (the “**MCC Principles**”) consistent with the core values driving the Company’s day-to-day business operations, including with respect to the adoption of a new MCC for standalone gun and ammunition stores.²

By requesting a report addressing the governance of the MCC standards the Company uses to categorize the wide range of merchants on its network, including in particular a new MCC covering gun and ammunition stores, the Proposal seeks to improperly interfere with the management of the Company’s products and services offerings. Because the Proposal directly relates to the Company’s ordinary business decisions around its products and services, the Company believes the Proposal may be properly omitted from the 2023 Proxy Materials pursuant to Rule 14a-8(i)(7).

Further, the Commission has stated that a proposal requesting the publication of a report may be excludable under Rule 14a-8(i)(7) if the subject matter of the report is within the ordinary business of the company. See Exchange Act Release No. 34-20091 (Aug. 16, 1983) (the “**1983 Release**”). In addition, Staff Legal Bulletin No. 14H (Oct. 22, 2015), which was issued by the Staff to clarify its views on the scope and application of Rule 14a-8(i)(7), re-affirms that the analysis of the ordinary business exception “should focus on the underlying subject matter of a proposal’s request for board or committee review regardless of how the proposal is framed.” Although the Proposal is phrased in terms of preparing a report, including with respect to board oversight, this framing does not change the underlying subject matter of the Proposal: management’s ordinary business decisions around merchant categorization matters that directly impact how the Company facilitates commerce and offers its products and services across its network.

B. The Proposal Does Not Raise Significant Social Policy Issues That Transcend the Company’s Ordinary Business Operations.

In the 1998 Release, the Commission expressed that while proposals relating to ordinary business matters “but focusing on sufficiently significant social policy issues generally would not be excludable,” under Rule 14a-8(i)(7), the Staff has indicated that proposals that relate to both ordinary business matters and significant social policy issues may be excludable if the proposals do not “transcend the day-to-day business matters.” SLB 14L states that in making the determination on whether a proposal raises a significant social policy issue, the Staff will “focus on the social policy significance of the issue that is the subject of the shareholder proposal” and “consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.”

The mere fact that a proposal is phrased to reference or invoke issues that could implicate significant social policy issues under the Staff’s current interpretation of Rule 14a-8(i)(7) is not sufficient to transcend day-to-day business matters. A proposal may still be excluded when it effectively focuses on an ordinary business matter. See, e.g., *Walmart Inc.* (Mar. 6, 2020) (concurring with the exclusion of a proposal requesting that the company publish a report on the use of contractual provisions requiring employees to arbitrate employment-related claims); *Amazon.com, Inc.* (Domini Impact Equity Fund and the New York State Common Retirement Fund) (Mar. 28, 2019) (concurring with the exclusion of a proposal requesting that the

¹ <https://www.mastercard.us/content/dam/public/mastercardcom/na/global-site/documents/quick-reference-booklet-merchant.pdf>.

² <https://www.mastercard.com/news/press/2022/september/how-we-support-merchants-and-consumers-through-clear-consistent-principles/>. (“In light of recent interest and conversation around the International Standards Organization’s (ISO) creation of a new merchant code (MCC) for standalone firearms retailers, we thought it was important to share the principles on how we manage such standards and the operation of our business.”)

company publish a report on the impacts of its operations when the company has “hundreds of facilities” around the world and employs a large workforce); *JPMorgan Chase & Co.* (Mar. 9, 2015) (concurring with the exclusion of a proposal requesting that the company amend its human rights-related policies related to political participation because the proposal related to the company’s “policies concerning its employees”).

The Proposal includes the topic of gun violence, but the real subject matter of the proposal remains the Company’s categorization of the merchants that participate in the use of the products and services offered by the Company across its network.

The Company acknowledges that in *Mastercard Inc.* (Apr. 22, 2022), the Staff did not concur with the exclusion of a proposal requesting that the Company prepare a report describing if and how the Company intends to reduce the risk associated with the processing of payments involving its cards and/or electronic payment system services for the sale and purchase of certain untraceable firearms and related components and accessories. Here, the Proposal is distinguishable because the focus is not directly on the risks that certain types of firearms purchased on the Company’s payment systems can pose with respect to community violence. Instead, the subject matter of the Proposal addresses the Company’s day-to-day decision-making around policies and procedures governing the manner in which the Company categorizes gun retailers and all other merchants, and more generally offers products and services across its network.

II. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(10) Because the Company Has Substantially Implemented the Proposal.

Rule 14a-8(i)(10) permits a company to exclude a shareholder proposal if the company has already substantially implemented the proposal. According to the Commission, the purpose of this rule is to “avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by management.” 1983 Release; Exchange Act Release No. 34-12598 (July 1976). The Commission has stated that “substantial” implementation under the rule does not require implementation in full or exactly as presented by the proponent. 1998 Release.

The Staff has consistently found that “a determination that the company has substantially implemented the proposal depends upon whether [the company’s] particular policies, practices and procedures compare favorably with the guidelines of the proposal.” See, e.g., *Texaco, Inc.* (Mar. 28, 1991). Further, the Staff has provided no-action relief under Rule 14a-8(i)(10) when a company has substantially implemented and therefore satisfied the “essential objective” of a proposal, even if the company did not take the exact action requested by the proponent, did not implement the proposal in every detail, or exercised discretion in determining how to implement the proposal. See *Best Buy Co., Inc.* (Apr. 22, 2022); *IDACORP Inc.* (Apr. 1, 2022); *Edison International* (Feb. 23, 2022); *BlackRock, Inc.* (Apr. 2, 2021); *JPMorgan Chase & Co.* (Mar. 9, 2021); *Devon Energy Corp.* (Apr. 1, 2020); *Johnson & Johnson* (Jan. 31, 2020); *Pfizer Inc.* (Jan. 31, 2020); *The Allstate Corp.* (Mar. 15, 2019); *Johnson & Johnson* (Feb. 6, 2019); *United Cont’l Holdings, Inc.* (Apr. 13, 2018); *eBay Inc.* (Mar. 29, 2018); *Kewaunee Scientific Corp.* (May 31, 2017); and *Wal-Mart Stores, Inc.* (Mar. 16, 2017).

The core of the Proposal, or its “essential objective,” is for the Company to provide information about management’s decision-making “to establish a merchant category code (MCC) for standalone gun and ammunition stores,” as well as its “governance of MCC standards” more generally. The Company has satisfied the essential objective of the Proposal by announcing its commitment to adopt the new MCC on which the Proposal focuses, as well as by reporting on its governance of MCC standards in a manner that compares favorably with the guidelines of the Proposal.

MCCs are used by payment processing companies to categorize merchants based on the types of goods and services sold. As noted in the Proposal, the International Standards Organization (the “ISO”) is a

Geneva-based nonprofit organization responsible for setting standards for the payments industry, including by approving applications for MCCs. On September 9, 2022, the ISO unilaterally created a new MCC for purchases made at standalone gun and ammunition stores. It was under ISO's own rules that ISO Secretariat took this decision. The Registration and Maintenance Management Group that the Company participates in did not establish the MCC. Subsequent to ISO's decision, on October 19, 2022, the Company formally published an announcement to its customers classified as AN 7002 Revised Standards for a New Card Acceptor Business Code. The announcement included a new "MCC Description," specifically for "Retailers primarily engaged in the sale of firearms and ammunition." The effective date stated in the announcement is April 14, 2023. This effective date for the implementation of the new MCC is timed to facilitate industry-wide implementation of the new MCC across payment networks. By publishing the announcement in October 2022 and designating the April 2023 effective date for customer implementation, the Company has already acted favorably on the Proposal's request for a report addressing the implementation of this new category code.

The Company has further satisfied the essential objective of the Proposal by publicly reporting on how it manages MCC standards, including with respect to the Company's commitment to adopt the new MCC for standalone gun and ammunition stores. The Quick Reference Booklet that the Company publishes lists all of the MCCs that the Company currently implements and provides an overview on their criteria and required use. In addition, the Company's MCC Principles also specifically respond to the ISO's new MCC for sales made by standalone gun and ammunition stores. The MCC Principles explain that the Company manages all of its MCCs in a manner consistent with its well-established commitments to permitting lawful purchase across its payments systems and protecting the privacy of its network participants, stating that "[n]othing in [the] ISO's creation of an MCC will cause us to deviate from these principles." The MCC Principles also reiterate that MCCs provide the Company with limited information that only identifies the primary business of a merchant, and that the Company's rules do not permit selective authorization of transactions, such as blocking based solely on an MCC. If the Company identifies unauthorized blocking or intentional restrictions of legal commerce by any of its network participants, the Company will take action to address such activity.

Substantial implementation does not require implementation in full or exactly as presented by a proposal. The Company's public commitment to adopting the ISO's new MCC for purchases made at standalone firearm and ammunition stores, as well as its reporting on how it manages and governs its MCC standards, may not be actions identical to the Proposal's request for a particular report, but they do compare favorably with the Proposal's guidelines. The essential objective of the Proposal is for the Company to provide an understanding of its position on a new MCC for purchases made at standalone gun and ammunition stores, and on the governance of its MCC standards more generally. The Company's public commitment and existing reporting satisfy this objective, and therefore the Company believes the Proposal may be omitted pursuant to Rule 14a-8(i)(10).

CONCLUSION

For the reasons set forth above, the Company believes that the Proposal may be excluded from the Company's 2023 Proxy Materials pursuant to Rule 14a-8(i)(7) and Rule 14a-8(i)(10). The Company respectfully requests the Staff's concurrence with its decision to exclude the Proposal from its 2023 Proxy Materials and further requests confirmation that the Staff will not recommend enforcement action to the SEC if it so excludes the Proposal.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this request. If you should have any questions or need additional information, please contact the undersigned at (212) 450-4908 or at ning.chiu@davispolk.com.

Respectfully yours,

A handwritten signature in blue ink, appearing to read "Ning Chiu". The signature is written in a cursive style with a large, stylized "Q" at the end.

Ning Chiu

Attachment

cc w/ att: Adam Zitter, Corporate Secretary, Mastercard Incorporated
Michael Garland, Office of the Comptroller of the City of New York

Proposal

Report on Company's Stance on New Merchant Category Code

RESOLVED: Shareholders request the Mastercard Incorporated Board of Directors issue a public report, omitting proprietary and privileged information, concerning its oversight of management's decision-making regarding any application to the International Standards Organization (ISO) to establish a merchant category code (MCC) for standalone gun and ammunition stores. This report should cover Mastercard's governance of MCC standards, as well as disclose and explain the justification for its position on any applications to create an MCC for gun and ammunition stores.

Supporting Statement

Mass shootings are a significant societal problem. In 2022, there were 432 mass shootings through August 2022.¹

As a financial institution, Mastercard must ensure its systems are not used for criminal purposes. A new MCC for gun and ammunition stores would allow banks to comply with their regulatory obligation to report suspicious purchasing activity associated with illegal activity², and credit card companies would be able to voluntarily file this information under existing reporting systems. This could be accomplished *without limiting or regulating gun sales or creating any additional burden to internal systems*.

Suspicious activity could include gun sales associated with diversion from legal to illegal markets, and purchasing behavior associated with mass shootings. Failure to act could lead to regulatory and reputational risk, including reputational risk associated with costly litigation.

Suspicious purchasing activity that could constitute reportable suspicious activity might involve the frequency and size of purchases, and the type of retailer. For example, the Aurora, Colorado movie theatre shooter used a Mastercard issued to purchase \$11,000 worth of weapons and military gear in the six weeks, including purchases at two standalone gun stores.¹ One week before the mass shooting at the Pulse Nightclub, in which 49 people were killed and 50 injured, the shooter used a Mastercard (among others) to purchase more than \$26,000 worth of guns and ammunition, including purchases at a standalone gun retailer.²

An application to create an MCC for gun and ammunition stores was twice denied. It has been reported that Mastercard pushed back on the application and that "credit card industry employees were part of an internal committee within ISO that recommended the application's rejection."³

Shareholders would benefit from transparency on how Mastercard's Board of Directors is overseeing any final position taken on any MCC application for standalone gun and ammunition stores, and whether Mastercard is appropriately considering the risks inherent in failing to take action to report suspicious purchasing activity at these retailers.

We believe that failure to do so will result in lost lives, as well as regulatory, reputational, and litigation risks that may threaten long-term shareholder value.

We urge you to vote FOR this proposal.

¹ <https://www.gunviolencearchive.org/>

² <https://www.law.cornell.edu/cfr/text/31/1020.320#:~:text=31%20CFR%20%C2%A7%201020.320%20-%20Reports%20by%20banks,%C2%A7%201020.320%20Reports%20by%20banks%20of%20suspicious%20transactions.>

³ <https://www.cbsnews.com/news/bank-credit-cards-suspect-gun-ammo-sales/>

March 20, 2023

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Ladies and Gentlemen:

On behalf of Mastercard Incorporated, a Delaware corporation (the “**Company**”), we are writing to supplement our letter, dated February 7, 2023 (the “**No-Action Request**”), with respect to the shareholder proposal (the “**Proposal**”) submitted by the Comptroller of the City of New York on behalf of the New York City Employees’ Retirement System, the New York City Teachers’ Retirement System and the New York City Board of Education Retirement System (the “**Proponent**”) for inclusion in the proxy materials the Company intends to distribute in connection with its 2023 Annual Meeting of Shareholders (the “**2023 Proxy Materials**”). Capitalized terms not defined herein are used as defined in the No-Action Request. A copy of the No-Action Request is attached hereto as Exhibit A. We have been advised by the Company as to the factual matters set forth herein.

As stated in the No-Action Request, the Company believes the Proposal may be properly omitted from the 2023 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters related to the Company’s ordinary business operations, and Rule 14a-8(i)(10) because the Company has already substantially implemented the Proposal.

With respect to the Company’s substantial implementation of the Proposal, the No-Action Request explained that the Company satisfied the “essential objective” of the Proposal both by announcing the adoption of the new MCC as well as by reporting on its governance of MCC standards, in a manner that compares favorably with the guidelines of the Proposal.

Following the ISO’s decision to unilaterally create a new MCC for purchases made at standalone gun and ammunition stores, on October 19, 2022, the Company formally published an announcement to its customers classified as AN 7002 Revised Standards for a New Card Acceptor Business Code (the “**Customer Announcement**”) informing its customers that it was revising the Mastercard Standards for a New Card Acceptor Business Code with a new MCC specifically for “Retailers primarily engaged in the sale of firearms and ammunition,” which would take effect on April 14, 2023. The Company advised customers that they should review the revisions and make appropriate plans to support the new MCC. This effective date was timed to facilitate what was expected to be the industry-wide customer implementation of the new MCC across payment networks.

Recently, a number of states have introduced legislation related to the use of the new MCC. On March 9, 2023, the Company informed customers through an update to the Customer Announcement that the work on implementing the new MCC had been paused. Other payment processing companies across the industry took the same action. The Company has publicly stated that this pause is due to the inconsistency in how the new MCC could be applied by merchants, banks and payment networks at this time. The Company’s pause will ensure that the Company takes the appropriate time to understand this evolving legal situation, including the requirements and obligations of the Company and its customers.

The Company continues to believe that it has substantially implemented the Proposal, the “essential objective” of which is for the Company to provide information about management’s decision-making “to establish [an MCC] for standalone gun and ammunition stores,” as well as its “governance of MCC standards” more generally. With respect to the new MCC on which the Proposal focuses, the Company has satisfied the essential objective regarding its decision-making to establish an MCC by initially announcing the adoption of the new MCC, and also the pause in its implementation as it evaluates evolving circumstances. As described in detail in the No-Action Request, the Company has also further satisfied the essential objective of the Proposal by publicly reporting on how it manages MCC standards.

CONCLUSION

For these reasons as well as those stated in the No-Action Request (including with respect to Rule 14a-8(i)(7)), the Company continues to believe that the Proposal may be excluded from the Company’s 2023 Proxy Materials pursuant to Rule 14a-8(i)(10).

We would be happy to provide you with any additional information and answer any questions that you may have regarding this request. If you should have any questions or need additional information, please contact the undersigned at (212) 450-4908 or at ning.chiu@davispolk.com.

Respectfully yours,

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Ning Chiu

Attachment

cc w/ att: Adam Zitter, Corporate Secretary, Mastercard Incorporated

Michael Garland, Office of the Comptroller of the City of New York

February 7, 2023

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

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The Company's core network, across which transaction data about a particular transaction ("transaction data") flows, supports what is often referred to as a "four-party payments network" and for each transaction includes the following participants:

- "account holder" (a person or entity who holds a card or uses another device enabled for payment);
- "issuer" (the account holder's financial institution);
- "merchant" (the entity from who an account holder makes a purchase); and
- "acquirer" (the merchant's financial institution).

The Company does not issue cards, extend credit, determine or receive revenue from interest rates or other fees charged to account holders by issuers, or establish the rates charged by acquirers in connection with merchants' acceptance of the Company's products. In the case of core network transactions, account holder relationships belong to, and are managed by, the issuers. The issuers and acquirers are the Company's customers. Accordingly, transaction data, as well as data pertaining to the identity of the account holders making such purchases, is owned and controlled by the issuers who are the Company's customers, and not the Company itself.

In short, when account holders use their cards, the Company does not know who they are or what they purchased. For each transaction processed over the Company's network, the Company only sees the card number, the merchant's name and location, the date and amount of the transaction, the merchant category code (the "MCC") and other technical data elements relating to transaction processing technology. The MCC only identifies the primary business of the merchant and does not identify what items the account holder purchased. There is no other data available through the MCC. In practical terms, the Company has no way of ascertaining from transaction data what items account holders have purchased in a transaction.

REASONS FOR EXCLUSION OF THE PROPOSAL

The Company believes that the Proposal may be properly omitted from the 2023 Proxy Materials pursuant to:

- Rule 14a-8(i)(7) because the Proposal deals with matters related to the Company's ordinary business operations; and
- Rule 14a-8(i)(10) because the Company has already substantially implemented the Proposal.

I. **The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(7) Because the Proposal Deals with Matters Related to the Company's Ordinary Business.**

Rule 14a-8(i)(7) allows a company to omit a shareholder proposal from its proxy materials if such proposal deals with a matter relating to the company's ordinary business operations. The policy underlying the ordinary business exception is based on two central considerations: (i) that "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight" and (ii) the "degree to which the proposal seeks to 'micromanage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." See Exchange Act Release No. 34-40018 (May 21, 1998, n.30) (the "1998 Release"); see also Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("SLB 14L").

A. The Proposal Relates to the Company's Policies and Procedures Around the Products and Services That It Offers.

With respect to this first policy consideration, the Staff has repeatedly concurred that proposals related to a company's decisions around the sale or distribution of specific products or services that it offers are generally excludable under Rule 14a-8(i)(7), even if such products or services are deemed controversial. In *Wal-Mart Stores, Inc.* (Mar. 20, 2014, aff'd and cited in *Trinity Wall Street v. Wal-Mart Stores, Inc.* 792 F.3d 323 (3d Cir. 2015)), the Staff permitted the exclusion of a proposal requesting board oversight to determine whether the company should sell certain products, namely guns equipped with high-capacity magazines, noting that "[p]roposals concerning the sale of particular products and services are generally excludable under [R]ule 14a-8(i)(7)." In *Kroger* (Apr. 7, 2016), the Staff provided the same rationale in permitting exclusion of a proposal requesting a board policy to ban the sale of semi-automatic firearms and accessories at all company owned and operated stores. See also *The Home Depot, Inc.* (Mar. 21, 2018) (permitting exclusion of a proposal requesting that the company stop selling glue traps because of their harm to mice and danger to other wildlife and human health); *Walgreens Boots Alliance, Inc.* (Nov. 7, 2016, recon. denied November 22, 2016) (permitting exclusion of a proposal requesting that the board prepare a report assessing the financial risk of continued sales of tobacco products); *Amazon.com, Inc.* (Mar. 27, 2015) (permitting exclusion of a proposal requesting the company disclose reputational and financial risk arising from the sale of products that implicated mistreatment of animals); *Rite Aid Corp.* (Mar. 24, 2015) (permitting exclusion of a proposal requesting board oversight to determine whether the company should sell certain products that may endanger public safety); *Dillard's, Inc.* (Feb. 27, 2012) (permitting exclusion of a proposal requesting the board develop a plan to phase out the sale of fur from raccoon dogs).

The proposals in *Wal-Mart* and *Kroger* each requested that a general retailer adopt a policy related to its decision-making process around the sale of particular kinds of guns. For such retail stores that sell hundreds of thousands of products throughout the United States, decisions relating to the products and services offered for sale are matters central to their ordinary business operations.

Similarly, the Proposal requests that the Company prepare a report describing board oversight of management's decision-making around the process to establish an MCC for purchases made at standalone gun and ammunition stores. As part of overseeing the Company's day-to-day business, management regularly makes strategic decisions around the hundreds of MCCs that it uses to categorize the broad range of merchants that participate in commerce on its network. MCCs only identify the primary business of the merchant. There is no other data available to the Company through the MCC. By focusing on the Company's governance of these MCCs, the Proposal's underlying subject matter is the manner in which the Company operates its payment processing services, as they relate to particular types of merchants who participate in the Company's four-party payments network. Like the topics of the proposals in *Wal-Mart* and *Kroger*, the decision-making around MCC standards is fundamental to the Company's ordinary business operations.

The Proposal's request for a report appears to be primarily focused on the Company's decision-making to adopt a particular MCC for standalone gun and ammunition stores, as well the Company's "governance of MCC standards" more generally. On October 19, 2022, the Company formally published an announcement to its customers classified as AN 7002 Revised Standards for a New Card Acceptor Business Code. The announcement included a new "MCC Description," specifically for "Retailers primarily engaged in the sale of firearms and ammunition," which is part of the broader management of the numerous MCCs it utilizes as part of the provision of payment products and services, and is fundamental to the ordinary business of the Company in facilitating commerce across its network. Given the Company's complex payment processing business, decisions around the categorization of the different types of merchants that may use its products and services are essential to management's ability to run the Company.

For example, the Company publishes a detailed guide (the “**Quick Reference Booklet**”) that lists all of the MCCs that the Company currently implements and provides an overview on their criteria and required use, as determined by management in its discretion.¹ The Quick Reference Booklet makes clear that the Company’s choices related to the management of its MCCs play a critical role in organizing the Company’s offerings throughout its broad payments network. The Company also provides a description on its website of the principles it has adopted to manage its MCC standards (the “**MCC Principles**”) consistent with the core values driving the Company’s day-to-day business operations, including with respect to the adoption of a new MCC for standalone gun and ammunition stores.²

By requesting a report addressing the governance of the MCC standards the Company uses to categorize the wide range of merchants on its network, including in particular a new MCC covering gun and ammunition stores, the Proposal seeks to improperly interfere with the management of the Company’s products and services offerings. Because the Proposal directly relates to the Company’s ordinary business decisions around its products and services, the Company believes the Proposal may be properly omitted from the 2023 Proxy Materials pursuant to Rule 14a-8(i)(7).

Further, the Commission has stated that a proposal requesting the publication of a report may be excludable under Rule 14a-8(i)(7) if the subject matter of the report is within the ordinary business of the company. See Exchange Act Release No. 34-20091 (Aug. 16, 1983) (the “**1983 Release**”). In addition, Staff Legal Bulletin No. 14H (Oct. 22, 2015), which was issued by the Staff to clarify its views on the scope and application of Rule 14a-8(i)(7), re-affirms that the analysis of the ordinary business exception “should focus on the underlying subject matter of a proposal’s request for board or committee review regardless of how the proposal is framed.” Although the Proposal is phrased in terms of preparing a report, including with respect to board oversight, this framing does not change the underlying subject matter of the Proposal: management’s ordinary business decisions around merchant categorization matters that directly impact how the Company facilitates commerce and offers its products and services across its network.

B. The Proposal Does Not Raise Significant Social Policy Issues That Transcend the Company’s Ordinary Business Operations.

In the 1998 Release, the Commission expressed that while proposals relating to ordinary business matters “but focusing on sufficiently significant social policy issues generally would not be excludable,” under Rule 14a-8(i)(7), the Staff has indicated that proposals that relate to both ordinary business matters and significant social policy issues may be excludable if the proposals do not “transcend the day-to-day business matters.” SLB 14L states that in making the determination on whether a proposal raises a significant social policy issue, the Staff will “focus on the social policy significance of the issue that is the subject of the shareholder proposal” and “consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.”

The mere fact that a proposal is phrased to reference or invoke issues that could implicate significant social policy issues under the Staff’s current interpretation of Rule 14a-8(i)(7) is not sufficient to transcend day-to-day business matters. A proposal may still be excluded when it effectively focuses on an ordinary business matter. See, e.g., *Walmart Inc.* (Mar. 6, 2020) (concurring with the exclusion of a proposal requesting that the company publish a report on the use of contractual provisions requiring employees to arbitrate employment-related claims); *Amazon.com, Inc.* (Domini Impact Equity Fund and the New York State Common Retirement Fund) (Mar. 28, 2019) (concurring with the exclusion of a proposal requesting that the

¹ <https://www.mastercard.us/content/dam/public/mastercardcom/na/global-site/documents/quick-reference-booklet-merchant.pdf>.

² <https://www.mastercard.com/news/press/2022/september/how-we-support-merchants-and-consumers-through-clear-consistent-principles/>. (“In light of recent interest and conversation around the International Standards Organization’s (ISO) creation of a new merchant code (MCC) for standalone firearms retailers, we thought it was important to share the principles on how we manage such standards and the operation of our business.”)

company publish a report on the impacts of its operations when the company has “hundreds of facilities” around the world and employs a large workforce); *JPMorgan Chase & Co.* (Mar. 9, 2015) (concurring with the exclusion of a proposal requesting that the company amend its human rights-related policies related to political participation because the proposal related to the company’s “policies concerning its employees”).

The Proposal includes the topic of gun violence, but the real subject matter of the proposal remains the Company’s categorization of the merchants that participate in the use of the products and services offered by the Company across its network.

The Company acknowledges that in *Mastercard Inc.* (Apr. 22, 2022), the Staff did not concur with the exclusion of a proposal requesting that the Company prepare a report describing if and how the Company intends to reduce the risk associated with the processing of payments involving its cards and/or electronic payment system services for the sale and purchase of certain untraceable firearms and related components and accessories. Here, the Proposal is distinguishable because the focus is not directly on the risks that certain types of firearms purchased on the Company’s payment systems can pose with respect to community violence. Instead, the subject matter of the Proposal addresses the Company’s day-to-day decision-making around policies and procedures governing the manner in which the Company categorizes gun retailers and all other merchants, and more generally offers products and services across its network.

II. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(10) Because the Company Has Substantially Implemented the Proposal.

Rule 14a-8(i)(10) permits a company to exclude a shareholder proposal if the company has already substantially implemented the proposal. According to the Commission, the purpose of this rule is to “avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by management.” 1983 Release; Exchange Act Release No. 34-12598 (July 1976). The Commission has stated that “substantial” implementation under the rule does not require implementation in full or exactly as presented by the proponent. 1998 Release.

The Staff has consistently found that “a determination that the company has substantially implemented the proposal depends upon whether [the company’s] particular policies, practices and procedures compare favorably with the guidelines of the proposal.” See, e.g., *Texaco, Inc.* (Mar. 28, 1991). Further, the Staff has provided no-action relief under Rule 14a-8(i)(10) when a company has substantially implemented and therefore satisfied the “essential objective” of a proposal, even if the company did not take the exact action requested by the proponent, did not implement the proposal in every detail, or exercised discretion in determining how to implement the proposal. See *Best Buy Co., Inc.* (Apr. 22, 2022); *IDACORP Inc.* (Apr. 1, 2022); *Edison International* (Feb. 23, 2022); *BlackRock, Inc.* (Apr. 2, 2021); *JPMorgan Chase & Co.* (Mar. 9, 2021); *Devon Energy Corp.* (Apr. 1, 2020); *Johnson & Johnson* (Jan. 31, 2020); *Pfizer Inc.* (Jan. 31, 2020); *The Allstate Corp.* (Mar. 15, 2019); *Johnson & Johnson* (Feb. 6, 2019); *United Cont’l Holdings, Inc.* (Apr. 13, 2018); *eBay Inc.* (Mar. 29, 2018); *Kewaunee Scientific Corp.* (May 31, 2017); and *Wal-Mart Stores, Inc.* (Mar. 16, 2017).

The core of the Proposal, or its “essential objective,” is for the Company to provide information about management’s decision-making “to establish a merchant category code (MCC) for standalone gun and ammunition stores,” as well as its “governance of MCC standards” more generally. The Company has satisfied the essential objective of the Proposal by announcing its commitment to adopt the new MCC on which the Proposal focuses, as well as by reporting on its governance of MCC standards in a manner that compares favorably with the guidelines of the Proposal.

MCCs are used by payment processing companies to categorize merchants based on the types of goods and services sold. As noted in the Proposal, the International Standards Organization (the “ISO”) is a

Geneva-based nonprofit organization responsible for setting standards for the payments industry, including by approving applications for MCCs. On September 9, 2022, the ISO unilaterally created a new MCC for purchases made at standalone gun and ammunition stores. It was under ISO's own rules that ISO Secretariat took this decision. The Registration and Maintenance Management Group that the Company participates in did not establish the MCC. Subsequent to ISO's decision, on October 19, 2022, the Company formally published an announcement to its customers classified as AN 7002 Revised Standards for a New Card Acceptor Business Code. The announcement included a new "MCC Description," specifically for "Retailers primarily engaged in the sale of firearms and ammunition." The effective date stated in the announcement is April 14, 2023. This effective date for the implementation of the new MCC is timed to facilitate industry-wide implementation of the new MCC across payment networks. By publishing the announcement in October 2022 and designating the April 2023 effective date for customer implementation, the Company has already acted favorably on the Proposal's request for a report addressing the implementation of this new category code.

The Company has further satisfied the essential objective of the Proposal by publicly reporting on how it manages MCC standards, including with respect to the Company's commitment to adopt the new MCC for standalone gun and ammunition stores. The Quick Reference Booklet that the Company publishes lists all of the MCCs that the Company currently implements and provides an overview on their criteria and required use. In addition, the Company's MCC Principles also specifically respond to the ISO's new MCC for sales made by standalone gun and ammunition stores. The MCC Principles explain that the Company manages all of its MCCs in a manner consistent with its well-established commitments to permitting lawful purchase across its payments systems and protecting the privacy of its network participants, stating that "[n]othing in [the] ISO's creation of an MCC will cause us to deviate from these principles." The MCC Principles also reiterate that MCCs provide the Company with limited information that only identifies the primary business of a merchant, and that the Company's rules do not permit selective authorization of transactions, such as blocking based solely on an MCC. If the Company identifies unauthorized blocking or intentional restrictions of legal commerce by any of its network participants, the Company will take action to address such activity.

Substantial implementation does not require implementation in full or exactly as presented by a proposal. The Company's public commitment to adopting the ISO's new MCC for purchases made at standalone firearm and ammunition stores, as well as its reporting on how it manages and governs its MCC standards, may not be actions identical to the Proposal's request for a particular report, but they do compare favorably with the Proposal's guidelines. The essential objective of the Proposal is for the Company to provide an understanding of its position on a new MCC for purchases made at standalone gun and ammunition stores, and on the governance of its MCC standards more generally. The Company's public commitment and existing reporting satisfy this objective, and therefore the Company believes the Proposal may be omitted pursuant to Rule 14a-8(i)(10).

CONCLUSION

For the reasons set forth above, the Company believes that the Proposal may be excluded from the Company's 2023 Proxy Materials pursuant to Rule 14a-8(i)(7) and Rule 14a-8(i)(10). The Company respectfully requests the Staff's concurrence with its decision to exclude the Proposal from its 2023 Proxy Materials and further requests confirmation that the Staff will not recommend enforcement action to the SEC if it so excludes the Proposal.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this request. If you should have any questions or need additional information, please contact the undersigned at (212) 450-4908 or at ning.chiu@davispolk.com.

Respectfully yours,

A handwritten signature in blue ink, appearing to read "Ning Chiu". The signature is written in a cursive style with a large, stylized "Q" at the end.

Ning Chiu

Attachment

cc w/ att: Adam Zitter, Corporate Secretary, Mastercard Incorporated
Michael Garland, Office of the Comptroller of the City of New York

Proposal

Report on Company's Stance on New Merchant Category Code

RESOLVED: Shareholders request the Mastercard Incorporated Board of Directors issue a public report, omitting proprietary and privileged information, concerning its oversight of management's decision-making regarding any application to the International Standards Organization (ISO) to establish a merchant category code (MCC) for standalone gun and ammunition stores. This report should cover Mastercard's governance of MCC standards, as well as disclose and explain the justification for its position on any applications to create an MCC for gun and ammunition stores.

Supporting Statement

Mass shootings are a significant societal problem. In 2022, there were 432 mass shootings through August 2022.¹

As a financial institution, Mastercard must ensure its systems are not used for criminal purposes. A new MCC for gun and ammunition stores would allow banks to comply with their regulatory obligation to report suspicious purchasing activity associated with illegal activity², and credit card companies would be able to voluntarily file this information under existing reporting systems. This could be accomplished *without limiting or regulating gun sales or creating any additional burden to internal systems*.

Suspicious activity could include gun sales associated with diversion from legal to illegal markets, and purchasing behavior associated with mass shootings. Failure to act could lead to regulatory and reputational risk, including reputational risk associated with costly litigation.

Suspicious purchasing activity that could constitute reportable suspicious activity might involve the frequency and size of purchases, and the type of retailer. For example, the Aurora, Colorado movie theatre shooter used a Mastercard issued to purchase \$11,000 worth of weapons and military gear in the six weeks, including purchases at two standalone gun stores.¹ One week before the mass shooting at the Pulse Nightclub, in which 49 people were killed and 50 injured, the shooter used a Mastercard (among others) to purchase more than \$26,000 worth of guns and ammunition, including purchases at a standalone gun retailer.²

An application to create an MCC for gun and ammunition stores was twice denied. It has been reported that Mastercard pushed back on the application and that "credit card industry employees were part of an internal committee within ISO that recommended the application's rejection."³

Shareholders would benefit from transparency on how Mastercard's Board of Directors is overseeing any final position taken on any MCC application for standalone gun and ammunition stores, and whether Mastercard is appropriately considering the risks inherent in failing to take action to report suspicious purchasing activity at these retailers.

We believe that failure to do so will result in lost lives, as well as regulatory, reputational, and litigation risks that may threaten long-term shareholder value.

We urge you to vote FOR this proposal.

¹ <https://www.gunviolencearchive.org/>

² <https://www.law.cornell.edu/cfr/text/31/1020.320#:~:text=31%20CFR%20%C2%A7%201020.320%20-%20Reports%20by%20banks,%C2%A7%201020.320%20Reports%20by%20banks%20of%20suspicious%20transactions.>

³ <https://www.cbsnews.com/news/bank-credit-cards-suspect-gun-ammo-sales/>



CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
BRAD LANDER

JUSTINA K. RIVERA
GENERAL COUNSEL

OFFICE OF THE GENERAL COUNSEL

March 24, 2023

By e-mail: shareholderproposals@sec.gov

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Response to Mastercard, Inc.'s No-Action Request

Dear Counsel:

I write on behalf of the New York City Employees' Retirement System, the New York City Teachers' Retirement System, and the Board of Education Retirement System of the City of New York (collectively, the "Systems") in response to the no-action request from Mastercard Incorporated ("Mastercard" or the "Company"), dated February 7, 2023, as supplemented by an additional letter from Mastercard, dated March 20, 2023 (collectively, the "No-Action Request"). The No-Action Request seeks the concurrence of the Office of Chief Counsel of the Division of Corporate Finance of the Securities and Exchange Commission ("Staff") in Mastercard's contention that the Company may exclude the Systems' shareholder proposal ("Proposal") from its 2023 proxy materials. As we detail below, Mastercard has not met its burden of establishing that the Proposal may be excluded under either the ordinary business and substantial implementation standards of Rule 14a-8(i)(7) and Rule 14a-8(i)(10). Accordingly, the Systems respectfully request that the Staff deny Mastercard's No-Action Request.

PROPOSAL AND SUPPORTING STATEMENT

The Systems' Proposal¹ states:

RESOLVED: Shareholders request the Mastercard Incorporated Board of Directors issue a public report, omitting proprietary and privileged information, concerning its oversight of management's decision-making regarding any application to the International Standards Organization (ISO) to establish a merchant category code (MCC) for standalone gun and ammunition stores. This report should cover Mastercard's governance of MCC standards, as well

¹ A copy of the Proposal and supporting statement is attached as Exhibit A to Mastercard's No-Action Request.

as disclose and explain the justification for its position on any applications to create an MCC for gun and ammunition stores.

The Proposal focuses on an important corporate governance and risk management issue for the Company, one of the world's leading payment processors. Specifically, the Proposal seeks a public report from Mastercard's Board on its oversight of management's decision-making process concerning any application to the International Organization for Standardization ("ISO") for the establishment of a new merchant category code ("MCC") for standalone gun and ammunition stores.²

Among other things, the requested report would cover Mastercard's governance of MCC standards in general, as well as explain the Company's justification for its position on any application to the ISO to create a specific MCC for gun and ammunition stores. (The ISO is the international body responsible for issuing MCCs that are later adopted and used by the credit card industry). The reason for the Proposal's focus is that the ISO twice denied earlier applications for an MCC for standalone gun and ammunition stores, reportedly after employees from Mastercard, Visa, and American Express, serving as part of an internal committee within the ISO, recommended rejection.³

Although corporate governance and risk management is a core concern of the Proposal, the Supporting Statement makes clear that significant social policies underly the Proposal: the twin epidemics of mass shootings and the diversion of legally purchased firearms into illegal markets. It is beyond dispute that the United States is plagued by mass shootings. When the Systems submitted the Proposal on August 26, 2022, there had been 432 mass shootings in 2022 *alone*.⁴ Additionally, large quantities of guns are regularly purchased legally and then illegally diverted into the black market, where they are often used in the commission of other crimes. In many cases, these illegal actions are facilitated by high-dollar gun and ammunition purchases made with credit cards. The Supporting Statement provides two well-known examples:

² By way of background, an MCC is a four-digit numerical code that identifies the primary business of a merchant for payment processing purposes. MCCs are highly specific and categorize merchants based on the product or services sold. For example, there's a distinct MCC for wig and toupee shops (5698), duty free stores (5309), grocery stores (5411), candy, nut, and confectionary stores (5441), car washes (7542), barber shops (7230), bookstores (5942), office, schools supply, and stationery stores (5943), game, toy, and hobby shops (5945), and camera and photographic supply stores (5946). The MCC distinctions are so fine-grained that there are even separate codes for public golf courses (7992) and private golf courses (7997). Despite the granular specificity of MCCs, standalone gun and ammunition stores have historically not had a dedicated MCC. Instead, payment processors such as Mastercard utilized a generic MCC – "Miscellaneous and Specialty Retail Stores" – for standalone gun and ammunition stores. *See generally* <https://www.mastercard.us/content/dam/public/mastercardcom/na/global-site/documents/quick-reference-booklet-merchant.pdf>.

³ The Supporting Statement cited a CBS News report from June 20, 2022, which reported that "[t]he credit card industry has blocked a novel effort to track suspect firearm and ammunition purchases, depriving law enforcement of a potential tool to identify and stop gun crime. Documents obtained by CBS News show employees from domestic and international credit card companies, including Visa, Mastercard and American Express, pushed back on an application to create a merchant category code for firearm and ammunition sellers. . . . The documents show that the credit card industry employees were part of an internal committee within ISO that recommended the application's rejection." *See* <https://www.cbsnews.com/news/bank-credit-cards-suspect-gun-ammo-sales/>.

⁴ The Gun Violence Archive, cited in the Supporting Statement, calculated the number of mass shootings for all of 2022 at 646, nearly double the 338 mass shootings reported in 2018. *See* <https://www.gunviolencearchive.org/> (accessed March 10, 2023).

- The Aurora, Colorado movie theater shooter used a Mastercard to purchase \$11,000 worth of weapons and military gear in the six weeks prior to his mass shooting, which killed 12 people. Two of his purchases were at standalone gun stores.
- The Pulse Nightclub shooter in Orlando, Florida used a Mastercard (as well as other credit cards) to purchase more than \$26,000 worth of guns and ammunition shortly before his mass shooting, which killed 49 people.

When the Proposal was submitted in August 2022, standalone gun and ammunition stores did not have a dedicated MCC. Instead, they were nonsensically lumped together with “map and atlas stores ... magic stores, party supply stores, silk flower shops, fireworks shops, ice dealers, picture frame shops, sunglasses shops, beauty supply stores, and bottled and distilled water dealers” in the MCC category for “Miscellaneous and Specialty Retail Stores.”⁵ Because standalone gun and ammunition stores lack a dedicated MCC, suspicious high-dollar transactions at those merchants (which, in conjunction with other purchasing activity, may be indicative of gun trafficking or other criminal activity sufficient to trigger the filing of a suspicious activity report) go unreported to law enforcement. As the Supporting Statement explains, the ISO’s approval of an MCC for standalone gun and ammunition stores – and the implementation of that MCC by credit card companies, such as Mastercard – would “allow banks to comply with their regulatory obligation to report suspicious purchasing activity associated with illegal activity, and credit card companies would be able to voluntarily file this information under existing reporting systems. This could be accomplished *without limiting or regulating gun sales or creating any additional burden to internal systems.*”

The Supporting Statement concludes that “[s]hareholders would benefit from transparency on how Mastercard’s Board of Directors is overseeing any final position taken on any MCC application for standalone gun and ammunition stores, and whether Mastercard is appropriately considering the risks inherent in failing to take action to report suspicious purchasing activity at these retailers,” as any failure by Mastercard’s Board to properly consider these risks “will result in lost lives, as well as regulatory, reputational, and litigation risks that may threaten long-term shareholder value.”

DEVELOPMENTS AFTER THE PROPOSAL’S SUBMISSION

On September 9, 2022 – approximately two weeks after the Systems submitted the Proposal – the ISO approved an application from Amalgamated Bank for the creation of an MCC for standalone gun and ammunition stores.⁶ Soon thereafter, Mastercard and the other major credit card companies abandoned their previously reported opposition to the new MCC and publicly committed to implementing the MCC across their payment networks.⁷ At the time, Mastercard

⁵ <https://www.mastercard.us/content/dam/public/mastercardcom/na/global-site/documents/quick-reference-booklet-merchant.pdf>, at p. 150.

⁶ <https://amalgamatedbank.com/news/amalgamated-bank-petition-new-code-gun-and-ammunition-stores-has-been-approved-international>.

⁷ <https://abcnews.go.com/Business/credit-card-code-stop-mass-shootings/story?id=89746820>.

stated: “With the ISO approving the proposed MCC, we now turn our focus to how it will be implemented by merchants and their banks as we continue to support lawful purchases on our network while protecting the privacy and decisions of individual cardholders.”⁸

In early March 2023, bills were introduced in numerous state legislatures, including Texas, Florida, Mississippi, Oklahoma, West Virginia, and Wyoming, that sought to prohibit or limit banks and payment processors (such as Mastercard) from using the newly issued MCC.⁹ In response to this potential legislative pushback, Mastercard did a complete about-face on its public commitment and “paused” its work on implementing the MCC.¹⁰ Mastercard has not indicated when, or even if, this “pause” will be lifted.

THE PROPOSAL CANNOT BE EXCLUDED AS ORDINARY BUSINESS

Mastercard argues the Proposal may be omitted under Rule 14a-8(i)(7) because it relates to the “ordinary business” of the Company. As we explain below though, the Proposal addresses significant social policy issues that transcend ordinary business concerns and therefore cannot be excluded under Rule 14a-8(i)(7).

A. The Ordinary Business Standard of Rule 14a-8(i)(7)

The “ordinary business” exception permits a company to exclude a proposal that “deals with a matter relating to the company’s ordinary business operations.” Rule 14a-8(i)(7). The applicability of this exception rests on two central considerations: (1) the “proposal’s subject matter,” and (2) “the degree to which the proposal ‘micromanages’ the company ‘by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.’” Staff Legal Bulletin 14L, § B.3 (Nov. 21, 2021) (“SLB 14L”). Mastercard does not argue micromanagement, and instead focuses solely on the subject matter prong.

With respect to subject matter of a proposal, SLB 14L re-affirmed the standards established in SEC Release No. 34-40018 (May 21, 1998) (the “1998 Release”), which explained that some “tasks are so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.” 1998 Release, § III. However, even if a proposal raises “ordinary business” issues, SLB 14L re-affirmed a longstanding exception, under which a company may not exclude a proposal that transcends a company’s ordinary business affairs because it addresses “significant social policy issues.” SLB 14L, § B.2. Specifically, “the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.” *Id.* Cited as examples were “human capital management issues with a broad societal impact,” such as employment discrimination. *Id.* & nn. 4-5. “In determining whether the focus of [a] proposal is a significant social policy issue, [the Staff] consider[s] both the proposal and the supporting statement as a whole.” Staff Legal Bulletin 14C, § D.2 (June 28, 2005).

⁸ *Id.*

⁹ <https://www.reuters.com/world/us/us-republicans-aim-stymie-gun-sale-codes-state-level-2023-03-03/>

¹⁰ <https://www.reuters.com/business/finance/mastercard-pause-work-new-payments-code-firearms-sellers-2023-03-09/>.

B. The Proposal Addresses Significant Policy Issues that Transcend the Company's Ordinary Business

The Systems strongly disagree with Mastercard's contention that the Proposal involves nothing more than "ordinary business decisions around merchant categorization matters that directly impact how the Company facilitates commerce and offers its products and services across its network." No-Action Request, at 4. To the contrary, the Proposal seeks transparency regarding the Company's position and role on a matter that has become a significant social policy issue: the issuance of a new MCC that could help reduce mass shootings and other illegal gun activity (such as gun trafficking), both of which have plagued the United States for far too long. Accordingly, the subject matter of the Proposal transcends "ordinary business," and falls outside of matters that are "so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." 1998 Release, § III.

The issue of mass shootings – or, more specifically, how they can be reduced or eliminated – is a significant social policy issue for millions of Americans. A 2022 midterm election poll found that "[w]hen asked to identify the most important issues that [voters] want Congress and the President to address, 17% of voters identified 'mass shootings and gun policy' as one of their top priorities. Mass shootings were sixth among all priorities mentioned by voters, coming in higher than education or immigration. Mass shootings and gun policy are a high priority for voters regardless of whether they live in rural, suburban, or small or large urban areas of the country – voters from all geographical areas named gun policy as a key priority at either 16% or 17%."¹¹ And Americans have good reason to be concerned about mass shootings: their frequency has increased dramatically over the past decade. The Gun Violence Archive ("GVA"), which is one of several organizations that track mass shootings in the United States, defines a mass shooting as an incident where "four or more people are shot or killed in a single incident, not including the shooter." GVA calculates that the number of mass shooting incidents jumped from 273 in 2014 to 690 in 2021 and 646 in 2022.¹² Through March 22, 2023, GVA has identified 119 mass shootings.¹³

Mass shootings are also a significant social policy issue for investors and the companies in which they invest. In recent years, the threat to public-facing companies from mass shootings has become so great that affected companies have started to list "active shooter situations" as a "risk factor" in their public filings. Consider these examples:

- *The Kroger Co.*, Form 10-K, p. 18 (Mar. 29, 2022): Identifying "active shooter situations (which have occurred in the past at our locations)" as a risk factor that "could reduce consumer spending, could materially affect our financial condition, results of operations or cash flows."¹⁴

¹¹ <https://www.brookings.edu/blog/how-we-rise/2023/01/23/voters-want-congress-to-address-gun-violence-and-mass-shootings/>.

¹² <https://www.gunviolencearchive.org/past-tolls>.

¹³ <https://www.gunviolencearchive.org/reports/mass-shooting>.

¹⁴ <https://www.sec.gov/ix?doc=/Archives/edgar/data/56873/000155837022004595/kr-20220129x10k.htm>.

- *Walmart Inc.*, Form 10-Q, p. 33 (Sept. 6, 2019): Stating that “active shooter situations (two of which recently occurred in our stores), in countries in which we operate or in which our suppliers are located, could have a negative impact on consumer spending and could adversely affect our operations and financial performance.”¹⁵
- *Dave & Buster’s Entertainment Inc.*, Form 10-K, p. 23 (Apr. 2, 2019): Stating that “[a]ny act of violence at or threatened against our stores or the centers in which they are located, including active shooter situations and terrorist activities, may result in restricted access to our stores and/or store closures in the short-term and, in the long term, may cause our customers and employees to avoid visiting our stores. Any such situation could adversely impact cash flows and make it more difficult to fully staff our stores, which could materially adversely affect our business.”¹⁶
- *The Cheesecake Factory Inc.*, Form 10-K, p. 25 (Mar. 4, 2019): citing “active shooter situations” as having the potential to “unfavorably impact our restaurant sales, which could materially adversely affect our financial performance.”¹⁷

Mass shootings are not the only significant social policy undergirding the Proposal. Guns are often legally purchased, but then resold or transferred on illegal markets. Because many of these trafficked guns end up in the hands of criminals who otherwise would not be able to purchase a gun legally, identifying novel ways to tackle illegal gun trafficking has also become a significant social policy issue. In fact, the issue is so significant that the State of New York has created a “Tracing Analytics Platform” to “better understand gun trafficking patterns and to assess the efficacy of laws in combatting illegal guns in New York State.”¹⁸

The question then arises: What role do companies like Mastercard play in addressing these significant social policy issues? As the Supporting Statement points out, Mastercard, for both legal and reputational reasons, “must ensure its systems are not used for criminal purposes.” With respect to the prevention of mass shootings and illegal gun trafficking, that goal is difficult, if not impossible, to achieve under the current system, where there is no way to identify potentially suspicious transactions at standalone gun and ammunition stores, due, in no small part, to there being no dedicated MCC for these stores.

To better understand how a dedicated MCC for standalone gun and ammunition stores could help reduce mass shootings and illegal gun trafficking, we offer a brief overview of the use and purpose of MCCs.

Credit card companies utilize MCCs to categorize the individual merchants and retailers that accept their credit cards. Mastercard’s *Quick Reference Booklet, Merchant Edition*, sets forth the MCCs that Mastercard currently utilizes. This 286-page booklet explains the required uses of MCCs as follows: “MCCs are required in all authorization and clearing messages initiated at a point-of-interaction location. The MCCs help to accurately reflect the merchant’s primary business

¹⁵ <https://www.sec.gov/ix?doc=/Archives/edgar/data/104169/000010416919000064/wmtform10-qx7312019.htm>.

¹⁶ <https://www.sec.gov/Archives/edgar/data/1525769/000119312519095746/d675414d10k.htm>.

¹⁷ https://www.sec.gov/Archives/edgar/data/887596/000110465919012501/a19-30057_110k.htm.

¹⁸ <https://targettrafficking.ag.ny.gov/>

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and facilitate risk management.”¹⁹

MCCs serve important transactional purposes, such as proper reporting for tax and accounting purposes and calculating appropriate fees to be charged to merchants. But there is a separate aspect that is important here: identifying high-risk merchants. “High-risk” in this context can refer to a risk that there will be a chargeback to the card, but also to the inherent nature of the merchant’s business. According to one industry group: “Some merchants are classified as high risk simply because of the reputation of the particular industry they’re in,” including adult entertainment, online gambling, cannabis and firearms.²⁰

In its 2022 Form 10-K, Mastercard itself acknowledges that there are enhanced risks associated with payment processing for certain merchants, including those selling firearms, as well as for transactions in which the Company cannot detect or prevent illegal activities occurring over its payment network:

“Our business may be affected by actions taken by our customers, merchants or other organizations that impact the perception of our brands or the payments industry in general. From time to time, our customers may take actions that we do not believe to be in the best interests of our brands, such as creditor practices that may be viewed as “predatory”. Moreover, adverse developments with respect to our industry or the industries of our customers or other companies and organizations that use our products and services (including certain legally permissible but high-risk merchant categories, such as adult content, firearms, alcohol and tobacco) may also, by association, impair our reputation, or result in greater public, regulatory or legislative scrutiny, as well as potential litigation. We may also face similar scrutiny to the extent that we are unable to detect and/or prevent illegal activities using our payment products or otherwise occurring over our network.”²¹

The relevance of a dedicated MCC as a tool for combating mass shootings and illegal gun trafficking was aptly explained by Phyllis Sims Brown, the President of Amalgamated Bank, which filed the petition asking the ISO to issue the new MCC for standalone gun and ammunition stores. In an interview with CNBC, Brown explained:

“‘While there are merchant codes for the hair salon and the shoeshine place and every other retailer, there’s no merchant code for gun stores,’ said Brown. ‘If we did have a merchant code for gun stores, we could detect patterns that would indicate that there had been something unusual going on.’”

¹⁹ <https://www.mastercard.us/content/dam/public/mastercardcom/na/global-site/documents/quick-reference-booklet-merchant.pdf> at p. 93.

²⁰ <https://www.chargebackgurus.com/blog/keeping-high-risk-merchants-safe-from-chargebacks>.

²¹ https://s25.q4cdn.com/479285134/files/doc_financials/2022/AR/MA.12.31.2022-10-K-as-filed.pdf, at p. 37

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Credit card companies could detect any unusual activity, and submit a suspicious activity report with law enforcement, if needed. This type of activity monitoring would prove to be particularly important, Brown said, in detecting when someone purchases large amounts of weapons, or when someone is buying weapons for somebody that is not legally allowed to do so.

Software would be able to detect, for example, if someone spent \$1,000 at a firearm store, and on the same day, received a \$1,000 deposit from someone who is not legally allowed to purchase firearms themselves. In addition, the type of mass purchasing that MCCs would allow banks to detect have proven to be a pattern in the buying history of recent mass shooters in the U.S.

The shooter who killed 59 people at a Las Vegas music festival in 2017, for example, charged over \$90,000 on credit cards prior to the shooting. The New York Times reported that the shooter had opened six new credit card accounts over the months prior, and twelve days before the shooting, began an over \$26,000 firearm and ammunition buying spree. Before that, his average spending was only a mere \$1,500 a month.

If these gun purchases had been tagged with an MCC, Brown said, the credit card companies would have been notified of this alarming pattern.”²²

Although applications to the ISO for the creation of a dedicated MCC for standalone gun and ammunition stores are relatively recent, the role of the credit card industry in financing mass shootings has long been documented. In 2018, Aaron Ross Sorkin of the New York Times published a lengthy investigative report entitled “How Banks Unwittingly Finance Mass Shootings,” which detailed how many of the most infamous recent mass shooters “built their stockpiles of high-powered weapons with the convenience of credit” with “[n]o one watching.”²³ Particularly alarming were facts surrounding the Pulse Nightclub shooting in Orlando, Florida. The mass shooter, Omar Mateen, opened six new credit accounts and used the new cards to purchase over \$26,000 worth of guns and ammunition in the 12 days leading up to the shooting.²⁴ Likely fearing that his suspicious gun and ammunition purchases would draw the attention of law enforcement (he had previously spent an average of \$1,500 per month on his only credit card), Mateen ran internet searches for “credit card reports all three bureaus,” “FBI,” and “Why banks stop your purchases.”²⁵ But as Sorkin notes, “[Mateen] needn’t have worried. None of the banks, credit card network operators or payment processors alerted law enforcement officials about the purchases he thought were so suspicious.”²⁶ The article then details how “the financial industry is

²² <https://www.cnn.com/2022/07/13/bank-ceo-on-why-we-can-and-should-track-gun-purchases-on-cards-.html>

²³ <https://www.nytimes.com/interactive/2018/12/24/business/dealbook/mass-shootings-credit-cards.html>

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

uniquely positioned to see, if it chose to do so, a potential killer's behavior in a way that retailers, law enforcement officials, concerned family members or mental health professionals cannot."²⁷

The foregoing discussion makes clear that the Proposal addresses significant social policy issues that transcend Mastercard's "ordinary business." If there were any doubt on this point, it is removed by events that occurred after ISO issued the new MCC, including the events that Mastercard cites as the reason it has chosen to "pause" implementation of the new MCC.

As we noted above, after the ISO issued the new MCC and the major credit card companies (including Mastercard) announced that they would implement the MCC into their payment processing systems, Republican legislators in Texas, Florida, Mississippi, Oklahoma, West Virginia and Wyoming responded by introducing legislation that would prohibit or limit banks and payment processors from using the newly issued MCC. A Mastercard spokesperson specifically stated: "It's for that reason that we have decided to pause work on the implementation of the firearms-specific MCC."²⁸ On the other side of the aisle, Democrats in both the House and Senate, as well as several state attorney generals and prominent state and local politicians have voiced their support of the implementation of the MCC.²⁹

Given the significant public debate around ways to curb or prevent mass shootings and illegal gun trafficking – including the implementation of an MCC for gun and ammunition stores – Mastercard's contention that the Proposal raises only issues of ordinary business falls flat. If anything, because of the robust public debate on the issues involved, the best course for the Staff is to let Mastercard shareholders, through their vote on the Proposal, convey to Company management and the Board how significant they believe this issue is.

C. The No-Action Determinations Mastercard Relies Upon are Easily Distinguished

Mastercard cites a series of prior no-action determinations that purportedly support the Company's reliance on the ordinary business exclusion. We respond to the specific cases below, but we begin with a point that Mastercard only grudgingly acknowledges; namely, the recent decision in *Mastercard Inc.* (April 22, 2022), which denied no-action relief as to a proposal seeking a report on how Mastercard:

"intends to reduce the risk associated with the processing of payments involving its cards and/or electronic payment system services for the sale and purchase of untraceable firearms, including 'Buy, Build, Shoot' firearm kits, components and/or accessories used to assemble privately made firearms known as 'Ghost Guns'."

²⁷ *Id.*

²⁸ <https://www.reuters.com/business/finance/mastercard-pause-work-new-payments-code-firearms-sellers-2023-03-09/>

²⁹ *See, e.g.*, <https://dean.house.gov/2022/9/congresswoman-dean-and-senator-warren-urge-bank-ceos-to-adopt-new-code-for-gun-and-ammunition-retailers>; <https://www.warren.senate.gov/newsroom/press-releases/warren-menendez-lead-effort-urging-treasury-doj-to-issue-guidance-to-financial-institutions-for-implementation-of-mcc-code-for-gun-and-ammunition-retailers>; <https://oag.ca.gov/news/press-releases/california-attorney-general-bonta-and-new-york-attorney-general-james-call>; and <https://pix11.com/news/local-news/live-mayor-adams-talks-gun-safety/>.

There, as here, a core issue in the proposal is “the risk associated with the processing of payments.” Mastercard argues that the present Proposal can be distinguished because “the focus is not directly on the risks that certain types of firearms purchased on the Company’s payment systems can pose with respect to community violence.” No-Action Request, at p. 5. Such a hair-splitting distinction is not persuasive. The focus of the Proposal is on governance in pursuit of the same goal in the “ghost guns” proposal – risk reduction with respect to matters related to gun violence and illegal gun activity. The Proposal’s Supporting Statement cites examples of mass shootings where the shooter used his Mastercard to purchase significant amounts of guns and ammunition. As the earlier discussion noted, the proper classification of merchants by way of MCCs relates directly to Mastercard’s exposure to high-risk retailers and points out the regulatory, reputational and litigation risks that can threaten long-term shareholder value.

Mastercard cites a series of letters in which the Staff agreed that proposals could be excluded where they are aimed at limiting or banning the sale or distribution of specific goods for services. No-Action Request, at p. 3. Those decisions³⁰ are irrelevant here because the Proposal does not seek to regulate Mastercard’s decision about what products to sell or services to provide. The focus of this Proposal is on governance – specifically, Board oversight of Mastercard’s position before the ISO as it relates to an issue with significant social policy implications.

Mastercard also cites numerous decisions for the proposition that a proposal may be excluded if it “effectively focuses” on an ordinary business matter, even if the proposal “is phrased to reference or invoke issues that could implicate significant social policy issues.” No-Action Request at 4. The problem with this argument is that the proposals Mastercard cites sought reports on company-wide practices that, because the focus was so broad, may only tangentially or incidentally touch upon a significant policy issue. Here, the Proposal focuses specifically on a discrete issue directly relevant to the significant social policy issues implicated by the Proposal.

The point is illustrated by the two letters that Mastercard highlights, *Walmart Inc.* (Mar. 6, 2020) and *Dollar General Corp.* (Mar. 6, 2020), where the proposals sought a report on the use of contractual provisions requiring employees to arbitrate employment-related claims. However, this argument ignores the fact that more narrowly tailored proposals may be proper subjects for shareholder consideration. SLB 14L is clear on this point, as it cites *Dollar General* as valid precedent in the situation presented there, where the proposal “did not focus on specific policy implications of the use of arbitration at the company.” SLB 14L, § B.2, n.5. Citing the 1998 Release, SLB 14L distinguished that type of proposal from a proposal that relates to workforce management, but “focus[es] on sufficiently significant social policy issues (e.g., significant discrimination matters),” given that such topics “raise policy issues so significant that it would be appropriate for a shareholder vote.” *Id.* Contrast that situation with letters such as *CBRE Group*,

³⁰ *Wal-Mart Stores, Inc.* (Mar. 20, 2014, aff’d and cited in *Trinity Wall Street v. Wal-Mart Stores, Inc.* 792 F.3d 323 (3d Cir. 2015)) (requesting Board oversight of whether Wal-Mart should sell guns equipped with high-capacity magazines); *Kroger* (Apr. 7, 2016) (requesting Board policy on the sale of semi-automatic firearms and Accessories); *The Home Depot, Inc.* (Mar. 21, 2018) (asking the company to stop selling glue traps because of the harm to mice and danger to other wildlife and human health); *Walgreens Boots Alliance, Inc.* (Nov. 7, 2016, recon. denied November 22, 2016) (requesting report on financial risk of selling tobacco products); *Amazon.com, Inc.* (Mar. 27, 2015) (seeking disclosure of reputational and financial risk from selling products implicated in mistreatment of animals); *Rite Aid Corp.* (Mar. 24, 2015) (requesting Board oversight of sales of certain products that may endanger public safety); *Dillard’s, Inc.* (Feb. 27, 2012) (requesting plan to phase out selling fur from raccoon dogs).

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Inc. (Jan. 2, 2019), where the proposal sought a report on “the risks that may result from the Company’s current mandatory arbitration policy on claims of sexual harassment.” The Staff concluded the specific focus of this proposal on sexual harassment claims was enough to transcend CBRE’s ordinary business matters.

The other letters cited by Mastercard do not support the Company’s argument. In *Amazon.com Inc.* (March 28, 2019) (Domini, New York State Common Retirement Fund), the proposal sought a report on the “community impacts” of Amazon’s operations and attendant risks. The Staff granted no-action relief as the broad focus on “community impacts” did not “appear to focus on an issue that transcends ordinary business matters.” That is not the situation here, where the Proposal clearly focuses significant social policy issues that transcend ordinary business, as we explained in detail above.

In *JPMorganChase & Co.* (Mar. 19, 2015), the proposal sought an amendment to the company’s employee policies “to address the right to take part in one’s own government free from retribution and report its findings to shareholders.” The staff agreed with the company’s characterization that the proposal “fundamentally related to ordinary business operations (i.e., management of the workforce.” Although the proponent argued at a general level that the proposal sought to advance human rights goals and the ability of employees to participate in the political process, the Staff concluded that the focus was on “policies concerning its employees.”

That decision can be distinguished from the present situation because the Proposal does not seek to amend company policies. Nonetheless, even if one should regard *JPMorganChase* as correctly decided as to the specific resolution in that case, it should not be extended to the current Proposal, particularly in light of the more recent guidance in SLB 14L and *CBRE Group* that a company cannot exclude employment-related policies that relate to significant issues, including discrimination and the handling of sexual harassment cases.

Moreover, the Company simply ignores letters that are plainly closer to the situation we have here, notably several proposals to gun manufacturers relating to gun violence.

In *Smith & Wesson Brands, Inc.* (Aug. 15, 2020), the proposal sought “a comprehensive policy articulating [the company’s] commitment to respect human rights,” to include a “description of proposed due diligence processes to identify, assess, prevent and mitigate actual and potential adverse human rights impacts.” The supporting statement cited the “lethality of firearms products and the potential for their misuse,” a factor that meant “the risk of adverse human rights impacts is especially elevated for all gun manufacturers.” The Staff rejected the company’s claims that the proposal was improper because it related to products sold by the company, lacked a significant policy issue, and constituted micromanagement.

Even more relevant to the current Proposal, the Staff denied no-action relief in *SturmRuger & Co. Inc.* (Mar. 5, 2001), where the proposal sought a report on the company’s “policies and procedures aimed at stemming the incidence of gun violence in the United States.” The Staff rejected the company’s arguments, which Mastercard echoes, that the proposal sought to regulate what products the company offered and was lacking in a significant policy issue.

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For these reasons, the Systems respectfully ask the Staff to advise Mastercard that it is unable to concur with the Company's argument that the Proposal may be omitted under the "ordinary business" exclusion.

MASTERCARD HAS NOT SUBSTANTIALLY IMPLEMENTED THE PROPOSAL

In the weeks following Mastercard's submission of its No-Action Request, the factual situation has changed dramatically, and Mastercard can no longer plausibly argue that the Proposal has been "substantially implemented" under Rule 14a-8(i)(10).

To prevail on "substantial implementation" grounds, a company bears the burden of demonstrating that its actions address the guidelines and implement the essential objectives of the challenged proposal. In making its determination, the staff examines whether the company's particular policies, practices, and procedures compare favorably with the proposal's guidelines. *Texaco, Inc.* (avail. Mar. 6, 1991, *recon. granted* Mar. 28, 1991). A company must demonstrate that it has sufficiently addressed *both* the proposal's guidelines and its essential objectives. *Exelon Corp.* (avail. Feb. 26, 2010).

The original linchpin of Mastercard's substantial implementation argument (No-Action Request at p. 5) was that it had satisfied the essential objective of the Proposal when it announced its commitment to adopt the new MCC for standalone gun and ammunition stores:

"The Company has satisfied the essential objective of the Proposal by announcing its commitment to adopt the new MCC on which the Proposal focuses, as well as by reporting on its governance of MCC standards in a manner that compares favorably with the guidelines of the Proposal.

Mastercard's argument on this point is unpersuasive for two reasons. To state the most obvious reason first, the Company has "paused" its implementation of the new MCC, which constitutes yet another change in position from Mastercard. To recap, Mastercard has now done a double flip-flop on a dedicated MCC for standalone gun and ammunition stores. It was first reportedly opposed to the issuance of the MCC when the application was before the IOC, then announced that it would implement the new MCC after the ISO issued it, only to again change course by "pausing" that implementation in response to proposed legislation in certain state legislatures. Accordingly, even if Mastercard's public commitment to implement the new MCC had previously satisfied the essential objective of the Proposal – and it did not – that argument is no longer available to Mastercard. Second, and more fundamentally, the *adoption* of the new MCC by Mastercard is not even broached in the Proposal. Accordingly, Mastercard's one-time commitment to adopt the MCC would not satisfy the essential objective of the proposal. As is clear from its face, the Proposal is focused on obtaining disclosure of, and an explanation from Mastercard regarding, the justification for management's position before the ISO *prior to the ISO's issuance of the MCC*. Mastercard's Board has not prepared or pointed to *any* document that addresses the Proposal's request for a discussion of the Board's oversight of management's position on this crucial policy issue.

Mastercard's supplemental letter acknowledges that it has now paused its implementation

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of the MCC, but nevertheless declines to abandon the substantial implementation argument:

“The Company continues to believe that it has substantially implemented the Proposal, the “essential objective” of which is for the Company to provide information about management’s decision-making “to establish [an MCC] for standalone gun and ammunition stores,” as well as its “governance of MCC standards” more generally. With respect to the new MCC on which the Proposal focuses, the Company has satisfied the essential objective regarding its decision-making to establish an MCC by initially announcing the adoption of the new MCC, and also the pause in its implementation as it evaluates evolving circumstances. As described in detail in the No-Action Request, the Company has also further satisfied the essential objective of the Proposal by publicly reporting on how it manages MCC standards.”

As we noted above though, the Proposal is not focused on what Mastercard did *after* the ISO issued the new MCC. Thus, Mastercard’s conflicting after-the-fact actions provide no insight into what Mastercard’s position was vis-à-vis applications to the ISO for an MCC for standalone gun and ammunition stores. And while Mastercard’s public reporting on how it manages MCC standards in general arguably addresses a limited aspect of the proposal, that reporting does nothing to address the essential objective of the Proposal.

In short, Mastercard had no basis for a “substantial implementation” argument at the time this Proposal was submitted. Mastercard’s professed “commitment” to the 2022 ISO code was plainly inadequate, given that the Company cannot cite any statement that addresses the essential objective of the Proposal – namely, a report on Board oversight of management’s actions and position on applications before the ISO for the issuance of an MCC for standalone gun and ammunition stores. With Mastercard’s multiple flip-flops, leading to the current implementation “pause,” shareholders are more in the dark now than ever before. Mastercard clearly has some explaining to do on an important governance topic.

For these reasons, the Systems respectfully request that the Staff advise Mastercard that it is unable to concur with the Company’s position that the Proposal may be excluded under the “substantial implementation” exemption.

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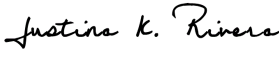
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CONCLUSION

For the reasons set forth above, we respectfully request that Mastercard's No-Action Request be denied.

If you have any questions or need additional information, please do not hesitate to contact me at the phone number or email address provided above.

Respectfully submitted,

DocuSigned by:

4FA7FC017929408...
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