



DIVISION OF  
CORPORATION FINANCE

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

April 25, 2019

Byron B. Rooney  
Davis Polk & Wardwell LLP  
byron.rooney@davispolk.com

Re: MasterCard Incorporated  
Incoming letter dated February 7, 2019

Dear Mr. Rooney:

This letter is in response to your correspondence dated February 7, 2019 concerning the shareholder proposal (the "Proposal") submitted to MasterCard Incorporated (the "Company") by Howard B. Mann et al. (the "Proponents") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. We also have received correspondence on the Proponents' behalf dated March 27, 2019. Copies of all of the correspondence on which this response is based will be made available on our website at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml>. For your reference, a brief discussion of the Division's informal procedures regarding shareholder proposals is also available at the same website address.

Sincerely,

M. Hughes Bates  
Special Counsel

Enclosure

cc: Lisa Lindsley  
SumOfUs  
lisa@sumofus.org

April 25, 2019

**Response of the Office of Chief Counsel**  
**Division of Corporation Finance**

Re: MasterCard Incorporated  
Incoming letter dated February 7, 2019

The Proposal requests that the board direct the Nominating and Corporate Governance Committee to create a standing committee to oversee the Company's responses to domestic and international developments in human rights that affect the Company's business.

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. Accordingly, we do not believe that the Company may omit the Proposal from its proxy materials in reliance on rule 14a-8(i)(7).

Sincerely,

Eric Envall  
Attorney-Adviser

**DIVISION OF CORPORATION FINANCE**  
**INFORMAL PROCEDURES REGARDING SHAREHOLDER PROPOSALS**

The Division of Corporation Finance believes that its responsibility with respect to matters arising under Rule 14a-8 [17 CFR 240.14a-8], as with other matters under the proxy rules, is to aid those who must comply with the rule by offering informal advice and suggestions and to determine, initially, whether or not it may be appropriate in a particular matter to recommend enforcement action to the Commission. In connection with a shareholder proposal under Rule 14a-8, the Division's staff considers the information furnished to it by the company in support of its intention to exclude the proposal from the company's proxy materials, as well as any information furnished by the proponent or the proponent's representative.

Although Rule 14a-8(k) does not require any communications from shareholders to the Commission's staff, the staff will always consider information concerning alleged violations of the statutes and rules administered by the Commission, including arguments as to whether or not activities proposed to be taken would violate the statute or rule involved. The receipt by the staff of such information, however, should not be construed as changing the staff's informal procedures and proxy review into a formal or adversarial procedure.

It is important to note that the staff's no-action responses to Rule 14a-8(j) submissions reflect only informal views. The determinations reached in these no-action letters do not and cannot adjudicate the merits of a company's position with respect to the proposal. Only a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials. Accordingly, a discretionary determination not to recommend or take Commission enforcement action does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court, should the company's management omit the proposal from the company's proxy materials.



March 27, 2019

Via e-mail at [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)  
Securities and Exchange Commission  
Office of the Chief Counsel  
Division of Corporation Finance  
100 F Street, NE  
Washington, DC 20549

Re: Request by Mastercard Incorporated to omit proposal submitted by Howard B. Mann & Jennifer G. Mann

Ladies and Gentlemen,

Pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, Howard B. Mann and Jennifer G. Mann (the "Proponents") submitted a shareholder proposal (the "Proposal") to Mastercard Incorporated ("Mastercard" or the "Company"). The Proposal asks Mastercard's board to direct its nominating and corporate governance committee to create a standing committee to oversee the Company's response to domestic and international developments in human rights that affect Mastercard's business.

In a letter to the Division dated February 7, 2019 (the "No-Action Request"), Mastercard stated that it intends to omit the Proposal from its proxy materials to be distributed to shareholders in connection with the Company's 2019 annual meeting of shareholders. Mastercard argues that it is entitled to exclude the Proposal in reliance on Rule 14a-8(i)(7), on the ground that the Proposal deals with the Company's ordinary business operations. As discussed more fully below, Mastercard has not met its burden of proving its entitlement to exclude the Proposal on that basis, and the Proponents respectfully request that Mastercard's request for relief be denied.

### **The Proposal**

The Proposal states:

**RESOLVED:** Shareholders of Mastercard International ("Mastercard") request that the Board direct the Nominating and Corporate Governance Committee to create a standing committee to oversee the Company's responses to domestic and international developments in human rights that affect Mastercard's business.

## Ordinary Business

Rule 14a-8(i)(7) allows exclusion of proposals related to a company's ordinary business operations. Mastercard urges that the Proposal is excludable on ordinary business grounds because its subject is the use of its products and services by certain customers, or Mastercard's legal compliance program, which are ordinary business matters.

Mastercard's arguments rest on a mischaracterization of the Proposal. To hear Mastercard tell it, the "crux" of the Proposal is not human rights; rather, its "primary focus" is seeking to "dictate the manner in which the Company decides which merchants should be prohibited from using its products and services and how to apply the legal term of use applicable to merchants."<sup>1</sup> But that description is unsupported by the Proposal's language.

The action the resolved clause requests—creating a new board committee to oversee human rights risks—deals solely with human rights. The resolved clause does not ask that the new board committee formulate policies to address business relationships with hate groups or any other category of customer. Nothing in the Proposal supports Mastercard's assertion that the Proposal would allow shareholders to supplant management's role in administering the Mastercard Rules. Thus, the Proposal would establish oversight responsibility but not suggest a particular substantive outcome.<sup>2</sup>

Nor does the supporting statement advocate particular decisions on specific groups, as Mastercard implies. A single paragraph describes potential risks posed by white supremacist groups but does not ask Mastercard to stop doing business with those groups or assert that board-level oversight would lead Mastercard to take that action. The supporting statement cites Mastercard's relationships with those groups to explain how the Company could be exposed to human rights risks through its business relationships, rather than its own activities.<sup>3</sup> Moreover, without such an articulated connection to Mastercard's business, the Proposal could

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<sup>1</sup> No-Action Request, at 7.

<sup>2</sup> In that regard, the Proposal differs from those cited by Mastercard asking companies to cease or report on relationships with particular charitable organizations, such as Home Depot Inc. (Mar. 18, 2011), where the proposal sought disclosure of charitable contributions but the bulk of the supporting statement referred to a specific type of charitable group. Here, by contrast, only half of one of the supporting statement's four paragraphs mentions Mastercard's business relationships with white supremacist groups.

<sup>3</sup> As noted in the supporting statement, the UN Guiding Principles on Business and Human Rights state that companies should "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts." (United Nations Human Rights Office of the High Commissioner, *United Nations Guiding Principles on Business and Human Rights*, at 14 (2011)). Article 20(2) of the International Covenant on Civil and Political Rights sets forth the right to be free from incitement to discrimination, hostility or violence resulting from the advocacy of national, racial, or religious hatred; the groups listed in the supporting statement engage in these activities.

be viewed as lacking a sufficient nexus to the Company and therefore vulnerable to exclusion on that basis.

The Division has consistently found human rights to be a significant policy issue. No-action relief has been denied on ordinary business grounds for proposals asking a company to adopt or amend a human rights policy.<sup>4</sup> The Staff has characterized a proposal as focusing on “the significant policy issue of human rights” even when it requested a specific kind of human rights policy rather than a more general one.<sup>5</sup> As well, a proposal asking for disclosure of a company’s human rights due diligence process has survived ordinary business challenge.<sup>6</sup> It is clear that proposals focused on human rights transcend ordinary business operations.

Proposals addressing the sale or use of a company’s products and services are not excludable on ordinary business grounds if the proposal’s subject is a significant policy issue like human rights. The Staff has declined to allow exclusion of proposals whose subjects were significant policy issues such as drug pricing risk disclosure<sup>7</sup> and the opioid epidemic,<sup>8</sup> though the proposals, by necessity, dealt with the sale or use of a company’s products or services.

That approach has held even when companies claim, as Mastercard does here, that any significant policy issue is too remote from the company’s own activities. In Walgreens Boots Alliance, Inc.,<sup>9</sup> the company urged that a proposal asking for a report on governance changes made to better manage risks related to the opioid abuse crisis could be excluded on ordinary business grounds because its subject was the choice of products to sell and that, as a retailer, it lacked a sufficient nexus to those products. The Walgreens proponents argued that the opioid epidemic was a significant policy issue and that Walgreens’ sufficient nexus to the opioid epidemic was shown by litigation and enforcement actions against the company related to opioid dispensing. The Staff declined to grant relief, stating that “we are

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<sup>4</sup> *E.g.*, Halliburton Co. (Mar. 9, 2009) (proposal asking Halliburton to “review its policies related to human rights to assess areas where the company needs to adopt and implement additional policies” not excludable); Abbott Laboratories (Feb. 28, 2008) (proposal asking Abbott to “amend the company’s human rights policy to address the right to access to medicines” not excludable).

<sup>5</sup> Yahoo, Inc. (Apr. 5, 2011) (declining to concur with Yahoo that a proposal asking the company to adopt human rights principles to guide its business in China and other repressive countries was excludable on ordinary business grounds, stating that “[i]n our view, the proposal focuses on the significant policy issue of human rights”).

<sup>6</sup> *See, e.g.*, Amazon.com, Inc. (Mar. 25, 2015) (proposal urges the board to report to shareholders on Amazon’s process for comprehensively identifying and analyzing potential and actual human rights risks of Amazon’s entire operations and supply chain not excludable as it “focuses on the significant policy issue of human rights”). *See also* discussion of Northrop Grumman determination, *infra*.

<sup>7</sup> Gilead Sciences, Inc. (Feb. 23, 2015); Celgene Corporation (Mar. 19, 2015); Vertex Pharmaceuticals Inc. (Feb. 25, 2015) (all asking for disclosure of risks related to public concern over the high cost of specialty pharmaceuticals).

<sup>8</sup> *See, e.g.*, AmerisourceBergen Corporation (Jan. 11, 2018) (requesting report on governance measures implemented by the company to manage risks related to the opioid crisis).

<sup>9</sup> Walgreens Boots Alliance, Inc. (Nov. 20, 2018).

unable to conclude that this particular proposal is not sufficiently significant to the Company's business operations such that exclusion would be appropriate."

Earlier this month, the Staff rejected arguments similar to Mastercard's in Northrop Grumman Corp.,<sup>10</sup> which involved a human rights proposal. The Northrop Grumman proposal asked the company to report on the management systems and processes it used to implement its human rights policy, and the whereas clauses cited potential human rights risks stemming from the company's development and sale of products and services to the U.S. federal government. Northrop Grumman argued that the proposal was excludable on ordinary business grounds because its subject was the company's sale of products and services and relationships with its customers. The proponents urged that the proposal's subject was the significant policy issue of human rights. The Staff did not grant relief, explaining that "the Proposal transcends ordinary business matters."

The same result was reached in a 2011 challenge to a human rights proposal whose resolved clause, unlike the Proposal's, focused on specific products and services. In Yahoo Inc.,<sup>11</sup> the proposal asked Yahoo to adopt human rights principles "relating to its business in China and other repressive countries" and to "review, report to shareholders and improve all policies and actions (including supervising the abused Yahoo Human Rights Fund) that might affect human rights observance in countries where it does business." The proposal's resolved clause further specified that Yahoo should not sell "information technology products or technologies" or provide assistance "to authorities in China and other repressive countries that could contribute to human rights abuses" and that the company "will support the efforts to assist users to have access to encryption and other protective technologies and approaches."

Yahoo challenged the proposal on ordinary business grounds, claiming that the proposal's subject was not limited to a significant policy issue because certain principles "clearly relate to the ordinary business matters of determining the manner in which the Company should or should not provide its products and services, determining what products and services to offer, and establishing procedures for protecting customer information." Although the proponent did not respond substantively to the company's request, the Staff declined to grant relief, explaining that "[i]n our view, the proposal focuses on the significant policy issue of human rights."

The determinations Mastercard cites on pages 5-7 of the No-Action Request are not to the contrary. Those determinations fall into two groups: 1) proposals the

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<sup>10</sup> Northrop Grumman Corp. (Mar. 19, 2019). Likewise, Amazon unsuccessfully argued that a proposal on human rights risk assessment was excludable on ordinary business grounds, urging that it "relates to the products and services offered for sale by the Company." (Amazon.Com, Inc. (Mar. 25, 2015).

<sup>11</sup> Yahoo, Inc. (Apr. 5, 2011).

Staff did not view as addressing a significant policy issue all,<sup>12</sup> and 2) proposals that dealt with a significant policy issue but tacked on an additional matter that the Staff viewed as not implicating a significant policy issue.<sup>13</sup> None of those determinations involved a proposal where the putative ordinary business matter was subsumed within and inseparable from the significant policy issue, as is the case here.

Mastercard also urges that the Proposal's subject is actually the Company's legal and compliance program, because the Proposal attempts to "evaluate whether the Company is in compliance with the Mastercard Rules, which focuses on whether those using the Company's network are in compliance with laws."<sup>14</sup> But the Proposal does not mention the Mastercard Rules or compliance, which distinguishes the Proposal from the proposals in the determinations Mastercard cites on pages 5-6 of the No-Action Request.

Potential overlap between a significant policy issue that is the central focus of a proposal and legal requirements applicable to a company does not change the proposal's subject to legal compliance. The Staff has rejected an argument much like Mastercard's in a request to exclude a proposal seeking changes to a human rights policy. In Halliburton Inc.,<sup>15</sup> the proposal asked Halliburton to "to review its policies related to human rights to assess areas where the company needs to adopt

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<sup>12</sup> Hewlett-Packard Company (Jan. 23, 2015) (proposal asked for a report on the sale of products and services to foreign military, police and intelligence agencies, and the company argued that previous determinations had explicitly found a significant policy issue to exist only when proposals focused on sales of military equipment, not all products and services); Pfizer, Inc. (Mar. 1, 2016) and McKesson Corporation (June 1, 2017) (proponents argued that proposals asking the companies to report on the controlled distribution systems they used to prevent diversion of drugs used in executions implicated the "the impermissible use of medicines to carry out execution by lethal injection" (McKesson) or lethal injection more generally (Pfizer)); Dominion Resources Inc. (Feb. 19, 2014) (proposal asked the company to constitute a committee of outside renewable energy experts and Green Power customers to develop options for changing the Green Power program, lacked a connection to a significant policy issue like climate change and focused on very specific program changes); Danaher, Inc. (Mar. 8, 2013; reconsideration denied, Mar. 20, 2013) (Staff did not deem mercury in dental amalgam a significant policy issue).

<sup>13</sup> Amazon.com Inc. (Mar. 27, 2015) (proposal asking it to "disclose to shareholders any reputational and financial risks that it may face as a result of negative public opinion pertaining to the treatment of animals used to produce products it sells" did not focus solely on animal cruelty); Papa John's International (Feb. 13, 2015) (putative significant policy issues identified by the proponent—"the environment, animal welfare and human health"—were likely viewed as both too general and too remote from the proposal's request that Papa John's "expand its menu offerings to include vegan cheeses and vegan meats."); Bank of America Corp (Feb. 24, 2010) and JPMorgan Chase & Co. (Mar. 12, 2010) (allowing exclusion of proposals asking the companies to report on both their policies regarding funding of companies engaged in mountaintop removal coal mining and the environmental impacts of expanding those policies; the Staff identified the portion of the proposals addressing funding policy as going "beyond the environmental impact of [the companies'] project finance decisions.").

<sup>14</sup> No-Action Request, at 5.

<sup>15</sup> Halliburton, Inc. (Mar. 9, 2009).

and implement additional policies and to report its findings.” Halliburton argued that the proposal was excludable on ordinary business grounds because it “pertain[ed] to compliance with laws or requesting implementation of policies regarding compliance with laws,” but the Staff disagreed and declined to grant relief.

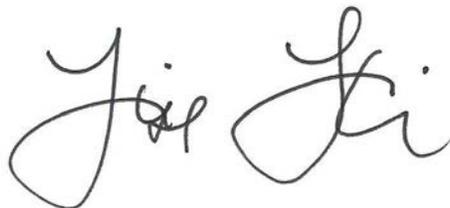
The Proposal asks Mastercard to establish a board committee to oversee how the Company responds to human rights developments affecting its business. The resolved clause and nearly all of the supporting statement focuses on human rights, with only part of one paragraph of the supporting statement addressing business relationships with white supremacist organizations that could give rise to human rights risk. The Proposal does not attempt to dictate or even suggest how Mastercard should treat particular kinds of customers. Finally, legal compliance is mentioned in neither the resolved clause nor the supporting statement. For these reasons, the Proposal’s subject is not Mastercard’s sale of products or services, or legal compliance, but rather oversight of human rights issues by a newly-created board committee.

\* \* \*

For the reasons set forth above, Mastercard has not satisfied its burden of showing that it is entitled to omit the Proposal in reliance on Rule 14a-8(i)(7). The Proponents thus respectfully request that Mastercard’s request for relief be denied.

The Proponents appreciate the opportunity to be of assistance in this matter. If you have any questions or need additional information, please contact me at (201) 321-0301 or [lisa@sumofus.org](mailto:lisa@sumofus.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa". The signature is fluid and cursive, with the first letter being a large, stylized "L".

cc: Byron B. Rooney, Esq.  
[Byron.rooney@davispolk.com](mailto:Byron.rooney@davispolk.com)



**Byron B. Rooney**

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February 7, 2019

**VIA Email**

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549  
Via email: [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)

Ladies and Gentlemen:

On behalf of Mastercard Incorporated, a Delaware corporation (the “**Company**” or “**Mastercard**”), 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 stockholders who have designated as their representative, the SumofUs (the “**Proponent**”) for inclusion in the proxy materials the Company intends to distribute in connection with its 2019 Annual Meeting of Shareholders (the “**2019 Proxy Materials**”). The Proposal and related correspondence is attached hereto as Exhibit A.

We hereby request confirmation that the Staff of the Division of Corporation Finance (the “**Staff**”) will not recommend any enforcement action if, in reliance on Rule 14a-8, the Company omits the Proposal from the 2019 Proxy Materials. In accordance with Rule 14a-8(j), this letter is being filed with the Securities and Exchange Commission not less than 80 days before the Company plans to file its definitive proxy statement.

Pursuant to Staff Legal Bulletin No. 14D (CF), Shareholder Proposals (November 7, 2008), Question C, we have submitted this letter and any related correspondence via email to [shareholderproposals@sec.gov](mailto: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 to omit the Proposal from the 2019 Proxy Materials. This letter constitutes the Company’s statement of the reasons it deems the omission of the Proposal to be proper.

## THE PROPOSAL

The Proposal states:

“RESOLVED: Shareholders of Mastercard Incorporated (“Mastercard”) request that the Board direct the Nominating and Corporate Governance Committee create a standing committee to oversee the Company’s responses to domestic and international developments in human rights that affect Mastercard’s business.”

## REASONS FOR EXCLUSION OF THE PROPOSAL

The Company believes that the Proposal may be properly omitted from the 2019 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal relates to the Company’s ordinary business operations.

## ANALYSIS

### Company Background.

Mastercard is a technology company in the global payments industry that connects consumers, financial institutions, merchants, governments, digital partners, businesses and other organizations worldwide, enabling them to use electronic forms of payment instead of cash and checks. The Company operates a global payments processing network, facilitating the switching (authorization, clearing and settlement) of payment transactions and delivering related products and services.

The Company’s business is to make payments easier and more efficient by creating a wide range of payment solutions and services using a family of well-known brands, including Mastercard®, Maestro® and Cirrus®. The Company also provides value-added offerings such as safety and security products, information services and consulting, loyalty and reward programs and issuer and acquirer processing.

A typical transaction on the Company’s core network involves four additional participants: (i) an account holder (a consumer who holds a card or uses another device enabled for payment); (ii) merchant; (iii) an issuer (the account holder’s financial institution); and (iv) an acquirer (the merchant’s financial institution). The account holder purchases goods or services from a merchant using one of the Company’s branded payment products. After the transaction is authorized by the issuer, the issuer pays the acquirer an amount equal to the value of the transaction, minus the interchange fee, and then posts the transaction to the account holder’s account. The acquirer pays the amount of the purchase, net of a discount, to the merchant.

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 branded products. In most cases, account holder relationships belong to, and are managed by, the Company’s financial institution customers. The Company’s revenue is generated from assessing customers based on the gross dollar volume of activity on the Company’s branded products the fees that the Company charges customers for switching transactions and from other payment-related products and services.

**The Proposal may be excluded under Rule 14a-8(i)(7) because it addresses matters relating to the Company's ordinary business operations.**

The Company may exclude the Proposal pursuant to Rule 14a-8(i)(7) because it deals with matters relating to the Company's ordinary business operations regarding the use of the Company's products and services by specific types of merchants.

Rule 14a-8(i)(7) permits the Company to omit from its proxy materials a stockholder proposal that relates to its "ordinary business" operations. According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the term "ordinary business" "refers to matters that are not necessarily 'ordinary' in the common meaning of the word," but instead the term "is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 40018 (May 21, 1998). In the 1998 Release, the Commission stated that the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting," and identified two central considerations that underlie this policy. One of the considerations is that certain 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, as such, may be excluded, unless the proposal raises policy issues that are sufficiently significant to transcend day-to-day business matters.

*A. The Proposal may be excluded under Rule 14a-8(i)(7) because it addresses decisions concerning the use of the Company's products and services.*

The Proposal may be excluded pursuant to Rule 14a-8(i)(7) as relating to the Company's ordinary business operations because it addresses the decisions concerning the Company's products and services, in particular the use of those products and services by specific types of merchants. The Proposal asks the Company to establish a special board committee to oversee the Company's response to human rights developments, but the Commission has long held that, when applying Rule 14a-8(i)(7), such proposals are evaluated by considering the underlying subject matter of the proposal. See Exchange Act Release No. 20091 (Aug. 16, 1983).

The primary focus of the Proposal is the Company's products and services. The supporting statement asks the Company to cease processing payments for merchants that are deemed to be "neo-Nazis," "hate groups" and "white supremacists," citing to outside articles and external websites, and names specific organizations.

These organizations are the merchants in the typical four-way transaction described above. They are among the millions of the merchants receiving payments from account holders through the use of the Company-branded cards. The transactions are switched over the Company's global payment processing system. The Company does not have direct relationships with merchants with respect to switched transactions; the Company's direct customers are the merchants' financial institutions.

Decisions regarding the use of company products and services is part of a company's ordinary business. See *Pfizer, Inc.* (Mar. 1, 2016). The proposal in Pfizer asked the company to control the distribution system for certain medicines in order to prevent their sale to prisons for the purpose of aiding executions. The Staff determined that the proposal related to the sale or distribution of company products and was therefore an ordinary business matter. As the Pfizer letter

shows, decisions regarding the distribution of a product or service and the identity of the ultimate user of the product or service is within the purview of management. This remains the case even when the potential use of a company's products and services is for questionable or risky purposes, or in ways that may cause a company to be criticized or affect its reputation. See *Wal-Mart Stores, Inc.* (Mar. 20, 2014) (permitting exclusion of a proposal requesting board oversight relating to the formulation of policies that determine whether the company should sell a product that "especially endangers public safety and well-being, has the substantial potential to impair the reputation of the company and/or would reasonably be considered by many offensive to the family and community values integral to the company's promotion of its brand," where the proposal identified guns with high-capacity magazines as its principal concern); *Netflix, Inc.* (Mar. 14, 2016) (permitting exclusion of a proposal requesting that "the company issue a report describing how company management identifies, analyzes and oversees reputational risks related to offensive and inaccurate portrayals of Native Americans, American Indians and other indigenous peoples," as relating to "the nature, presentation and content of programming and film production"); and *McKesson Corporation* (June 1, 2017) (permitting exclusion of a proposal requesting a report of the company's controlled distribution system that the company implements on behalf of manufacturers to prevent the diversion of restricted medicines to prisons for use in executions).

In addition, proposals that relate to the products and services offered for sale, even when concerns were raised about whether the "products will be used in controversial actions raising serious human rights and ethical concerns," were permitted to be omitted as ordinary business matters. See *Hewlett-Packard Company* (Jan. 23, 2015), where the proposal requested that the company focus on the sale of its products to certain types of organizations (the military, police and intelligence agencies of foreign countries) and sought to subject decisions about whether that company should conduct business with specific types of businesses to stockholder oversight. The question of managing business relationships with the ultimate user of a company's product and services is fundamental to the role of management, and the Staff has consistently concurred in the exclusion of proposals relating to the sale, distribution and use of a company's products and services, including to particular types of groups.

For example, in *Bank of America Corp.* (Feb. 24, 2010), the proposal requested that the company publish a report assessing the adoption of a policy barring future financing for companies engaged predominantly in mountain-top-coal removal. The Staff concurred in the exclusion of the proposal, noting in particular that the proposal related to the company's "decisions to extend credit or provide other financial services to particular types of customers." As the Staff explained, "[p]roposals concerning customer relations or the sale of particular services are generally excludable under rule 14a-8(i)(7)." See also *JPMorgan Chase & Co.* (Mar. 12, 2010) (concurring in the exclusion under Rule 14a-8(i)(7) of a similar mountain-top-coal-removal proposal, since it was regarding the provision of "services to particular types of customers" is "generally excludable under [R]ule 14a-8(i)(7)"); *Wells Fargo & Co.* (Feb. 16, 2006) (concurring in the exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company not provide its services to payday lenders as relating to "customer relations"); and *Bank of America Corp.* (Mar. 7, 2005) (same).

The Proposal is primarily focused on the use of the Company's products and services by groups with goals that the Proponent views to be controversial or problematic, an objective that is reflected in the Proponent's public campaign to stop the Company and other payments companies from processing donations for certain types of groups.<sup>1</sup> The Proposal's key objective is to dictate the manner in which the Company decides which merchants should be prohibited from using its

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<sup>1</sup> <https://actions.sumofus.org/a/stop-credit-card-giants-from-funding-facist-hatred-and-violence>.

payment processing system, namely the specific types of organizations that are named in the Proposal as merchants.

The Proposal is also similar to prior proposals asking for reports on charitable contributions that want stockholders to be involved with management's decisions about contributions to specific types of organizations, where the proposals attempt to dictate the manner of charitable contributions that companies should make by targeting groups that the proposals believed have questionable purposes. The Staff has consistently taken the position that proposals that relate to contributions to specific types of organizations are part of a company's ordinary business operations.

For example, in *The Home Depot, Inc.* (Mar. 18, 2011), the Staff permitted exclusion of a proposal requesting that the company publish on its website a list of recipients of "corporate charitable contributions or merchandise vouchers of \$5,000 or more." The proposal's supporting statement, however, focused primarily on the gay, lesbian, bisexual and transgender community and associated organizations. The decision to allow the company to omit the proposal stated that the proposal related to "charitable contributions to specific types of organizations." Similarly, in *Johnson & Johnson* (Feb. 12, 2007), the Staff permitted exclusion of a proposal requesting that each company publish all charitable contributions on its website, particularly those to Planned Parenthood and other charitable groups involved in abortions and same sex marriages, because the proposal related to "contributions to specific types of organizations." Here, the Proposal targets the Company's business relationships with specific organizations that the Proponent views to be "neo-Nazis," "hate groups" and "white supremacists."

*B. The Proposal may be excluded under Rule 14a-8(i)(7) because it addresses the Company's legal compliance program and compliance with laws.*

In application of Rule 14a-8(i)(7), the Staff has consistently permitted companies to exclude proposals that request board of directors to undertake actions to ensure compliance with legal requirements, because such proposals relate to ordinary business operations.

Mastercard is one of the world's largest technology companies in global payments with an operations processing network, facilitating the switching (authorization, clearing and settlement) of payment transactions and delivering related products and services. This industry is heavily-regulated and the Company believes that compliance with laws, rules and regulations and monitoring business practices to ensure such compliance is fundamental to management's ability to run the company on a day to- day basis. As a practical matter, this cannot be subject to direct stockholder oversight. Here, the Proposal's attempt to evaluate whether the Company is in compliance with the Mastercard Rules, which focuses on whether those using the Company's network are in compliance with laws, is an effort to monitor the Company's business practices. The procedures and processes in place to affirm legal compliance is within the competency of the Company's management, direction and oversight as part of its ordinary business.

See *The AES Corporation* (Jan. 9, 2007), where the Staff permitted the company to exclude a proposal that requested the board create an ethics oversight committee of independent directors to monitor the company's compliance with applicable laws, rules and regulations of federal, state, local governments and the AES Code of Business Conduct and Ethics, since they relate to ordinary business operations; *Monsanto Company* (Nov. 03, 2005), in which the proposal called for the board of directors to create an ethics oversight committee of independent directors for the purpose of monitoring the company's domestic and international business practices to ensure compliance with the company's code of business conduct and applicable laws, rules and regulations of federal, state,

provincial and local governments, including the Foreign Corrupt Practices Act; *Hudson United Bancorp* (Jan. 24, 2003) (proposal requested the board of directors to appoint an independent shareholders committee to investigate possible corporate misconduct); and *Allstate Corp.* (Feb. 16, 1999) (proposal would require establishing an independent shareholder committee to investigate and prepare a report on whether there has been illegal activity by the company).

The Proposal asks the Company to cease providing payment switching services to specific merchants. Merchants, acquirers and issuers are all subject to the Mastercard Rules that pertain to acceptable use. The Rules prohibit illegal and other activities that carry higher risks or are viewed as problematic. The Company uses its own technology and resources to monitor assurance that merchants are not involved in illegal activities and have not violated the other terms of the Mastercard Rules.

Evaluating whether the terms of use of the Company's products and services have been breached would require difficult and intricate considerations. The legal analysis involved with such a decision may be dependent upon an examination of the particular facts of each situation, with respect to information about the organizations that may be quite murky, not readily available or simply inaccessible. Whether merchants have conducted illegal acts, and the processes and procedures established to make those determinations, are fundamental to management's role and responsibilities.

The analysis of compliance with the Mastercard Rules that relate to discretionary judgment about the nature of the activities by the merchants, and the necessary remedying actions if non-compliance is suspected, are tasks that should be undertaken by management and the Company. They are not matters that can easily be subject to an up-or-down vote by stockholders. In addition, the final decision to terminate merchant relationships is often dependent upon the acquirer, the merchant's bank, and not the Company. As part of the Company's ordinary course day-to-day operations, the Company notifies the acquirer of potential Rule violations through its processes and procedures and ensures the acquirer takes the necessary actions to bring its customer into compliance with the Rules. The business relationships that the Company has with its customers, including how it should work with them to interpret and enforce the Mastercard Rules, are fundamental to Company management's ability to operate the Company.

*C. Regardless of whether the Proposal touches upon a significant policy issue, the Proposal is excludable because it addresses ordinary business matters.*

A proposal generally will not be excludable under Rule 14a-8(i)(7) where it raises a significant policy issue. *Staff Legal Bulletin 14E* (October 27, 2009). However, the Staff has indicated that even proposals relating to social policy issues may be excludable in their entirety if they do not "transcend the day-to-day business matters" discussed in the proposals (1998 Release).

In line with the 1998 Release, the Staff has permitted companies to exclude proposals that relate to ordinary business decisions even where the proposal referenced a significant policy issue. The Staff stated in SLB 14C that "[i]n determining whether the focus of these proposals is a significant social policy issue, we consider both the proposal and the supporting statement as a whole." In *Amazon.com, Inc.* (Feb. 3, 2015), the Staff permitted the company to exclude a proposal requesting that it "disclose to shareholders reputational and financial risks it may face as a result of negative public opinion pertaining to the treatment of animals used to produce products it sells" despite the proponent's argument that the sale of foie gras raised a significant policy issue (animal cruelty). The Staff determined that the proposal related to "the products and services offered for sale

by the company.” See also *Papa John’s International, Inc.* (Feb. 13, 2015) (permitting the exclusion of a proposal that requested the company to include more vegan offerings in its restaurants, despite the assertion that the proposal would promote animal welfare, a significant policy issue, since that proposal fundamentally related to “the products offered for sale by the company”); and *Dominion Resources, Inc.* (Feb. 14, 2014) (permitting the exclusion of a proposal relating to use of alternative energy because the proposal related, in part, to ordinary business operations (the company’s choice of technologies for use in its operations)).

The Proposal relates to the ordinary business matter of the Company’s decisions to provide payment switching services, or cease providing them, to specific merchants. The resolution asks for a board committee to oversee human rights, but the Proposal makes clear that its primary focus is not human rights overall, but rather the ability to dictate the manner in which the Company decides which merchants should be prohibited from using its products and services and how to apply the legal term of use applicable to merchants. Consequently, the Proposal’s core objective extends far beyond being a policy issue to relate instead to the Company’s ordinary business operations. The supporting statement outlines the potential risks to the Company’s business associated with providing its products and services to certain types of merchants, or not prohibiting those relationships. The services of the other public companies named in the Proposal are characterized as “support functions” for the types of organizations that are the target of the Proposal, such as internet infrastructure or social media platforms and payment firms, all multiple digital platforms that are the primary products and services of those named companies’ businesses. The Proposal cites to concerns that the Company has received negative press for the “processing of payments to white supremacist groups,” lists other types of groups for which it wants the Company to stop processing payments, names specific groups and also includes articles and news stories that highlight the use of the Company’s products and services by particular organizations. The intent of the Proposal is for stockholders to interfere with specific decisions regarding the Company’s products and services, and the application of the terms and conditions that the Company has established to ensure legal compliance with the use of those products and services.

The central targets of the Proposal are specific organizations and business relationships, not human rights issues more generally. We recognize that the Staff has permitted proposals that ask for the identification and analysis of human rights risk pertaining to the rights of workers in a company’s operations and supply chain. See *Amazon.com, Inc.* (Mar. 25, 2015). That proposal, however, centered largely on elements of human rights risk posed by the treatment of the company’s own workers or workers employed by the company’s suppliers. The crux of this Proposal, by comparison, is centered on accusations that the Company is enabling certain hate groups by not affirmatively disallowing the use of the Company’s products and services, with those groups identified by a third-party source. The Proposal is not focused on workers’ rights, and it is also not concerned with the rights of disenfranchised groups or discriminatory actions by the Company, such as the issues raised in *Procter & Gamble Co.* (Aug. 16, 2016) (a proposal calling for a report on the costs and risks to the company caused by enacted or proposed state policies supporting discrimination against LGBT people).

Rather than focusing solely on human rights issues, the Proposal instead targets specific types of controversial groups. Some, or in fact many of them, may very well be implicated in human rights issues, but it is not completely clear and the list of groups is quite large, and therefore it is best left to management to properly evaluate and determine. The groups themselves, as merchants, are not central to the Company’s operations, and are not even the Company’s customers as noted above. The Company’s interactions with them are indirect, primarily through the Company’s customers who are the banks for those merchants.

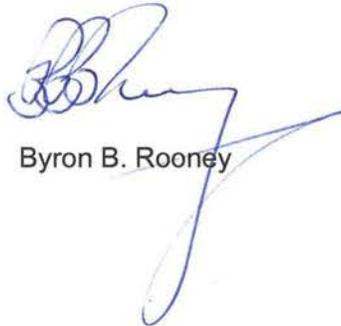
As noted above, the Staff has consistently concurred that proposals requesting that a company refrain from relationships with specific organizations that are viewed, at least by certain proponents, to espouse controversial goals, relate to a company's ordinary business operations. In *The Home Depot, Inc.* (Feb. 13, 2018), the proposal requested that the company's management review policies related to "human rights" and areas where the Company needs to implement additional policies, where the statement referenced efforts by the Human Rights Campaign organization to undermine religious freedom in the United States, in addition to another organization and extremist groups generally. See also *PG&E Corp.* (Feb. 4, 2015) (concurring that a proposal recommending the formation of a committee to determine the effect of "anti-traditional family political and charitable contributions" was excludable because it related to "contributions to specific types of organizations") and *The Walt Disney Co.* (Nov. 20, 2014) (concurring that a proposal seeking to preserve the Boy Scouts of America as an eligible charitable organization for the company's matching contributions program was excludable under Rule 14a-8(i)(7) because it related to "charitable contributions to a specific organization").

## CONCLUSION

Accordingly, consistent with the Staff's previous interpretations of Rule 14a-8(i)(7), the Company believes that the Proposal may be excluded as concerning the Company's ordinary business operations and because it has been substantially implemented.

The Company requests confirmation that the Staff will not recommend any enforcement action if, in reliance on the foregoing, the Company omits the Proposal from its 2019 Proxy Materials. If you should have any questions or need additional information, please contact the undersigned at 212-450-4658 or byron.rooney@davispolk.com. If the Staff does not concur with the Company's position, we would appreciate an opportunity to confer with the Staff concerning these matters prior to the issuance of its response.

Respectfully yours,

A handwritten signature in blue ink, appearing to read 'Byron B. Rooney', with a long, sweeping tail extending downwards and to the right.

Byron B. Rooney

Attachment

cc w/ att: Janet McGinness, Mastercard

Lisa Lindsley, SumofUs

**Exhibit A**

RESOLVED: Shareholders of Mastercard Incorporated ("Mastercard") request that the Board direct the Nominating and Corporate Governance Committee create a standing committee to oversee the Company's responses to domestic and international developments in human rights that affect Mastercard's business.

#### SUPPORTING STATEMENT:

Mastercard's exposure to conflict in human rights risk is significant as our company operates in over 210 countries and territories, some of which have a significant risk of human rights violations.

Companies can face risks related to human rights even when they only perform support functions. Internet infrastructure companies like web host GoDaddy, social media platform Facebook and payments firm PayPal have come under pressure for doing business with or providing a forum for neo-Nazis and other hate groups. Mastercard has received negative publicity for processing of payments to white supremacist groups.<sup>1</sup> According to the website [bloodmoney.org](http://bloodmoney.org) (accessed on December 18, 2018), Mastercard continues to process payments for organizations such as American Border Patrol, League of the South, Proud Boys and Stormfront.

The United Nations Guiding Principles on Business and Human Rights (the "Guiding Principles") approved by the UN Human Rights Council in 2011, note that "Business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties... For the purpose of these Guiding Principles a business enterprise's 'activities' are understood to include both actions and omissions; and its 'business relationships' are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services."<sup>2</sup>

None of Mastercard's current Board Committees have been assigned responsibility for overseeing human rights issues. We believe that the significant risks associated with adverse human rights impacts at Mastercard warrant specific accountability and responsibility at the Board level.

We urge shareholders to support this proposal.

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<sup>1</sup> "Organizers Catch Credit Card Companies Profiting From White Supremacy: Online payment companies are complicit in authorizing transactions related to hate groups," *AlterNet*, August 22, 2017 at <https://www.alternet.org/news-amp-politics/color-change-activism>; and "Color Of Change Is Attacking Hate Groups At The Source: Their Funding," *Fast Company*, August 21, 2017 at <https://www.fastcompany.com/40456061/color-of-change-is-attacking-hate-groups-at-the-source-their-funding>.

<sup>2</sup> See [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf), page 15.

## Yonda, Kathryn

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**From:** Yonda, Kathryn  
**Sent:** Friday, December 28, 2018 4:28 PM  
**To:** 'lisa@sumofus.org'  
**Cc:** McGinness, Janet  
**Subject:** Shareholder proposal  
**Attachments:** Letter to proponents of shareholder proposal re deficiency.pdf

Dear Ms. Lindsley,

Please see the attached response of Janet McGinness, Corporate Secretary, to the shareholder proposal submitted to Mastercard Incorporated by Ms. Jennifer G. Mann and Messrs. Howard B. Mann and Keith C. Schnip, revised to correct the spelling of Mr. Schnip's name.

Please confirm receipt of the attached by return email. Thank you.

**Kathryn Yonda**  
Manager  
Legal Services, Corporate Finance and Governance

Mastercard  
2000 Purchase Street | Purchase, New York 12577  
tel 914.249.6173





**VIA EMAIL AND OVERNIGHT MAIL**

December 28, 2018

Re: Stockholder Proposal

Mr. Howard B. Mann and Ms. Jennifer G. Mann

\*\*\*

Mr. Keith Schnip

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cc: [lisa@sumofus.org](mailto:lisa@sumofus.org)

Dear Ms. Mann and Messrs. Mann and Schnip:

We received your letters dated and postmarked December 21, 2018 submitting as co-sponsors a stockholder proposal requesting that the board of Mastercard Incorporated (Mastercard) direct the governance committee to create a standing committee to oversee Mastercard's responses to domestic and international developments in human rights that affect Mastercard for inclusion in Mastercard's proxy statement for its 2019 annual meeting (proposal). The letter instructs Mastercard to contact Ms. Lisa Lindsley to discuss the proposal. The purpose of this email and letter is to let you and Ms. Lindsley know that the proposal contains certain procedural deficiencies related to proof of ownership, which the Securities and Exchange Commission ("SEC") regulations require us to bring to your attention.

Rule 14a-8(b)(1) of the Securities Exchange Act of 1934, as amended, requires that in order to be eligible to submit a proposal for inclusion in the Company's proxy statement, each shareholder proponent must, among other things, have continuously held at least \$2,000 in market value of the Company's common stock, or 1%, of the company's securities entitled to vote on the proposal at the meeting for at least one year by the date the proposal is submitted.

Mastercard's stock records do not indicate that you are currently the registered holder on the Company's books and records of shares of the Company's common stock and you have not provided proof of ownership. Accordingly, you must submit to us a written statement from the "record" holder of the shares verifying that, at the time you submitted the proposal on December 21, you had continuously held at least \$2,000 in market value, or 1%, of the Company's common stock for at least the one year period prior to and including December 21, 2018.

Rule 14a 8(b) requires that a proponent of a proposal must prove eligibility as a shareholder of the company by submitting either:

- a written statement from the "record" holder of the securities verifying that at the time the proponent submitted the proposal, the proponent had continuously held the requisite amount of securities for at least one year; or
- a copy of a filed Schedule 13D, Schedule 13G, Form 3, Form 4, Form 5, or amendments to those documents or updated forms, reflecting the proponent's ownership of shares as of or before the date on which the one year eligibility period begins and the proponent's written statement that he or she continuously held the required number of shares for the one year period as of the date of the statement.

To help shareholders comply with the requirements when submitting proof of ownership to companies, the SEC's Division of Corporation Finance published Staff Legal Bulletin No. 14F ("SLB 14F"), dated October 18, 2011, and Staff Legal Bulletin No. 14G ("SLB 14G"), dated October 16, 2012. We have attached copies of both for your reference. A copy of Rule 14a-8, which applies to shareholder proposals submitted for inclusion in proxy statements, is also enclosed for your reference.

Please note that most large U.S. banks and brokers deposit their customers' securities with, and hold those securities through, the Depository Trust Company ("DTC"), a registered clearing agency that acts as a securities depository (DTC is also known through the account name of Cede & Co.). SLB 14F and SLB 14G provide that for securities held through the DTC, only DTC participants should be viewed as "record" holders of securities that are deposited at DTC. You can confirm whether your bank or broker is a DTC participant by checking DTC's participant list, which is currently available on the Internet at <http://www.dtcc.com/client-center/dtc-directories>.

If you hold shares through a bank or broker that is not a DTC participant, you will need to obtain proof of ownership from the DTC participant through which the bank or broker holds your shares. You should be able to find out the name of the DTC participant by asking your bank or broker. If the DTC participant that holds your shares knows your bank or broker's holdings, but does not know your holdings, you may satisfy the proof of ownership requirements by submitting two proof of ownership statements—one from your bank or broker confirming your ownership and the other from the DTC participant confirming the bank or broker's ownership. Both should verify your ownership for the one-year period prior to and including December 21, 2018. Please review SLB 14F carefully before submitting proof of ownership to ensure that it is compliant.

In order to meet the eligibility requirements for submitting a shareholder proposal, the SEC rules require that these defects that we have identified be remedied. The revised documentation proving you had continuously held at least \$2,000 in market value, or 1%, of Mastercard's common stock for at least the one year period prior to and including December 21, 2018 must be postmarked (or transmitted electronically) to us no later than 14 calendar days from the date you receive this letter.

Please confirm receipt of this email and address any response to me at  
janet.mcginness@mastercard.com.

Sincerely,

A handwritten signature in black ink that reads "Janet McGinness". The signature is written in a cursive, flowing style.

Janet McGinness  
Corporate Secretary

Attachments

**Mr. Keith C. Schnip**

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December 21, 2018

Janet L. McGinness  
Corporate Secretary  
Mastercard Incorporated  
2000 Purchase Street  
Purchase, NY 10577

Re: Shareholder proposal for 2019 annual meeting

Dear Ms. McGinness:

I submit the enclosed shareowner proposal for inclusion in the proxy statement that Mastercard Incorporated plans to circulate to shareowners in connection with the 2019 annual meeting. The proposal is being submitted under SEC Rule 14a-8, and relates to a request that the board direct the Governance Committee to create a standing committee to oversee the Company's responses to domestic and international developments in human rights that affect our company.

I am located at the address shown above. I have beneficially owned more than \$2,000 worth of Mastercard Incorporated common stock for longer than a year. A letter from UBS, the record holder, confirming my ownership is being sent by separate cover. I intend to continue ownership of at least \$2,000 worth of Mastercard Incorporated common stock through the date of the 2019 annual meeting. My co-sponsors will be submitting materials under separate cover.

I would be pleased to discuss the issues presented by this proposal with you. If you require any additional information, please contact Ms. Lisa Lindsley who is advising me on this issue. Ms. Lindsley can be reached via email at [lisa@sumofus.org](mailto:lisa@sumofus.org) or via phone at (201) 321-0301.

Very truly yours,



RESOLVED: Shareholders of Mastercard Incorporated ("Mastercard") request that the Board direct the Nominating and Corporate Governance Committee create a standing committee to oversee the Company's responses to domestic and international developments in human rights that affect Mastercard's business.

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We urge shareholders to support this proposal.

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<sup>1</sup> "Organizers Catch Credit Card Companies Profiting From White Supremacy: Online payment companies are complicit in authorizing transactions related to hate groups," *AlterNet*, August 22, 2017 at <https://www.alternet.org/news-amp-politics/color-change-activism>; and "Color Of Change Is Attacking Hate Groups At The Source: Their Funding," *Fast Company*, August 21, 2017 at <https://www.fastcompany.com/40456061/color-of-change-is-attacking-hate-groups-at-the-source-their-funding>.

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Howard B. Mann and Jennifer G. Mann

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December 21, 2018

Janet L. McGinness  
Corporate Secretary  
Mastercard Incorporated  
2000 Purchase Street  
Purchase, NY 10577

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We are located at the address shown above. We have beneficially owned more than \$2,000 worth of Mastercard Incorporated common stock for longer than a year. A letter from Gardner Russo and Gardner, our Investment Advisor through Pershing Advisor Solutions, LLC, the record holder, confirming our ownership is being sent under separate cover. We intend to continue ownership of at least \$2,000 worth of Mastercard Incorporated common stock through the date of the 2019 annual meeting. Our co-sponsors will be submitting materials under separate cover.

We would be pleased to discuss the issues presented by this proposal with you. If you require any additional information, please contact Ms. Lisa Lindsley who is advising us on this issue. Ms. Lindsley can be reached via email at [lisa@sumofus.org](mailto:lisa@sumofus.org) or via phone at (201) 321-0301.

Very truly yours,



Howard B. Mann &



Jennifer G. Mann

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<sup>2</sup> See [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf), page 15.