mastercard

June 1, 2020

*Via www.regulations.gov*

Nat Weber, Chief of Staff
Matt Cameron, Staff Director
Taskforce on Federal Consumer Financial Law
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, DC 20552

**RE: Docket No. CFPB-2020-0013; Request for Information to Assist the Taskforce on Federal Consumer Financial Law**

Dear Messrs. Weber and Cameron:

Mastercard International Incorporated ("Mastercard") submits this comment letter to the Consumer Financial Protection Bureau (the "Bureau") in response to its request for information to assist the Taskforce on Federal Consumer Financial Law (the "Taskforce") (the "Request").[1] We support the efforts of the Taskforce to harmonize, modernize and update federal consumer financial law. The Taskforce has a unique opportunity to enhance the consumer financial legal framework in ways that would benefit consumers, and we encourage the Taskforce to make recommendations to the Director of the Bureau, as further described below, to: (1) advance the goal of broad financial inclusion by modifying regulations that apply to prepaid cards; (2) allow creditors to use alternative data in loan underwriting without issuing new regulations governing the use of alternative data; (3) develop principles-based standards for the reasonableness of a consumer reporting agency's procedures to assure the maximum possible accuracy of consumer information; and (4) support the passage of common sense uniform federal data breach notification legislation.

***Background on Mastercard***

Mastercard is a technology company in the global payments industry. Mastercard operates the world's fastest payments processing network, connecting consumers, financial institutions, merchants, governments and businesses in more than 210 countries and territories. Mastercard does not issue payment cards of any type, nor does it contract with merchants to accept those cards. In the Mastercard network, those functions are performed in the United States by depository institutions. Mastercard refers to the financial institutions that issue payment cards bearing the Mastercard brands to cardholders as "issuers." Mastercard refers to

[1] 85 *Fed. Reg.* 18,214 (April 1, 2020).



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the financial institutions that enter into contracts with merchants to accept Mastercard-branded payment cards as "acquirers."

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

***Comments***

We offer our comments below on portions of four questions, covering the topics of expanding access to financial services and consumer data, posed by the Bureau in the Request: Questions 1, 5, 8 and 9. Our comments are actionable and intended to focus on areas that "would provide the greatest marginal benefits relative to the marginal cost."[2]

I. *Expanding Access*

A. Access to Banking Services

**1. Should the Bureau promote greater access to banking services and, if so, how? Are alternatives to deposit accounts, such as prepaid cards and peer-to-peer electronic payments, sufficient when compared to traditional banking products? What is the evidence regarding consumers' understanding of, and experience and satisfaction with, these products?**

Prepaid card accounts have been vital to the effort to increase financial inclusion and have become widely used by underbanked and unbanked populations. The modes of distribution for prepaid cards and the accessibility and usability of prepaid products have proved so effective that some depository institutions even promote their deposit accounts and debit cards in a similar manner. In many ways, prepaid card accounts and deposit accounts with debit cards have become competing solutions to bring underbanked and unbanked populations into the modern financial system. However, for many underbanked and unbanked consumers, deposit accounts still remain out of reach and thus prepaid cards are essential.[3]

The functionality of prepaid cards and debit cards is now quite similar, and they are now subject to comparable consumer protections under the Bureau's Regulation E. However, the regulation of these similar products varies distinctly on the matter of overdraft protection. We

[2] *Id.* at 18,215.

[3] Mercator Advisory Group, *Consumers and Prepaid: Shifting Toward Digital*, at 11 (Sept. 2018). According to a Mercator survey, only 4% of consumers surveyed had no account at a financial institution, but certain segments are twice as likely as average not to have a bank account. These are 18–24 year olds (9%), earners of less than $50,000 a year (7%), African Americans (13%), and consumers who do not have a college education (9%). *Id.*

are concerned that over-regulation of prepaid cards on this feature may limit the financial inclusion benefits of prepaid cards.

We understand from our customers that depository institutions often do not provide overdraft protection on prepaid accounts due to the compliance burdens imposed by the "Prepaid Rule" under Regulation E that became effective last year.[4] With limited exception, overdrafts on prepaid accounts are treated as extensions of credit under Regulation Z,[5] subject to the requirements appurtenant to credit cards under Regulation Z, including the requirement for an issuer performing an ability-to-pay analysis on the cardholder.[6] These burdens do not apply when depository institutions provide overdraft protection on debit card transactions. Instead of treating deposit account debit card overdrafts as credit card loans, the approach to overdraft protection in Regulation E for holders of deposit accounts simply allows consumers to opt-in to overdrafts. This approach is more reasonable and should apply equally to holders of prepaid cards.

Specifically, Regulation E prohibits a depository institution from assessing a fee or charge on a consumer's deposit account for paying an automated teller machine ("ATM") or one-time debit card transaction pursuant to the depository institution's overdraft service, unless the depository institution:

(i) Provides the consumer with a notice in writing, or if the consumer agrees, electronically, segregated from all other information, describing the depository institution's overdraft service;
(ii) Provides a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the service for ATM and one-time debit card transactions;
(iii) Obtains the consumer's affirmative consent, or opt-in, to the institution's payment of ATM or one-time debit card transactions; and
(iv) Provides the consumer with confirmation of the consumer's consent in writing, or if the consumer agrees, electronically, which includes a statement informing the consumer of the right to revoke such consent.[7]

Regulation E also provides protections to ensure that consumers are not coerced into consent to an overdraft service. A depository institution must provide to consumers who do not affirmatively consent to the depository institution's overdraft service the same account terms, conditions, and features that it provides to consumers who do affirmatively consent.[8] Also, a depository institution must not: (i) condition the payment of any overdrafts for checks, automated clearinghouse ("ACH") transactions, and other types of transactions on the consumer affirmatively consenting to the institution's payment of ATM and one-time debit card transactions pursuant to the institution's overdraft service or (ii) decline to pay checks, ACH

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[4] *See, generally* 12 C.F.R. §§ 1005.15, 1005.18, 1005.19 and 1026.61.

[5] 12 C.F.R. § 1026.61.

[6] 12 C.F.R. § 1026.51.

[7] 12 C.F.R. § 1005.17(b)(1).

[8] 12 C.F.R. § 1005.17(b)(3).

transactions, and other types of transactions that overdraw the consumer's account because the consumer has not affirmatively consented to the institution's overdraft service for ATM and one-time debit card transactions.[9]

A depository institution generally would obtain the consumer's consent to receive overdraft services through the use of a Bureau model form disclosure.[10] This allows consumers to make an informed decision, and this process is manageable for depository institutions. However, Regulation E does not allow the same process for overdraft protection on prepaid accounts.

Notwithstanding evidence cited by the Bureau when it issued the Prepaid Rule, we have reason to believe that underbanked and unbanked consumers would benefit from overdraft protection. The Bureau cited to a Pew survey to conclude that "for both unbanked and banked consumers, the desire to avoid overdraft services associated with checking accounts appears to motivate many consumers to choose [general-purpose reloadable ("GPR")] cards over checking accounts" and "most GPR prepaid card users would rather have a purchase denied than overdraft their accounts and incur an overdraft fee."[11] However, these assertions by the Bureau do not accurately reflect the entire market. Based on our discussions with prepaid card issuers, we believe that there is a desire among some prepaid card users for overdraft protection, particularly when consumers use their prepaid card to pay routine bills (e.g., phone bills) from time to time. The Pew Survey only asked about overdraft preferences for in-person retail point-of-sale transactions.[12] In the case of paying routine bills, and possibly other cases, consumers may be willing to incur an overdraft fee if it means avoiding the inconveniences and potential penalties that come with missing a payment.

In addition, the Bureau, in part, chose not to apply the existing opt-in regime to prepaid accounts for reasons including (i) structural differences between checking accounts and prepaid accounts; and (ii) the fact that prepaid accounts are often marketed as products that are safe and easy to use, leading consumers to rely on prepaid products to control their spending.[13]

With respect to this first additional point, the Bureau focuses on the differences between overdrafts on checks, which generally are not pre-authorized transactions, and overdrafts on prepaid account transactions, which generally are pre-authorized, as a reason not to extend the Regulation E treatment of checking account overdrafts to prepaid cards. However, the Bureau's argument fails to account for the decision by the Board of Governors of the Federal Reserve System (the "Board") in 2009 to amend Regulation E by adding the overdraft opt-in provision

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[9] 12 C.F.R. § 1005.17(b)(2).

[10] 12 C.F.R. § 1005.17(d).

[11] 81 *Fed. Reg.* 83,934, 83,938 (Nov. 22, 2016) (citing to The Pew Charitable Trusts, *Banking on Prepaid: Survey of Motivations and Views of Prepaid Card Users* (June 2015) (the "Pew Survey")).

[12] Respondents to the survey were asked, "Pretend for a moment that you are at a store about to use your prepaid card to make a purchase and that you are unaware there is not enough money on your card to cover that purchase. Would you rather [have a transaction declined than pay an overdraft fee of $15 or $35]?" Pew Survey at 7.

[13] *See, generally*, 81 *Fed. Reg.* at 84,158-60.

that currently applies to debit cards. Debit card transactions are pre-authorized in the same way as prepaid card transactions. As long as overdrafts are exempt from Regulation Z and subject to the Regulation E opt-in provision for debit cards, there is no principled basis for subjecting overdrafts on prepaid cards to Regulation Z.

As to the Bureau's second additional concern, Mastercard recognizes that many consumers rely on prepaid cards to manage their finances and limit their debt. However, the rationale for the opt-in aspect of the overdraft feature is to protect consumers who do not want the feature while giving the option to those who do. In issuing the original opt-in section of Regulation E, the Board undertook a lengthy discussion of the reasons to use an opt-in approach. Much as the Bureau views prepaid cards now, the Board at that time recognized that "[d]ebit cards have been promoted as budgeting tools, and a means for consumers to pay for goods and services without incurring additional debt."[14] Based on a consumer study, the Board determined that many consumers did not want to incur an overdraft fee but that, for some consumers, coverage of occasional overdrafts and paying of overdraft fees may be preferable to having the transactions declined.[15] The Board determined that "[w]ith an opt-in approach, consumers who do not opt in will be less likely to incur unanticipated overdraft fees."[16] Moreover, the Board remarked that "[f]or those consumers who are unaware that they can overdraft at an ATM or at point-of-sale, however, an opt-in rule would have little impact on their expectations . . . ."[17]

In other words, the opt-in provision of Regulation E was adopted specifically to protect consumers who may not want, or who may be unaware of, overdraft features—the same group the Bureau aims to protect from overdrafts on prepaid accounts. However, some consumers who use prepaid cards would like an overdraft feature and would be willing to pay a fee, much as was the case with debit card users when the opt-in provision for deposit accounts was adopted.

Depository institutions that issue prepaid cards often are not willing to bear the burden of implementing a credit card compliance program merely to offer overdraft protection. As such, underbanked and unbanked consumers often are not given the choice of opting into an overdraft service, which can be a valuable tool for managing their finances. This is a direct consequence of the Bureau's decision to unnecessarily treat users of prepaid cards as needing additional protections when there is no sound reason to distinguish between consumers who use prepaid cards and those who use deposit accounts. As discussed above, these may in fact be the same consumers. Because access to prepaid cards and deposit accounts may be similar in design and functionality, depository institutions may be using similar approaches to the marketing and promotion of these products. Indeed, given the prominence that both types of products have in promoting financial inclusion, and the access that unbanked consumers have to both types of products, the Bureau should treat both types of products similarly as a policy matter. Accordingly, we urge the Bureau to provide identical regulatory treatment for overdrafts on

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[14] 74 *Fed. Reg.* 59,033, 59,038 (Nov. 17, 2009).

[15] *Id.* at 59,039.

[16] *Id.*

[17] *Id.*

prepaid card accounts and deposit accounts to maximize the financial inclusion benefit of prepaid cards.

B. Alternative Data

**5. Some creditors are supplementing or replacing traditional methods of underwriting (which often use income, debts, credit history, and stability factors) by employing "alternative data." Some types of alternative data clearly expand the sources of financial information, such as payment histories for rent, utilities, and other consumer obligations, and other types of alternative data appear to have little in common with traditional underwriting information. What role should the Bureau play in regulating the furnishing, reporting, and use of alternative data, and what should the Bureau consider in developing policy in this area? How should the Bureau consider alternative factors which creditors find helpful in predicting risk, but which may lack an obvious relationship with creditworthiness or have differential impacts on some consumers or groups of consumers?**

Creditors' use of new types of data, *i.e.* "alternative data," in their underwriting models benefits consumers by expanding access to credit to the 45 million Americans that have limited or no credit history.[18] These consumers disproportionately tend to be low-income, young, African American, and Hispanic.[19] As the Bureau's analysis of a specific underwriting model revealed, the use of alternative data can also lead to lower cost financial products for consumers.[20] The potential benefits of the use of "alternative data" in consumer finance has been broadly recognized, including by the Bureau and the prudential banking regulators.[21]

Creditors are best positioned to develop, implement, and evaluate the use of alternative data in the credit granting process. Managing credit risk is a core function of their businesses. They have the incentives to ensure that models are effective because they have the risk of loss for poor credit decisions. Creditors have established processes for ensuring credit models operate effectively pursuant to the Interagency Guidance on Model Risk Management, including for models developed by third-party vendors or service providers that are implemented by

[18] Bureau, *Who are the Credit Invisibles? How to Help People with Limited Credit Histories 2* (December 2016) (*available at* https://files.consumerfinance.gov/f/documents/201612_cfpb_credit_invisible_policy_report.pdf).

[19] *Id.* at 3-5.

[20] Bureau, *An Update on Credit Access and the Bureau's First No-Action Letter* (Aug. 6, 2019) (*available at* https://www.consumerfinance.gov/about-us/blog/update-credit-access-and-no-action-letter/).

[21] Federal Deposit Insurance Corporation ("FDIC"), Board, Bureau, Office of the Comptroller of the Currency, and National Credit Union Administration, *Interagency Statement on the Use of Alternative Data in Credit Underwriting* (Dec. 13, 2019) ("The agencies recognize that use of alternative data may improve the speed and accuracy of credit decisions and may help firms evaluate the creditworthiness of consumers who currently may not obtain credit in the mainstream credit system. Using alternative data may enable consumers to obtain additional products and/or more favorable pricing/terms based on enhanced assessments of repayment capacity.")

creditors.[22] Creditors also are subject to regulation under the Equal Credit Opportunity Act and Regulation B (collectively, the "ECOA") to ensure that their credit processes do not discriminate on a prohibited basis. In contrast, governmental agencies are in a poor position to assess the effectiveness and impact of the use of specific credit factors across the expansive consumer credit industry, in part because of the extremely wide variety of credit granting scenarios and the need to constantly adapt and refine credit models on a real-time basis in response to the particular situations faced by creditors and changing market conditions.

It is both unnecessary and premature for the Bureau to regulate the use of alternative data in credit models. The ECOA already provides adequate protections to consumers by prohibiting illegal discrimination, and at the same time recognizes the importance of providing creditors flexibility in their credit granting processes. Indeed, the ECOA expressly provides that, except as otherwise specifically provided, "a creditor may consider any information obtained, so long as the information is not used to discriminate against an applicant on a prohibited basis."[23] As with "traditional data," the general use of alternative data should be permitted so long as it does not unlawfully discriminate and is not specifically restricted by the ECOA.

The use of alternative data in credit underwriting is still relatively new to the consumer finance industry and is evolving. Creditors are considering and evaluating new types of data, the relationships between different points of data, and testing new models. It would also be premature for the Bureau to implement specific requirements. If the Bureau were to implement specific requirements concerning the use of alternative data, it would stifle innovation at an early phase of development in what is generally a promising innovation in consumer finance. Regulatory processes and technical requirements are not well suited to fostering innovation and to enhancing the effectiveness of evaluating consumers' creditworthiness. Stifling innovation will ultimately harm consumers with limited and no credit histories as they will not benefit from expanded access to credit or improved credit pricing.

The Bureau has asked how it should consider alternative factors that creditors find helpful in predicting risk, but which may lack an obvious relationship with creditworthiness or have differential impacts on certain consumers. We believe the Bureau should consider these issues pursuant to the already-established framework of the ECOA. Under this framework, the Bureau should consider:

1. Is the factor explicitly prohibited or restricted in the evaluation of applications by the ECOA, specifically 12 C.F.R. § 1002.6?

2. Does the factor lead to unlawful discrimination on a prohibited basis under the ECOA, either through disparate treatment or disparate impact?

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[22] *See e.g.*, FDIC, *Supervisory Guidance on Model Risk Management*, FIL-22-2017 (June 7, 2017).

[23] 12 C.F.R. § 1002.5.

As a long as the answer to both of these questions is "no," the Bureau should defer to creditors (who assume the credit risk) as to whether a factor is effective in determining consumers' creditworthiness even if the relationship is not obvious.

Further, Mastercard suggests that the Bureau provide clarification on the application of the ECOA to credit scoring models to remove existing uncertainties that may limit developments in the use of alternative factors. More specifically, as both a general legal matter and to foster the development of alternative-data credit models, we recommend that the Bureau should update Regulation B in light of the 2015 U.S. Supreme Court Case of *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[24] In the context of the Fair Housing Act, the U.S. Department of Housing and Urban Development ("HUD") has promulgated a proposed regulation based on *Inclusive Communities.*[25] We believe that the Bureau should adopt a similar interpretation as part of Regulation B or the Official Staff Commentary.

Under HUD's proposed test, the plaintiff or charging party must identify a specific, identifiable policy or practice that causes a disparate impact; it is insufficient to merely identify a program as a whole without explaining how a specific element of the program causes the disparate impact. Second, the plaintiff or charging party must allege the following five specific elements with respect to the policy or practice:

1. The challenged policy or practice is arbitrary, artificial and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration or requirement of law;

2. There is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class that shows the specific practice is the direct cause of the discriminatory effect;

3. The alleged disparity caused by the policy or practice has an adverse effect on members of a protected class in that class's capacity as a group;

4. The alleged disparity caused by the policy or practice is significant; and

5. There is a direct link between the disparate impact and the complaining party's alleged injury.[26]

HUD's proposal also includes three defenses specific to credit underwriting models, which are as follows:

[24] *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* 135 S. Ct. 2507 (2015) ("*Inclusive Communities*").

[25] 84 *Fed. Reg.* 42854 (Aug. 19, 2019) (the "HUD Proposed Rule").

[26] *See* the HUD Proposed Rule 24 C.F.R. § 100.500.

1. The model's "material factors" used as inputs do not rely in any material part on factors that are "substitutes or close proxies" for protected classes, and the model is predictive of credit risk or other similar valid objective;

2. The model is produced, maintained or distributed by a "recognized third party that determines industry standards," the inputs and methods within the model are not determined by the creditor, and the creditor is using the model as intended by the third party; or

3. The model has been subject to critical review and validated by an objective and unbiased neutral third party that has analyzed the challenged model and found that the model was empirically derived and is a demonstrably and statistically sound algorithm that accurately predicts risk or other valid objectives, and that none of the factors used in the algorithm rely in any material part on factors that are "substitutes or close proxies" for protected classes.[27]

Credit models, including those that use alternative data, might be challenged on the basis that the model has a disproportionate impact on a protected class and the creditor should have chosen model attributes that would have had a less discriminatory impact. There can be disagreement on the statistical analysis underlying these analyses, which may lead some creditors to be unable to reach desired levels of certainty related to compliance because of the inherent uncertainties in the analysis. The adoption of HUD's proposal with respect to the effects test, and the defenses specific to credit models in particular, will reduce these uncertainties and potential obstacles to greater use of alternative data in credit modeling, while still providing appropriate protections of the effects test to consumers and providing improved access to credit, especially to those with limited or no credit histories.

## II. *Consumer Data*

### A. Credit Reporting

**8. The FCRA requires consumer reporting agencies to "follow reasonable procedures to assure the maximum possible accuracy"; requires these agencies to disclose to a consumer the contents of the consumer's file; contains procedures for consumers to dispute the accuracy of information in these agencies' files; and requires notifications when information from these agencies' files has contributed to a user's adverse action. In addition, the FCRA's implementing Regulation V requires that data furnishers implement and maintain reasonable written policies and procedures concerning the accuracy of the data they furnish. Are these provisions designed to ensure accuracy sufficient? Why or why not? If not, what further protections should the Bureau or Congress consider? Are there obligations in these laws that impose a burden not justified by the commensurate consumer benefit?**

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[27] *See* the HUD Proposed Rule 24 C.F.R. § 100.500(c); the HUD Proposed Rule at 42859.

As recognized by Congress in the passage of the Fair Credit Reporting Act, the consumer credit market, which is presently approximately a $4 trillion market and a major component of the U.S. economy, is highly dependent on a robust and effective credit reporting system.[28] In order for the credit reporting system to work properly, there must be a vibrant ecosystem of consumer reporting agencies as well as furnishers that regularly and broadly report information to them. The Fair Credit Reporting Act, as implemented by Regulation V (collectively, the "FCRA"), imposes an extensive regulatory regime that already includes significant obligations on the part of consumer reporting agencies and furnishers to ensure that information is accurate. Consumer reporting agencies are required to have "reasonable procedures to assure *maximum* possible accuracy" of information in their consumer reports, a very high standard, and furnishers are required to "establish and implement reasonable written policies and procedures regarding the accuracy and integrity" of the information they furnish to consumer reporting agencies."[29] The FCRA also has other substantial consumer protections related to the accuracy of information, including consumer rights to receive copies of consumer reports on them and review their files at the consumer reporting agencies, consumer rights to dispute information in their credit report and files, and adverse action notice requirements.[30] We also note that the Bureau has significant authority to address particular issues that are raised with respect to the accuracy of information furnished to consumer reporting agencies or reported by consumer reporting agencies through its supervisory authority of larger participants in the consumer reporting market[31] and enforcement actions for violations of the FCRA.

Given the already extensive obligations that the FCRA imposes on consumer reporting agencies as well as furnishers with respect to the accuracy of information reported, we do not believe that additional requirements are needed and in fact believe that additional requirements could impede maintaining the vibrant ecosystem needed to support an effective consumer credit market. Additional requirements on furnishers, although intended simply to increase the accuracy of information in consumer reports, may discourage furnishers from reporting information because of additional operational and compliance resources, as well as potentially increased risk of liability for non-compliance. Additional requirements on consumer reporting agencies may discourage new market participants, including those dedicated to alternative data, which in turn may reduce competition and limit innovation in the market.

We are concerned that the absence of a regulatory standard for the statutory requirement of "reasonable procedures to assure maximum possible accuracy" may result in uncertainty that discourages new entrants into the consumer reporting market and hampers the development of underwriting and other models that rely on alternative data. As discussed above, the use of alternative data in credit underwriting models will increase and improve access to credit. Appendix E to Regulation V provides general principles-based guidelines for furnishers on what

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[28] 15 U.S.C. § 1681; Board, *Consumer Credit - G.19*, Board Data Homepage (May 13, 2020, 11:00 AM), https://www.federalreserve.gov/releases/g19/current/.

[29] 15 U.S.C. § 1681e(b) (emphasis added); 12 C.F.R. § 1022.42(a).

[30] 15 U.S.C. § 1681j; 15 U.S.C. § 1681i and 12 C.F.R. § 1022.44; and 15 U.S.C. § 1681m.

[31] 12 C.F.R. § 1090.104.

to consider and include in developing reasonable written policies on accuracy and integrity.[32] As suggested by the General Accounting Office, the Bureau should consider similar principles-based guidance for consumer reporting agencies as to what should be considered and included in "reasonable procedures to assure maximum possible accuracy."[33] Such guidance could codify existing expectations of the Bureau, current general industry practice, and otherwise provide general guidance on what constitutes reasonable procedures, recognizing that the appropriateness of practices will vary depending on the circumstances. Consumer reporting agencies will vary in their size, complexity, and history. It may not be appropriate to hold specialty consumer reporting agencies that report limited data to the same standards as nationwide consumer reporting agencies with the largest consumer reporting businesses. What is a reasonable procedure may also vary by the data element at issue. An address, which is used for purposes of ensuring the consumer reporting agency has identified the correct consumer, can be validated directly by the consumer reporting agency through various third-party independent sources. On the other hand, it may be more challenging for a consumer reporting agency to verify transactional information that concerns experience information between a third party and the consumer. If the Bureau were to adopt principles-based guidance for consumer reporting agencies as to what should be considered and included in "reasonable procedures to assure maximum possible accuracy," it would help limit uncertainty as to the application of the standard, thereby promoting new market entrants as well as the development and use of alternative-data credit models.

B. Data Breach Legislation

**9. Most States have enacted laws that afford consumers certain protections in the event of a data breach. There is considerable variation among these laws, including the triggering events for coverage by the law and the requirements and remedies relating to a breach. Would Federal legislation, regulation, or guidance addressing data breaches be desirable? Why or why not? Would it be desirable to have a uniform national standard for data breach obligations? Why or why not?**

Mastercard encourages the Bureau to support common sense federal legislation that establishes a uniform national standard for data breach notification. We believe that any such legislation should include the following key components, which will maximize the benefit of the legislation to consumers: (1) federal preemption of state data breach notification laws and exclusive federal enforcement of the legislation; (2) a "risk of harm" standard for breach notifications; (3) consumer notification by consumer-facing providers of goods and services; (4) notification of consumer-facing providers by their service providers; and (5) exemptions from breach notification requirements for Gramm-Leach-Bliley Act ("GLBA") financial institutions.

[32] 12 C.F.R. part 1022, appendix E.

[33] General Accounting Office, *Consumer Reporting Agencies: CFPB Should Define Its Regulatory Expectations* 39-42 (July 2019).

Federal preemption and federal enforcement would establish a uniform standard and uniform application of that standard across the country. As such, consumers could be assured that they would be entitled to notification of a breach of their personal information regardless of where the breach occurs in the United States. Moreover, consumers would understand that the law would be enforced in an even-handed manner by federal authorities against persons that fail to comply, thus avoiding the complications of over- or under-enforcement by state authorities.

A "risk of harm" standard would complement federal preemption by setting a minimum threshold for notifications. Mastercard believes that the trigger for a person to be required to provide a data breach notification should be "unauthorized access to personal information that is reasonably likely to cause substantial harm (identity theft or account fraud) to the consumer to whom the information relates." We believe that this "risk of harm" standard is similar to the standard in many state data breach laws. Also, this standard would address the risk of consumers receiving excessive notifications for low-risk episodes, which would dilute the effectiveness of notifications for high-risk episodes.

Companies that provide goods and services to consumers should be responsible for providing data breach notifications to their consumer customers. Companies that provide goods and services to such consumer-facing companies should provide data breach notifications to the companies that are their customers. This approach ensures that consumers receive notifications from the companies they know, thereby reducing the potential for consumer confusion. (In many instances, consumers will be unaware of the names of their service providers' service providers.) Also, this approach is practical. Many service providers to consumer-facing companies do not possess the information necessary to send notifications to consumers.

Finally, any data breach notification legislation should recognize that "financial institutions," as defined in the GLBA,[34] are already subject to data breach notification requirements, as implemented through regulation by the federal banking agencies.[35] Therefore, any such legislation should exempt GLBA financial institutions from data breach notification requirements.

Federal legislation of the type proposed above is long overdue. We encourage the Bureau to emphasize to Congress the importance of such legislation in protecting consumers from the harms associated with breaches of their personal information.

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[34] 15 U.S.C. § 6809(3).

[35] 12 C.F.R. part 30, supplement A to appendix B (national banks and federal savings associations); 12 C.F.R. part 208, supplement A to appendix D-2 (state member banks), 12 C.F.R. part 225, supplement A to appendix F (bank holding companies); and 12 C.F.R. part 364, supplement A to appendix B (state nonmember banks).

Mastercard appreciates the opportunity to provide comments to the Request. If there are any questions regarding our comments, please do not hesitate to contact the undersigned at Redacted Redacted or Redacted or our counsel at Sidley Austin LLP in this matter, Joel Feinberg, at Redacted or Jim Huizinga, at Redacted

Sincerely,

Tina Woo
Senior Managing Counsel
Regulatory Affairs

cc: Joel D. Feinberg
Jim A. Huizinga