

**SAFETY OF IMPORTED PHARMACEUTICALS:  
STRENGTHENING EFFORTS TO COMBAT THE SALES  
OF CONTROLLED SUBSTANCES OVER THE INTERNET**

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**Before the  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS  
COMMITTEE ON ENERGY AND COMMERCE  
UNITED STATES HOUSE OF REPRESENTATIVES**

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Good morning, Chairman Whitfield, Ranking Member Stupak and Members of the Subcommittee. My name is Michael McEneney and I am a partner in the Washington, DC office of the law firm Sidley Austin Brown & Wood. I am pleased to appear before you today on behalf of MasterCard International Incorporated to discuss the important issue of the sale of pharmaceuticals over the Internet.

MasterCard deplores the use of its system for any illegal purposes, including for the illegal purchase of pharmaceuticals. In addition to its standing prohibition against the use of its system for illegal activities, MasterCard has recently taken a number of steps to help prevent Internet pharmacies from accepting MasterCard cards for illegal pharmaceutical sales. MasterCard takes its obligations very seriously and is committed to doing its part to address this important issue. These steps, which are discussed in greater detail below, include: (i) working with MasterCard's customer financial institutions to shut off more than 500 web sites from accepting MasterCard-branded payment cards in connection with the illegal sale of

pharmaceuticals over the Internet; (ii) publishing a bulletin to all of its customer financial institutions worldwide reminding them of their obligations to ensure that the MasterCard system is not used for illegal pharmaceutical sales or other illegal transactions; and (iii) working with the Drug Enforcement Administration (“DEA”) and the Food and Drug Administration (“FDA”) in a collaborative fashion. The efforts MasterCard has taken to date represent important steps in fulfilling MasterCard’s commitment to play an appropriate role in addressing this issue.

## **Background**

MasterCard is a global organization comprised of more than 23,000 financial institutions that are licensed to use the MasterCard service marks in connection with a variety of payments systems. It is important to note that MasterCard itself does not issue payment cards nor does it contract with merchants to accept those cards. Instead, those functions are performed by its customer financial institutions. The financial institutions that issue payment cards bearing the MasterCard brands are referred to as “Card Issuers.” The financial institutions that enter into contracts with merchants, including Internet pharmacies, to accept MasterCard-branded cards are referred to as “Acquirers.” MasterCard provides the networks through which the customer financial institutions interact to complete payment transactions and sets the rules regarding those interactions.

A fundamental rule of the MasterCard system is that each customer financial institution must conduct its MasterCard programs and activities in accordance with all applicable laws. This includes, for example, ensuring that any transaction a customer submits into the MasterCard system pertains to only legal activity. MasterCard also has a series of rules that require Acquirers to ensure that the merchants they contract with to accept MasterCard-branded cards

are legitimate and engage in solely legal activities. These rules mandate, among other things, that Acquirers perform due diligence on a merchant before authorizing the merchant to accept MasterCard cards and that Acquirers monitor merchants for compliance with the rules. Customer financial institutions that fail to comply with the rules may be required to absorb the cost of any illegal transactions, and may be assessed fines, suspended or terminated, in MasterCard's sole discretion. MasterCard also works extensively with law enforcement officials to address situations where the legality of activities related to MasterCard payment card transactions is in question. For example, in the U.S., MasterCard works with a variety of federal and state law enforcement agencies on these issues generally, including state Attorneys General, the DEA, the FDA, the U.S. Secret Service, the Federal Bureau of Investigation, and other branches of the Department of Justice. A major objective of these efforts is to ensure that MasterCard provides appropriate support to law enforcement in their efforts to address illegal activity. MasterCard is sensitive to the fact that its efforts to enforce the MasterCard rules have the potential to hinder ongoing law enforcement investigations and the like. For example, when a merchant is shut off from accepting MasterCard-branded cards because the merchant violated MasterCard's rules, law enforcement's ability to gather evidence through MasterCard's system can be impeded and shutting off a merchant might be a tip-off to that merchant of an ongoing investigation.

### **Efforts to Address Illegal Pharmaceutical Sales**

MasterCard first became involved in efforts to address the important issue of illegal pharmaceutical sales over the Internet after an inquiry from the House Energy and Commerce Committee on December 9, 2003. Less than a week later, on December 15, 2003, MasterCard met with majority staff of the House Energy and Commerce Committee who explained the

efforts that were underway in Congress to find solutions to this issue, including solutions that may involve payments systems. Shortly thereafter, MasterCard met with staff of the Senate Permanent Subcommittee on Investigations and Democratic staff of the House Energy and Commerce Committee to discuss how MasterCard handles these issues, and what role MasterCard could play in the future. The meetings MasterCard has had with congressional staff, including the staff of this Subcommittee, were particularly helpful in highlighting the magnitude of the problem and in clarifying some of the legal issues surrounding the Internet sale of pharmaceuticals, particularly the issues as they relate to controlled substances. MasterCard has also met with staff of the DEA and FDA to exchange information and to explore ways in which MasterCard could be helpful to them in their efforts against illicit Internet pharmacies. Prior to this series of meetings, MasterCard did not have sufficient knowledge of the legal issues involved in the Internet pharmacy debate to take action.

Based on the information it received during these meetings, MasterCard embarked on a three-pronged proactive approach to address this issue. First, MasterCard established a working relationship with appropriate officials at the DEA and FDA. As a result, MasterCard has had a number of meetings and conversations to identify ways in which MasterCard could be helpful to the agencies in connection with their enforcement efforts, and it successfully established lines of communication that remain open in order to exchange information and do its part to assist in apprehending those violating the law. MasterCard has also provided information to the DEA on several occasions to help it with ongoing investigations.

Second, MasterCard sent a bulletin entitled “MasterCard Rules Prohibit MasterCard Transactions for Illegal Activities” to all of its customer financial institutions worldwide. This bulletin reminded MasterCard’s customer financial institutions of their obligation to ensure that

the MasterCard system is not used for illegal activity. The bulletin specifically highlighted Internet pharmacy transactions as involving a heightened risk of potential illegal activity. The bulletin also reminded customer financial institutions of their obligation to perform due diligence of merchants, including Internet pharmacies, before allowing them to accept MasterCard cards, to properly identify MasterCard transactions that are submitted into the system, and to ensure that merchants accepting the MasterCard cards comply with applicable law. The bulletin went on to note that if there was a lack of clarity regarding the legality of particular transactions, the customer financial institution should not submit those transactions.

Third, MasterCard directed its merchant security team to search the Internet for Internet pharmacies that purport to accept MasterCard-branded cards for illegal sales of controlled substances. These initial efforts identified approximately 400 web sites that appeared to be engaged in the illegal sale of pharmaceuticals—both controlled substances and other prescription drugs. For each of these sites, MasterCard attempted to identify the Acquirer that contracted with the Internet pharmacy to accept MasterCard-branded cards. In some cases, MasterCard could readily identify the Acquirer through “dummy” transactions. However, because MasterCard and its employees are prohibited by law from knowingly making illegal buys, MasterCard security personnel could not legally complete any transactions, making it difficult to identify the Acquirer in some circumstances. MasterCard then directed each of the identified Acquirers to immediately stop the Internet pharmacy from accepting MasterCard cards as payment for the illegal sale of pharmaceuticals. MasterCard also directed the Acquirer to respond in writing either to confirm that it had stopped the merchant’s acceptance of MasterCard-branded cards or to confirm that the merchant was not engaged in illegal activities and to provide all documentation regarding the steps the Acquirer had taken to confirm the

legality of those activities. MasterCard also reminded the Acquirer that any failure to comply with MasterCard's instructions might subject the Acquirer to fines, penalties, suspension, or termination by MasterCard. MasterCard is pleased to report that, to date, these efforts have been largely successful in shutting off the acceptance of MasterCard cards at more than 500 web sites. It is important to note, however, that MasterCard has seen already some web sites that have been terminated through one Acquirer popping up elsewhere in its system. Unfortunately, this reflects one of the limitations of private enforcement efforts by industry. Although MasterCard can be successful in shutting off web sites engaged in illegal activity, it does not have the ability to uproot the bad actors the way state and federal law enforcement could.

Although MasterCard has had success to date in addressing this situation, the task has been made more difficult by a lack of clarity on what sales of prescription drugs by Internet pharmacies are actually illegal. In this regard, it appears that there are unlikely scenarios that the sale could be legal if it met a variety of standards, which generally can only be confirmed through actually completing a purchase from the web site which, as mentioned above, MasterCard cannot legally do at this time. It is MasterCard's understanding from staff of the DEA and FDA that these standards are almost never achieved. However, the lack of a clear prohibition has made it more difficult to educate MasterCard's Acquirers about the illegality of the sale of pharmaceuticals over the Internet to U.S. cardholders. In addition, this lack of clarity increased the risk of litigation. In fact, MasterCard is being sued in Israel by a merchant who was blocked from accepting MasterCard-branded cards in connection with the sale of pharmaceuticals.

Chairman Whitfield and Ranking Member Stupak, thank you again for the opportunity to discuss these important issues with you today. MasterCard intends to do its part to prevent the

illegal sale of pharmaceuticals over the Internet, and it looks forward to continuing its work with each of you. It has also been our pleasure to work with Subcommittee staff and the DEA, FDA, and others, and we look forward to continuing these efforts. I would be glad to answer any questions you may have.