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Baxter Healthcare Corporation would like to thank the U.S. Food and Drug Administration for providing an open forum for comment on the anti-counterfeiting legislation and implementing regulations. The following regulatory comment is intended to complement the substantial work already conducted by the Counterfeit Drug Task Force. Accordingly, Baxter puts forth the following comments for inclusion in the administrative record:

(1) **To the extent that the Prescription Drug Marketing Act (PDMA) is determined to require amendment, Baxter supports abrogation of state authority governing wholesale drug distributor licensure in favor of a federal standard. Additionally, Baxter would support FDA consideration of distribution models currently employed in today's wholesale drug distribution scheme.**

a. **Current State Efforts**:

Over the past year industry has begun to see increased activity at the state level with regard to wholesale drug distributor reform legislation. Some standard themes have been noted among the several states that have enacted wholesale drug distributor legislation (i.e. pedigree requirements, increased licensure requirements for wholesalers, bond requirements, financial/criminal background checks, as well as the requirement for appointment of a designated representative, accreditation requirements).

However, the differences in the various legislative activities within the states that have enacted laws are also apparent (i.e. paper vs. electronic pedigree requirements, different wholesaler licensing/permitting requirements, different pedigree requirements and elements, different authentication requirements, differing views regarding which parties to the distribution chain are responsible for pedigree). Additionally, since many states have adopted the National Association of Boards of Pharmacy (NABP) model rules for wholesaler licensure and Verified Accredited Wholesale Distributor (VAWD) absent public disclosure of FDA's endorsement, the long-term implications of such differences are unknown. Furthering the lack of uniformity in the law are those states that have selected only specific elements from the model rules to implement in their laws.

b. Today's Wholesale Drug Distribution:

Baxter recommends that FDA, or an independent panel acting on the Agency's behalf, perform (1) a comprehensive review of enacted as well as pending state legislation and (2) a survey of current wholesale distribution models existing in today's wholesale drug distribution market. The results of these actions would serve

to substantiate any proposed changes to existing federal laws. Baxter believes that such an approach is necessary as current state efforts have and will continue to lead to inconsistent/divergent results and likely cause unnecessary constraints on the wholesale drug distribution industry.

(2) **Baxter supports implementation of a limited and/or phased-in, risk-based approach to track and trace technology (Electronic Pedigree and RFID).**

a. **Paper/Electronic Pedigree Implementation**:

i. Scope of the Pedigree Requirement:

Baxter believes that the effect of the pedigree requirements will be of greater significance and impact if it is focused on those areas most in danger of encountering counterfeit products. Accordingly, Baxter is providing the following limiting approaches to the pedigree requirement: (1) Prescription Drug Susceptibility Listing; (2) Transactions within the "Normal Chain of Distribution".

Prescription Drug Susceptibility Listing:

Baxter recommends that FDA utilize a list of most counterfeited drugs and base the applicability of the prescription drug pedigree requirement on the prescription drugs contained in this list. Several states have considered, or are currently considering, such a model to clearly define the scope of their respective pedigree requirements. Baxter submits that such a list would be relatively easy to create based on the list formerly used by NABP as well as other state sources. Additionally, this list would be similarly easy to update by way of monitoring the current prescription drug market through post-market, suspected counterfeit drug reporting mechanisms currently in place at the Agency.

Counterfeit drug operations thrive by selling drugs with high after-market popularity and national visibility. There are many drugs, including generic pharmaceuticals and intravenous solutions that are not a primary focus of counterfeit drug operations due to their low profit margins, lack of after-market popularity and the inability of users to abuse such products.

Applying the pedigree requirement to a specific list of drugs, a list that can be updated and revised as needed, renders the pedigree process more manageable for regulators and industry alike. FDA would be requiring pedigree information on those prescription drugs in which there is the most counterfeit interest while industry would not bear the burden of implementing pedigrees in all of their product families across all product lines. Baxter respectfully submits that this approach could be used as the defining threshold for when pedigrees will be required in all cases or, in the alternative, as a valuable first step in a systematic, phase-in process.

"Normal Chain of Distribution" Transactions:

In what was presumably an effort to diminish the burden on legitimate wholesaler operations, several states have enacted laws that require the creation or passing of a pedigree when a wholesale transaction falls outside of a statutorily defined "normal chain of distribution." While not entirely dissimilar to the concept of an authorized distributor of record, this is an overly simplistic view that does not take into consideration various common distribution scenarios currently employed by wholesale drug distributors and tries to capture only those few models thought to normally occur as a part of legitimate wholesale distribution activities.

To the extent the FDA finds value in using a similar modality to define the scope of the pedigree requirements, Baxter supports a federal definition of "normal chain of distribution" provided that such definition includes a consideration of the distribution models currently employed in today's wholesale distribution scheme. Under this rationale, transactions falling within the realm of a pre-defined "normal chain of distribution" would be exempt from having to generate and pass pedigree information. Those transactions not specifically captured in the federal definition of a normal distribution chain would then have the burden of passing pedigree.

In support of this position, Baxter provides the following transactions that it believes fall within the "normal chain of [wholesale drug] distribution" and thus should not require a prescription drug pedigree:

(i) Shipments from a prescription drug manufacturer to the end user by way of a third party logistics provider (3PL).
(ii) Shipments from a prescription drug manufacturer to a primary wholesaler by way of a 3PL provider.
(iii) Shipments from a prescription drug manufacturer to a primary wholesaler by way of a 3PL provider and subsequent shipment to a secondary wholesaler and then from the secondary wholesaler to the end user.
(iv) Shipments from the contract manufacturer of a prescription drug to the end user via 3PL.
(v) Shipments from a prescription drug manufacturer to the end user by way of a 3PL with a separate entity acting as a broker to the transaction.
(vi) Shipments from a prescription drug manufacturer to a wholesaler and subsequent shipment from the wholesaler to a hospital pharmacy, clinic, or other location authorized to receive such shipments.

In order to eliminate confusion over industry terms and descriptions of various entities within the supply chain, Baxter encourages FDA to consider defining the various participants in today's various distribution scenarios as well. For example, Baxter recommends that FDA define the third party logistics provider (3PL) at the federal level. A proposed definition would consider a 3PL to be the following:

> *Any party that, by business arrangement or contract with the prescription drug manufacturer, does not participate in prescription drug order procurement, order receipt from a customer, customer servicing related to the order of that prescription drug or invoicing for the wholesale transaction or sale, but whose role in wholesale drug distribution is limited in scope to order fulfillment (i.e. picking, packing, shipping and delivery) of a prescription drug. Transactions involving 3PL providers do not result in a transfer of title to the 3PL of the prescription drug product being distributed.*

Baxter also supports the re-incorporation of the Authorized Distributor of Record concept and its foreseeable future use in defining "normal chain of distribution" transactions. Further, Baxter encourages FDA to benchmark with industry to define and capture all of today's current, legitimate distribution models and incorporate the models, or the mechanisms thereof, into a federal definition of "normal chain of distribution."

ii. <u>Universal Pedigree Fields:</u>

While the relevant provision of the Code of Federal Regulations, 21 CFR 203.50, remains under an enforcement stay, many of the states enacting wholesale drug

distributor reform legislation have implemented unique pedigree requirements. While several of these states merely incorporate the model requirements set out by the National Association of Boards of Pharmacy (NABP), there remains inconsistency surrounding the format and content of pedigrees from state to state.

The impact of differences in what is required of a pedigree in a given state versus what is required by another is best illustrated by example. State A may require a pedigree to contain information segments 1, 2 and 3. State B may only require 2 and 3. However, State C may require 1, 2 and 4 (with 4 being information only obtainable from a data source further upstream in the distribution chain). Obstacles such as the example provided are bound to arise where there exists no recognized standard for the overall content and format of a prescription drug pedigree.

Baxter encourages FDA to continue the stay on 21 CFR 203.50 until such time as FDA can implement standard criteria, as opposed to minimum criteria, for the content and format of a prescription drug pedigree.

iii. Data Management and Security:

Baxter supports FDA's efforts to address the pedigree data management and security concerns raised by implementation of pedigree and RFID. Specifically, Baxter encourages FDA to define whether data shall be managed/stored centrally, through multiple databases or via a peer-to-peer network. Baxter also encourages FDA to provide guidance as to security measures to be employed by industry for use of such systems.

iv. Systems Interoperability:

Another issue that is equally important in considering the adoption of electronic pedigree or RFID systems is the issue of systems interoperability. Baxter supports FDA mandating standards which define the requirement functions of the technology which must remain interoperable to avoid crippling the supply chain following implementation.

b. **RFID Implementation**:

Baxter applauds the FDA for its continuing dialog with firms, especially as the regulated healthcare industry approaches the edge of a new technological frontier that changes the way industry tracks its products. While Baxter views the future use of such technology favorably, we believe a mutual approach to adoption of such a powerful technology as RFID is required to ensure successful implementation. Additionally, as a regulated industry, it is imperative that FDA take the initiative in progressing towards the final endpoint of adoption. This will ensure that all of industry reaches the same endpoint and will eliminate the potential of divergent outcomes relating to utilization of RFID.

i. Adoption Issues:

Baxter believes that FDA must take a more active role during adoption/implementation because the following policy and technical issues require resolution on a federal level:

Financial Burden to the Generic Drug or Intravenous Solution Manufacturer:

RFID, although it automates product identification, is largely cost prohibitive in nature for products with little to no after-market popularity among counterfeit drug producers. Specifically, Baxter produces a wide range of prescription drugs that include, intravenous drugs as well as specialty products, such as kits, that are a combination of a prescription drug and a delivery device. The pharmaceutical portfolio includes premixed antibiotic drugs, critical care generic drugs, anesthetic agents and parenteral nutrition products. Baxter also produces prescription drugs used for peritoneal dialysis and hemodialysis.

As these drugs have never been the subjects of known counterfeit drug operations, implementation of a relatively expensive technology to prevent their unauthorized duplication will only raise the cost of Baxter's prescription drugs to end consumers. Baxter respectfully requests that FDA take this information into consideration as it progresses toward its goal of finding a global counterfeiting solution that balances product concerns with cost concerns that will ultimately be passed to the end consumers.

Technological Barriers Rendering Adoption Premature:

As addressed earlier, the technology for electronic pedigree and RFID has yet to be standardized with regard to interoperability. With the operability and technological standards development still ongoing, there has been meaningful effort toward full implementation of RFID. What FDA may view as slow progress could have simply been industry grappling with how to implement an entirely new technology solution.

To date, several firms within the healthcare industry performed, or are performing, pilot studies on the use of RFID. However, these studies only support RFID feasibility and not necessarily full-scale implementation as the pilots are limited in scope, had read rates of less than 100% (which necessitates the need to employ a back-up system), and which had differing approaches to RFID tag data content. Baxter is also not aware of pilots which addressed the use/compatibility of RFID on products other than capsule or pill dosage forms (such as with solutions, biologics, or lyophilized products). Additionally, and from a privacy perspective, Baxter is unaware of any studies that have been performed to demonstrate proper RFID tag decommissioning.

Need for Evaluation of Privacy Concerns Placed on the Consumer:

Baxter supports FDA's interest in addressing the privacy concerns raised by implementation of RFID and encourages FDA to provide a formal position on this issue. Baxter supports education and awareness activities for end users, specifically those activities that serve to disseminate information regarding the use of RFID on products.

ii. <u>Proposed Solutions to Adoption Issues</u>:

Provide industry with the choice of technology solution

Baxter believes that RFID technology should remain a voluntary standard for the foreseeable future. While RFID technology may be viewed as having sufficiently progressed such that widespread adoption and implementation is possible (ignoring the cost issues for the moment), requirements/standards would only serve to restrict technology enhancement/development. In addition, a voluntary standard would also acknowledge the fact that RFID content and tag

frequency standards are still under development, thus rendering mandatory and timely adoption of RFID premature.

Finally, there are hosts of technology suites available or soon to be available in the commercial marketplace to help industry ensure that counterfeiting or diversion of their products does not occur. Considering the cost burden to be placed upon manufacturers of products with a lower profit margin and low to non-existent after-market popularity among counterfeit drug operations, allowing industry to implement a track and trace solution commensurate to an individual firm's size and product portfolio would be prudent. FDA could ensure uniform adoption of such programs by defining the minimum criteria required for pedigree and product authentication in more general terms.

If RFID becomes mandatory, apply a limited, phased-in approach

FDA has stated, and Baxter agrees, that the United States has one of the safest drug supply chains in the world. More specifically, not all products are being counterfeited and those that are being counterfeited are those with a moderate to high after-market popularity. Given these statements by FDA and, to the extent that adoption of RFID becomes mandatory, Baxter strongly believes that a limited, phased-in approach to implementation should be the starting point. Specifically, Baxter submits the following proposed tiered implementation (in order of priority of implementation):

- On controlled substances (Schedules I-III) at the case and pallet level.
- On controlled substances, at the item level.
- On high-risk drugs, at the case and pallet level.
- On high-risk drugs, at the item level.
- On all products, at the case and pallet level – for inexpensive, low-risk drugs and only at a time when the technology can be implemented without substantial escalation of cost to the end user.

As alluded to earlier, Baxter supports the adoption of risk-based criteria for placing drugs on a suspect drug listing (in order to classify them as having a high/low counterfeit risk) and also supports FDA's use of an after-market surveillance program to monitor and revise the suspect drug listing as warranted.

In summary, Baxter Healthcare Corporation urges the FDA to closely evaluate its comments submitted in support of the current anti-counterfeiting initiative. Additionally, Baxter believes that by addressing the concerns and solutions noted in this memorandum, the wholesale drug distribution industry as well as the end consumer will ultimately benefit.

Respectfully submitted,

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