ADDENDUM to FDA's *Guidance for Industry: PDMA Pedigree Requirements – Questions and Answers* Related to the Preliminary Injunction ordered 12/5/06 in *RXUSA Wholesalers, Inc. v. HHS*
12.15.06

A. What is affected by the preliminary injunction?

- 21 CFR § 203.50(a). The court order enjoins FDA from implementing 21 CFR § 203.50(a). 21 CFR § 203.50(a)(6), states that information regarding "each prior transaction involving the drug, starting with the manufacture" be included in the pedigree. However, while the preliminary injunction is in effect, pedigrees shall include information regarding prior transactions going back to the manufacturer *or* the last ADR that sold, purchased, or traded the prescription drugs. FDA encourages wholesalers to include information regarding each prior transaction going back to the manufacturer when that information is available.

- 21 CFR § 203.50(a)(1)-(5). The court order also enjoins FDA from implementing the language in 21 CFR § 203.50 that requires pedigrees to include lot and control numbers, dosage, container size, and number of containers. As described in more detail below, however, the preliminary injunction does not affect the statutory requirement that pedigrees contain the dates of all listed transactions and the names and addresses of all parties involved in those transactions. In addition, since the court did not enjoin implementation of 21 CFR § 203.3(u), a written agreement between a manufacturer and a wholesaler may limit ADR status to a particular lot number(s), dosage, or the number or size of the containers of prescription drugs. We also note that, without the lot number on the pedigree, it would be extremely difficult to track the inventory that matches the pedigree if the inventory is further sold, purchased or traded. Therefore, FDA recommends that the lot or control number, dosage, and the number and size of the prescription drug containers be included on the pedigree even though it is not required while the preliminary injunction is in effect.

- Pedigrees for all current and future inventory are affected by the preliminary injunction as long is it remains in effect.

B. What is not affected by the preliminary injunction?

Pedigrees still must be passed by non-authorized distributors of record (non-ADR) prior to each wholesale distribution. In addition, the court does not mention other pedigree-related regulations or other agency-issued documents relating to the pedigree requirement. Accordingly, those regulations and documents, some of which are described below, are not affected by the preliminary injunction.

- 21 CFR § 203.3(u). This regulation, which went into effect on December 1, 2006, defines "ongoing relationship" for the purposes of determining who qualifies as an authorized distributor of record (ADR.) As of December 1, 2006, only those

wholesale distributors who have an ongoing relationship (including a written agreement) with the manufacturer, as that term is defined by this regulation, are exempt from the pedigree requirement.

- Compliance Policy Guide (CPG) 160.900, which issued in November 2006, remains in effect until December 1, 2007. The CPG describes how FDA intends to prioritize its enforcement efforts regarding the pedigree requirements in the first year after the effective date of 21 CFR §§ 203.3(u) and 203.50. However, FDA will not enforce 203.50(a) as long as the preliminary injunction remains in effect.

- All other definitions in 21 CFR Part 203 that relate to the pedigree requirement, including but not limited to, the definitions of manufacturer and wholesale distribution, have been in effect since December 2000 and remain in effect despite the injunction.

- The names and addresses of all parties to the transaction and the date of the transactions are required by the statute and must be included in the pedigree.

- 21 CFR § 203.50(b). This regulation, which went into effect on December 1, 2006, requires all wholesale distributors (both ADRs and non-ADRs) involved in the distribution of a prescription drug to retain a copy of the pedigree for three years. Accordingly, all wholesale distributors that provide or receive pedigrees after December 1, 2006, must retain copies of the pedigrees for three years.

- 21 CFR § 203.50(c). This regulation, which also went into effect on December 1, 2006, provides that a manufacturer that subjects a drug to additional manufacturing processes is not required to provide a pedigree identifying previous sales of the drug or its components.

- 21 CFR § 203.50(d). This regulation also went into effect on December 1, 2006, and requires manufacturers to maintain a current written list of all ADRs, to specify whether each ADR is authorized to distribute all of the manufacturer's drug products or only particular products, to update its list of ADRs on a continuing basis, and to make its list of ADRs available for public inspection or copying. Accordingly, as of December 1, 2006, all manufacturers should have available for public inspection a current list of ADRs that indicates which drug products the ADR is authorized to distribute.

- 21 CFR § 203.60. This regulation sets forth certain requirements with respect to the use of electronic records and signatures, record retention, and the availability of records for review and reproduction by FDA and other federal, state, and local regulatory and law enforcement officials. This regulation has been in effect since December 2000 and remains in effect despite the injunction.

C. Since the court's order only applies to 21 CFR § 203.50(a), does this mean that the statutory requirement that non-ADRs provide pedigrees that include "each prior sale, purchase, or trade" of the drugs is still in effect?

- Yes. The court order does not enjoin FDA from enforcing the statute. The court order affects only the regulations at 21 CFR § 203.50(a). It has been FDA's long-standing position, consistent with the language of the PDMA and its legislative history, that, 21 CFR § 203.50 notwithstanding, the statute itself requires non-ADRs to provide pedigrees that documents each prior transaction going back to the manufacturer. FDA recognizes, however, that confusion regarding the pedigree requirement could cause disruptions or delays in the nation's drug distribution system. Accordingly, as long as the court order remains in effect, FDA intends to exercise enforcement discretion, as described below. To this end, FDA does not intend to enforce the statute insofar as it requires pedigrees to contain information regarding each transaction going back to the manufacturer. Rather, FDA intends to permit non-ADRs to provide pedigrees that include information regarding transactions going back to the manufacturer *or* the last ADR that handled the prescription drugs. FDA, however, encourages all wholesalers to provide complete pedigrees documenting each prior transaction involving the prescription drug when that information is available.

D. How will FDA apply the court's order outside of the Eastern District of New York (EDNY) and to wholesale distributors that are not plaintiffs in the lawsuit?

- FDA believes that limiting application of the preliminary injunction to either the named plaintiffs or the EDNY could lead to confusion and possible disruptions or delays in the nation's drug distribution system and could provide undue advantage to certain wholesale distributors. Accordingly, to the extent that it could be argued that the injunction should be limited in scope, FDA intends to exercise enforcement discretion in a manner that is consistent with the court's opinion. To this end, as long as the court's order is in effect, FDA does not intend to initiate any enforcement actions against any wholesalers solely for (1) failing to include lot numbers, dosage, container size, or number of containers on a pedigree; or (2) failing to provide a pedigree that goes back to the manufacturer so long as the pedigree otherwise identifies the last authorized distributor of record that handled the drugs.

E. How does the court's order impact what FDA said in the Guidance to Industry: PDMA Pedigree Requirements – Questions and Answers (http://www.fda.gov/cder/regulatory/PDMA/PDMA_qa.pdf)?

- To the extent that Questions 2, 9, 10, 11, 14, 24, 29, and 33 refer to 21 CFR § 203.50(a), as long as the preliminary injunction is in effect, such references are limited to the scope of the court's order. For example, if the question states that a pedigree include information about each prior transaction going back to the

manufacturer, then the answer would be limited to including information going back to the manufacturer *or* the last ADR that handled the drugs.