



American Red Cross

National Headquarters

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February 4, 2000

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Re: Prescription Drug Marketing Act of 1987; Prescription Drug Amendments of 1992; Policies, Requirements, and Administrative Procedures - Final Rule (Docket Nos. 92N-0297 and 88N-0258, 64 Fed. Reg. 67720 (Dec. 3, 1999))

Dear Drs. Woodcock and Zoon:

The American Red Cross has reviewed the final rule on the procedures and requirements implementing the Prescription Drug Marketing Act (PDMA), as modified by the Prescription Drug Amendments of 1992 and the FDA Modernization Act of 1997. As the nation's single largest producer of blood-related products and a leading provider of blood-related services, the American Red Cross has a direct interest in the implementation of PDMA and its amendments.

After a careful review of the final rule's requirements, the American Red Cross wishes to share its concerns in the spirit of providing constructive feedback toward meeting the Agency's goal of ensuring the safest and most effective blood products, plasma derivatives, and related products and services.

The American Red Cross is concerned that the final rule does not exclude plasma derivatives from the procedures and requirements of PDMA. We believe this runs counter to the intent of Congress when it passed PDMA and FDA's own actions to exclude blood and blood components from PDMA's conditions. More importantly, failing to exclude plasma derivatives may hinder current and future efforts to improve distribution of such

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life-saving products as Immune Globulin Intravenous (IGIV) and alpha-1 anti-trypsin at a time when the availability of these products has been tenuous at best.

We believe there is a very efficient way to address this concern. Specifically, we ask that the regulation be modified to exclude blood banks. In addition to the collection, processing, and distribution of blood products and components, blood banks are often responsible for the recovery of plasma from blood donors and/or the distribution of plasma derivatives. Excluding them from the definition of "health care entity" would keep in place the protections found within PDMA to ameliorate problems that the Act was intended to fix, i.e., to protect the public against the threat of subpotent, adulterated, counterfeit, and misbranded drugs posed by the existence of drug diversion schemes and drug diversion sub-markets. At the same time, excluding blood banks from the Final Rule's definition of "health care entity" would allow for the continued distribution of blood products and plasma derivatives in its current manner so as to ensure the most efficient distribution of these life-saving products. Alternatively, we suggest that FDA expand the exclusion for blood or blood components to include plasma derivatives.

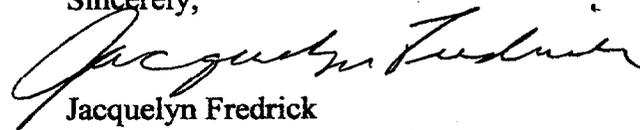
Our assessment outlines the following areas:

- the role of the American Red Cross in the collection and distribution of blood components and plasma derivatives,
- the current exclusion of blood and blood components from the provisions of PDMA
- Congressional intent and statutory language arguing for the exclusion of blood banks from the definition of "health care entity", and
- supply concerns and reasons for excluding plasma derivatives and related products from the provisions of PDMA.

The American Red Cross would like to meet with FDA to discuss the issues presented in this letter, and possible avenues to change the final rule to the mutual benefit of FDA, the blood banking community, and the patients we serve.

We appreciate this opportunity to express our views. If you have any questions, please feel free to contact me at 703-807-5351 or Anita Ducca, Director, Regulatory Affairs at 703-312-5601.

Sincerely,



Jacquelyn Fredrick
Interim Senior Vice President
Biomedical Services

Janet Woodcock, M.D. Director, CDER
Kathryn C. Zoon, Director, CBER
February 4, 2000

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Attachment

cc: FDA Office of General Counsel
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Ann Wion
Robert Yetter
Steven F. Falter
Dockets Management Branch (HFA-305)
(Docket nos. 92N-0297 and 88N-0258)



**American Red Cross Perspective
on the Policies, Requirements, and Administrative Procedures
of the Prescription Drug Marketing Act - Final Rule
(64 FR 67720; December 3, 1999)
Docket Nos. 92N-0297 and 88N-0258**

I. THE AMERICAN RED CROSS

The American Red Cross (ARC/Red Cross) is an independent non-profit corporation. ARC is the largest supplier of blood products and one of the largest providers of blood services in the United States. Each year, the Red Cross collects, processes, and distributes approximately six million units of whole blood, representing half the nation's blood supply. Blood collection for transfusion is conducted throughout the nation by 36 regional Red Cross blood centers, utilizing several hundred registered auxiliary collection sites. The American Red Cross then processes these units of whole blood into specific components such as red blood cells, platelets, and other products that are distributed to thousands of hospitals and other health care providers.

The blood donated by Red Cross volunteers is also recovered and processed or fractionated into plasma derivatives. After collection and recovery, these plasma units are transported to several vendors with whom we have established contracts to manufacture antihemophilic factor, intravenous immune globulin, albumin and solvent-detergent treated products under the Food and Drug Administration (FDA/Agency) licenses of those companies. These plasma products are distributed under the American Red Cross label to hospitals, hemophilia treatment centers, and other providers. In all, Red Cross collects approximately 1.2 million liters of recovered plasma, accounting for about 10 percent of the nation's supply of plasma derivatives.

The American Red Cross also provides certain blood-related services to many hospitals throughout the United States.

II. EXCLUSION OF BLOOD AND BLOOD COMPONENTS

The final rule states that FDA has made a final determination "that blood and blood components intended for transfusion should be excluded from all of the restrictions in and the requirements of PDMA." These products include whole blood, red blood cells, plasma, fresh frozen plasma, cryoprecipitated AHF, and platelets. The Red Cross concurs with

FDA's determination and the rationale to exclude these products, as set forth in the September 1990 proposed rule on the Applicability to Blood and Blood Components Intended for Transfusion; Guidelines for State Licensing of Wholesale Prescription Drug Distributors (55 FR 38027). FDA also outlined its reasoning for this exclusion in the March 1994 proposed rule on Prescription Drugs, Policies, Requirements, and Administrative Procedures (59 FR 11842) - hereafter referred to as the "proposed rule". In that rule, FDA noted that blood and blood components should be excluded from the requirements of PDMA because

"if PDMA were considered applicable to the distribution of blood and blood components, the result would be to impede the existing blood distribution system, thereby interfering with our nation's blood supply. Because application of PDMA to blood and blood components would produce this untenable result, FDA believes that Congress could not have intended to subject blood and blood components to PDMA's provisions."

We believe this reasoning is valid and appropriate. However, we point out that such reasoning also applies to plasma derivatives distributed by blood banks as evidenced by recent events surrounding shortages of some plasma derivatives, including some immune globulins and alpha-1 antitrypsin.

III. BLOOD BANKS AND THE DEFINITION OF HEALTH CARE ENTITY

PDMA generally prohibits the sale, purchase, or trade of a prescription drug that was purchased by a hospital or other health care entity, or donated or supplied to a charitable organization. It is our understanding that Congress enacted this law to preclude hospitals and other health care entities from obtaining pharmaceuticals at discounted prices and then reselling these drugs at a profit. According to the legislative history, this practice was considered to be unfair to wholesale and retail prescription drug distributors who had to pay average wholesale prices.

The final rule defines a health care entity as "any person that provided diagnostic, medical, surgical, or dental treatment, or chronic or rehabilitative care, but does not include any retail pharmacy or any wholesale distributor. A person cannot simultaneously be a health care entity and a retail pharmacy or wholesale distributor" (section 203.3(q)). However, section 503(c)(3) of the PDMA provides in part that:

"For purposes of this paragraph, the term "entity" does not include a wholesale distributor of drugs or a retail pharmacy licensed under state law."

Red Cross interprets this statutory language as clear confirmation that PDMA explicitly allows for an exception to the Act's sales restrictions for wholesale drug distributors and retail pharmacies who are licensed under state law. As a result, we believe that the definition of "health care entity" in the final rule runs counter to the language in the PDMA since the definition in the final rule effectively precludes health care entities from obtaining state licensure to distribute drugs. Thus, the definition in the final rule is contrary to the intent of Congress by contradicting the clear and unambiguous language of Section 503(c)(3) of the PDMA.

FDA notes in its final rule that this line of reasoning runs counter to the Agency's interpretation of the above clause because allowing health care entities to obtain State wholesale distributor licenses could assist entities in circumventing the types of abuses that Congress sought to prevent through PDMA's provisions. Nevertheless, we suggest that language in the final rule relating to the definition of a health care entity runs counter to the Agency's own interpretation of section 503(c)(3) when it noted in the preamble to the proposed rule:

"FDA interprets the first clause of the last sentence of section 503(c)(3) of the act to mean that the general prohibition against drug sales by hospitals, health care entities, and charitable institutions **was not intended to interfere with the operations of legitimate licensed prescription drug wholesalers and retail pharmacies.**" (emphasis added)

Given that there has never been any indication of any distribution abuses of the type banned under PDMA with respect to any licensed blood products or plasma derivatives, it would appear that FDA's own interpretation of the clause prohibiting anyone from simultaneously being a health care entity and distributor would not apply to blood banks acting as legitimate licensed wholesalers. Neither prior to, or during, the extensive congressional investigations relating to PDMA were there any documented abuses that would suggest that Congress intended that blood centers be prohibited from simultaneously acting as health care entities and wholesale distributors. From the earliest implementation of PDMA, Representative John Dingell, then Chairman of the Subcommittee most directly responsible for the enactment of PDMA, sent a clear message that blood products should be exempted from the requirements and restrictions of PDMA. In a letter on September 29, 1988 to public docket No. 88N-0258 Mr. Dingell stated, in part:

"The inclusion of blood and blood components in the Sales Restriction Section of the Act derives not from explicit language in the statute or legislative history, but rather by virtue of the fact that FDA had previously defined such products as 503(b) drugs by regulation [21 CFR 606.3(a) and (c)]."

It is important to note that FDA also defined plasma in this section at 21 CFR 606.3(d). Thus, reasons to exclude blood products and plasma derivatives from the prohibitions outlined in PDMA can be found through Congressional intent, FDA's own interpretative language in the proposed rule, and specific regulations already in place at the time PDMA was enacted.

In a letter to the FDA dated May 27, 1994, Congressman Dingell further noted that many full-service blood banks often serve as distributors of blood products and presumably comply with FDA regulations by registering with their respective states as wholesalers. He pointed out that FDA's proposed prohibition on a person simultaneously being a health care entity and a retail pharmacy or wholesale distributor suggested that such full-service blood banks that have registered with their respective states as a wholesaler would be prohibited from either providing blood components or plasma derivatives as part of their services (emphasis added). He noted that the Subcommittee understood that the FDA intended to address this issue in order to avoid disrupting the supply of biologics sold as prescription drugs to individuals such as hemophiliacs and individuals with compromised autoimmune systems.

The Red Cross believes that the FDA has not completely addressed this issue since the Agency has made no changes from the proposed rule to the final rule that would exclude blood banks from the restrictions outlined in the final rule or allow blood banks to serve as distributors of blood products and plasma derivatives.

IV. EXCLUSION OF PLASMA DERIVATIVES

Alternatively, if FDA determines that blood banks should not be excluded from the definition of "health care entity", the Agency should extend the exclusion from PDMA's sales restrictions for blood and blood components to include plasma derivatives and other related products. FDA has indicated in the final rule its view that the nation's supply of plasma derivatives would not be seriously impeded if blood banks were prohibited from distributing such products. However, as has been recently evidenced with several plasma

derivatives, the supply of such products can often be tenuous. Recent reports by the U.S. General Accounting Office, several Congressional hearings, and discussions at HHS and FDA advisory committee meetings have all highlighted intermittent supply problems affecting such products as Intravenous Immune Globulin and alpha-1 anti-trypsin.

Disrupting the distribution chain by prohibiting blood banks from distributing plasma derivatives would only exacerbate an already precarious situation. As noted previously, this is the very reason given by FDA to exclude blood and blood products from PDMA in order to avoid a situation that would:

"seriously impede the present blood distribution system and thereby substantially interfere with, and reduce, the nation's blood supply. Based largely on this untenable result, the Agency stated its belief that Congress did not intend to subject blood and blood components to PDMA's provisions."

Furthermore, the legislative history shows no intent to cover blood or blood components intended for transfusion or plasma derivatives. Instead, Congress enacted PDMA to regulate the sales of prescription drugs distributed in traditional pharmaceutical marketing networks. Like blood and blood components, plasma derivatives are largely distributed outside this framework. In passing PDMA, Congress also sought to prevent the sale of out-dated and other unsafe and ineffective drugs through the "diversion" market. Due to the comprehensive system of FDA and HCFA regulations in place for blood banks, this is not a concern for blood and blood components intended for transfusion. Similarly, this regulatory system serves to protect the safety of plasma derivatives distributed through blood banks.

IV. CONCLUSION

The Red Cross requests that blood banks be excluded from the definition of "health care entity". This will allow blood banks to continue to provide life-saving products and ensure an adequate national supply of blood components, plasma derivatives and related products. The current exclusion of blood components from the provisions of PDMA highlight both Congressional and FDA concern about maintaining an adequate blood supply. Clearly, such concern is also warranted in the plasma derivative arena. Alternatively, the Red Cross urges FDA to exclude plasma derivatives from section 203.22(g).

The American Red Cross appreciates this opportunity to express our views on this regulation.

CROSS FILE SHEET

FILE NO: 88N-0258/C70

SEE FILE NO: 92N-0297/C57