
Docket Nos. 92N-0297
88N-0258

2519 03 FEB -1 10 10

BEFORE

**THE UNITED STATES OF AMERICA
DEPARTMENT OF HEALTH AND HUMAN SERVICES
FOOD AND DRUG ADMINISTRATION**

**PETITION FOR CONTINUATION OF STAY OF ACTION AND SUSPENSION OF
EFFECTIVE DATE AND FOR ISSUANCE OF A DRAFT AGENCY GUIDANCE
DOCUMENT SETTING FORTH THE RECOMMENDED GUIDELINES FOR
PHARMACEUTICAL DISTRIBUTION SYSTEM INTEGRITY**

BY THE

PHARMACEUTICAL DISTRIBUTORS ASSOCIATION

**FINAL RULE CONCERNING POLICIES, REQUIREMENTS, AND
ADMINISTRATIVE PROCEDURES;
PRESCRIPTION DRUG MARKETING ACT OF 1987;
PRESCRIPTION DRUG AMENDMENTS OF 1992**

December 1, 2003

Pursuant to 21 C.F.R. § 10.35, the Pharmaceutical Distributors Association ("PDA"), a trade association of state-licensed wholesale distributors of prescription drugs, requests that the Commissioner of Food and Drugs continue the stay and suspend the effective date of 21 C.F.R. § 203.50 and 21 C.F.R. § 203.3(u), which are presently scheduled to go into effect on April 1, 2004. 68 Fed. Reg. 4912 (January 31, 2003).

In connection with a stay and suspension of the effective date for these regulations, the PDA also petitions the Commissioner of Food and Drugs to publish a draft Agency guidance document setting forth the Recommended Guidelines for Pharmaceutical Distribution System Integrity ("Guidelines," attached hereto as Appendix A) for public comment under 21 C.F.R. § 10.1150.

I. DECISION INVOLVED

The Prescription Drug Marketing Act ("PDMA") was enacted on April 22, 1988 (Pub. L. 100-293) and amended on August 26, 1992 (Pub. L. 102-353). Promptly after PDMA was enacted, the Food and Drug Administration ("FDA"), on August 1, 1988, issued a letter to industry to provide guidance on compliance with the new law ("1988 guidance"). Also in 1988, FDA proposed regulations setting forth minimum requirements for state licensure of wholesale drug distributors. These regulations were made final in September of 1990 and appear at 21 C.F.R. Part 205. It was not until March of 1994, however, that FDA proposed rules regarding the paperwork requirements of PDMA. And, five years later, on December 3, 1999, the FDA made these into a "final rule." 64 Fed. Reg. 67720.

The final rule requires, for the first time since PDMA was passed in 1988, that the paperwork accompanying wholesale distributions of prescription drugs ("prescription drug pedigree") include prior sale information back to the manufacturer even though some wholesale distributors, known as authorized distributors of record ("ADRs"), are

solution to perceived weaknesses in PDMA in Congress does not disserve the public interest.

Accordingly, implementation of 21 CFR § 203.50 in its present form should be stayed and its effective date suspended until one year after FDA issues a reconsidered final regulations regarding the scope of the pedigree requirement under PDMA.

D. FDA Has The Authority To Issue An Agency Guidance Document Setting Forth the Guidelines For Public Comment

This petition separately requests that the Commissioner of FDA issue a draft Agency guidance document for public comment under 21 C.F.R. § 10.115 that incorporates the Guidelines attached hereto in the form of a Guidance Document Submission as Appendix A.⁷

The Guidelines do essentially two things, both of which FDA has the authority to implement through issuance of a draft guidance document for public comment. First, through their definition of ADR, they propose an interpretation of PDMA's definition of "ongoing relationship." Second, they propose a system of due diligence checks, which, if followed, will help ensure the integrity of the drug supply.

FDA has ample authority to issue a draft Guidance for public comment as requested herein. As an initial matter, it is clear that an Agency guidance document need not originate with the Agency. Under 21 C.F.R. § 10.115(f), the public can suggest areas for guidance document development and can submit drafts of proposed guidance for FDA to consider. 21 C.F.R. §§ (f)(1)-(2).

⁷ These Guidelines (with slightly different definitions) have also been adopted by HDMA.

It is equally clear that FDA may issue a guidance document for the purposes of describing the agency's interpretation of or policy on a regulatory issue. 21 C.F.R. § 1-115(b)(1). Indeed, FDA does this routinely. *See e.g.*, Guidance for Industry: Qualifying for Pediatric Exclusivity Under Section 505A of The Federal, Food & Cosmetic Act (Sept. 1999) (setting forth guidance, including various definitions, on qualifying for pediatric exclusivity under Section 505A of the FFDCFA while final regulations on that subject are not yet in place).

By implementing the definition section of the proposed Guidelines, FDA would be doing no more than it has routinely done before: it would be providing a slightly revised and more stringent (from the 1988 Guidance) interpretation of "ongoing relationship" pending finalization of the regulations. It is clear that the Agency is authorized to do this in the form of a Guidance document because it did so in 1988. *See also* 21 C.F.R. § 10.115(c)(1) (explaining that a "Level 1" guidance document as including those that set forth initial interpretations of statutory or regulatory requirements; set forth changes in interpretation or policy that are of more than a minor nature; or cover highly controversial issues).⁸

The balance of the Guidelines essentially sets forth a series of due diligence voluntary mechanisms through which those in the prescription drug distribution chain may help ensure the integrity of the drug products that they buy and sell, i.e., that these drug products are not being bought from wholesalers who might be wholesalers of drug

⁸ The PDA notes that this definition could alternatively be implemented by the Agency through formal rulemaking procedures. The PDA has elected to request that the Agency issue these definitions in the form of a draft Guidance for public comment as PDA believes that this is a more efficient method for getting the definition in place.

products that are adulterated or misbranded. The CDTF, in their Interim Report, flagged this very issue as one that needed to be addressed. The CDTF stated that:

lack of high level of diligence by members of the U.S. drug distribution chain can facilitate the introduction of counterfeit drugs into the U.S. drug supply. Investigations performed by Federal and State authorities have repeatedly shown the existence of illicit nationwide networks designed to capitalize on the inadequate due diligence performed by members of the drug distribution system in order to introduce potentially unsafe diverted and counterfeit drugs into the distribution system.

CDTF Interim Report, p. 10.

Not only is it clear through the CDTF Interim Report that FDA should be interested in maximizing industry standards for due diligence, it is also crystal clear that the CDTF believes that FDA has the authority to issue guidance on it. In its Interim Report, the CDTF envisioned “[i]ssuance of a guidance document concerning physical site security and supply chain integrity.” CDTF Interim Report, p. 26. Surely this would not have been an option on the table if the CDTF believed such an activity to be beyond the authority of FDA. In fact, nothing in the Agency’s Good Guidance Practices regulation precludes issuance of an agency guidance document on such topics.⁹

The Good Guidance Practices regulation expressly permits issuance of guidance on FDA’s “inspection and enforcement policies.” 21 C.F.R. § 10.115(b)(2). Indeed, FDA’s Office of Regulatory Affairs routinely publishes such guidance in the form of Compliance Policy Guides (“CPGs”). *See e.g.*, Compliance Policy Guidance for FDA Staff and Industry: Pharmacy Compounding, Section 460.200 (setting forth guidance on

⁹ By regulation, the only items that may not be issued in the form of Guidance documents are: documents relating to internal FDA procedures, agency reports, general information documents provided to consumers or health professionals, speeches, journal articles and editorials, media interviews, press materials, warning letters, memoranda of understanding, or other communications directed to individual persons or firms. 21 C.F.R. § 10.115(b)(2). The Guidelines cannot reasonably be characterized as falling into any of the prohibited categories of guidance.

what types of compounding might be subject to enforcement action under the current law, and outlining therein the factors that FDA will consider with regard to its determination whether or not to take enforcement actions under the new drug, adulteration, or misbranding provisions of the FDCA).

It is PDA's view that the Guidelines could also form the basis of an Agency enforcement policy that creates a "safe harbor" from any strict criminal liability that might attach under FDCA § 301 with respect to the unknowing, unintentional and non-negligent commerce in counterfeit or otherwise unlawful prescription drugs.

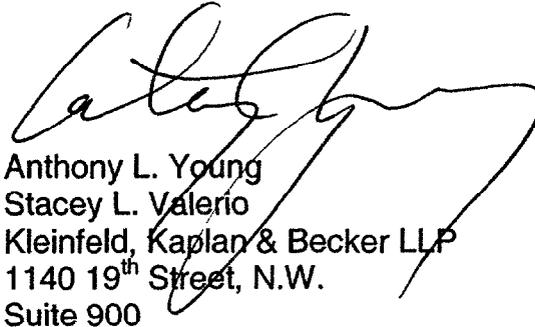
Finally, as a policy matter, putting the Guidelines in place now through issuance of a draft Guidance document for public comment makes sense. FDA is continuing to analyze 21st Century technology and the other information it received in response to the CDTF Interim Report to determine whether it currently has the authority to do more vis-à-vis anti-counterfeiting efforts, or whether it will need to approach Congress with a more comprehensive plan. If the history of these regulations tells us anything, it tells us that this effort will take time. Given that this is the case, and given that counterfeiters are not going to stop their bad behavior, it only serves the public interest to issue voluntarily guidelines that the trade believes will help ensure the integrity of the products reaching the American consumer.

IV. CONCLUSION

For the reasons set forth above, the PDA respectfully requests FDA continue the stay and to suspend the effective date of 21 C.F.R. § 203.50 and 21 C.F.R. § 203.3(u), which are presently scheduled to go into effect on April 1, 2004, and that in connection

with that stay, to issue a draft Agency guidance document for comment under 21 C.F.R.
§ 10.115 setting forth the Guidelines attached hereto as Appendix A.

Respectfully submitted,



Anthony L. Young
Stacey L. Valerio
Kleinfeld, Kaplan & Becker LLP
1140 19th Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 223-5120 (phone)
(202) 223-5619 (facsimile)
ayoung@kkblaw.com

Counsel for the
Pharmaceutical Distributors Association

Mr. Sal Ricciardi
President
Pharmaceutical Distributors Association
c/o Purity Wholesale Grocers, Inc.
5400 Broken Sound Blvd., NW
Suite 100
Boca Raton, FL 33487
(561) 994-9360 (phone)
(561) 994-9629 (facsimile)

APPENDIX A

Guidance Document Submission

Recommended Guidelines for Pharmaceutical Distribution System Integrity

Preamble

Prescription drug wholesalers, like all nongovernmental entities, do not have the investigative powers and resources to guarantee that certain products are not counterfeit. But they are uniquely situated to perform due diligence in order to protect the integrity of the pharmaceutical distribution system. Even with due diligence, in today's fast paced, just-in-time market, it is not always possible to determine the authenticity of specific prescription drugs being offered for sale. But rigorous due diligence can establish whether the sources of those prescription drugs meet certain criteria which provide a greater level of assurance that those sources are legitimate and present no reasonable probability of distributing counterfeit prescription drugs.

Experience with counterfeit drug distributors indicates that they are distinctly different from legitimate prescription drug wholesalers. Therefore, the first step in defining due diligence criteria is to identify the pertinent characteristics shared by legitimate prescription drug wholesalers. Once identified, these pertinent characteristics are the basis for the due diligence requirements contained herein. The logical nexus between the characteristics of legitimate prescription drug wholesaler and the due diligence criteria is an important safeguard to help assure the integrity of the prescription drug distribution system without disadvantaging law abiding wholesalers.

Legitimate prescription drug wholesalers share the following pertinent characteristics:

1. Their business is structured as a "going concern"
2. They demonstrate appropriate financial responsibility
3. They have robust operational standards
4. They have rigorous compliance systems
5. They can demonstrate their corporate and compliance history

An entity that does not display these characteristics may be identified as a suspect source of prescription drugs, or a source that may present an unreasonable risk to the integrity of the pharmaceutical distribution system and the public health.

The due diligence criteria and due diligence best practices in this guideline have been designed to identify facts and information about an entity that would demonstrate whether that entity displays the characteristics of a legitimate prescription drug wholesaler or, in the alternative, is reasonably likely to be a suspect source of prescription drugs. It is recommended that a prescription drug wholesaler:

1. Independently apply these Guidelines when evaluating proposed purchases from prescription drug wholesaler;
2. Use the due diligence best practices to determine whether the source of the prescription drugs meets the due diligence criteria; and
3. Purchase prescription drugs from sources that substantially demonstrate the characteristics of a legitimate prescription drug wholesaler in accordance with 2, above.

These Guidelines, therefore, outline best practices for the exercise of due diligence by prescription drug wholesalers to enhance the detection and elimination of illegitimate sources which market counterfeit products.

The public interest in drug product safety and efficacy is well served by this industry effort to detect and prevent counterfeit products from entering the prescription drug distribution pipeline in the United States.

I. Initial Information Request

When a prescription drug wholesaler is considering making purchases from another prescription drug wholesaler for the first time, it is recommended that a completed information request be obtained from the prospective selling wholesaler prior to the purchase. The information request should include the following information and it is recommended that this information request be updated annually:

1. A listing of states the company is domiciled in and shipping into and copies of all current state/federal regulatory licenses/registrations including license/registration number(s). (Note: purchaser is advised to check to ensure expiration dates have not passed);
2. The company's most recent site inspection(s) dates and inspection reports or resolutions (both state and federal inspections);
3. The minimum liability insurance limits the company maintains including general as well as product liability insurance;
4. All other "doing business as" (d/b/a's) names, and formerly known as (f/k/a's), including all affiliated businesses;
5. A complete list of all corporate officers;
6. A complete list of all owners of greater than 10 percent of the business unless it is a publicly-held company;
7. A list of all disciplinary actions by state/federal agencies against the company as well as principals, owners or officers over the last ten years, or since the company was first licensed, or any of the listed individuals were first in the prescription drug wholesale business;
8. The number of employees at the facility and screening procedures for hiring;
9. A full description of each facility/warehouse. Include all locations utilized for drug storage and/or distribution), including:
 - a. Square footage;
 - b. Security and alarm system description;
 - c. Terms of lease/own;
 - d. Address; and
 - e. Temperature and humidity controls.
10. A description of prescription drug import/export activities, including:
 - a. A listing of all countries importing from and exporting to;
 - b. A listing of what products are being imported/exported from each country identified in 10a;
 - c. The nature of the company's import/export activities pertaining to prescription drugs (i.e., repackaging, re-labeling, etc.); and
 - d. How are products designated for import/export separated from domestic inventory?
11. A description of the process the company uses to validate and certify its suppliers and purchases including the supplier's ADR status, (particularly if the process differs from the Recommended Guidelines for Pharmaceutical Distribution System Integrity).
12. A list of the classes of trade (e.g., manufacturer, wholesale, retail, hospital, institutional, clinics, etc.) the seller is purchasing from or selling his/her product from or to.
13. Available financial statements or SEC filings.

14. Systems and procedures in place for prompt reporting of any suspected counterfeit, stolen or otherwise unlawful prescription drug products or buyers or sellers of same to the appropriate state and federal authorities and manufacturer(s) of the product(s).

II. Certification of ADR Status

If the selling prescription drug wholesaler claims to be an ADR, it is recommended that the purchaser obtain a written statement from the seller stating that it is an ADR and on what basis. It is also recommended that the purchaser independently verify the seller's ADR status on the initial purchase and then at least annually thereafter.

III. Background Check

It is recommended that the purchaser conduct a background check of any prescription drug wholesaler it conducts business with prior to the initial transaction. This background check should include:

1. Subject to the requirements of the Fair Credit Reporting Act:
 - a. A criminal background and criminal and civil litigation check of all company officers, key management, principals and owners with 10 percent or greater interest in the company (the latter applying to non-publicly held companies only);
 - b. A driver's license and social security verification of all company officers, key management and owners;
 - c. Before completing a background check on the referenced individuals in 1a and 1b above, the purchaser must obtain the written consent of each such individual, clearly indicating how the information will be used. If the purchaser decides not to purchase from the prescription drug wholesaler based on the background information obtained, the purchaser must notify the individual (orally or in writing) in accordance with the notice requirements of the Fair Credit Reporting Act, 15 U.S.C. §1681(a);
2. A credit history maintained by an independent third party credit evaluation organization;
3. A check of the national database of licensed prescription drug wholesalers (if such a database is created);
4. A check to determine if civil/criminal litigation exists against the company; and
5. Verification of the date of incorporation and years in business, place of incorporation and form of entity.

IV. Physical Site Inspection

It is recommended, prior to an initial purchase, that a purchaser conduct a physical site inspection(s) of any prescription drug wholesaler seller it intends to do business with to ensure that the company's facility(ies) is/are in compliance with appropriate storage and operational conditions and practices. These inspections should be conducted on a biannual basis. A third party, so long as not a prescription drug wholesaler, may be used to conduct the inspections on behalf of the purchaser. A standard checklist for site inspections should be utilized and incorporate the following:

Administrative/Management

It is recommended that the purchaser:

1. Establish the authority, training, and experience of each individual providing the required information to them on behalf of the seller and each individual who controls and is responsible for the direct supervision of all persons who inspect, handle or have access to prescription drug products;
2. Request and examine the seller's organizational chart to identify key management and structure of the company; and
3. Verify the number of employees at the facility.

Building (size, physical conditions, etc.)

It is recommended that the purchaser check the

1. Structural appearance and general integrity based on a visual inspection;
2. Square footage;
3. Year of construction;
4. General security and alarm system;
5. Climate control; and
6. Surrounding area (e.g., zoning)

Operations

It is recommended that the purchaser examine the following:

1. Documentation of PDMA compliance status including receipt and provision of “identifying statements,” ADR status, requirements for PDMA compliance guarantees, recordkeeping and compliance with state and federal laws relating to the purchase and sale of prescription drugs.
2. Procedures for stock rotation;
3. Policies and procedures for conducting inspections of samples of product purchases;
4. Visually inspect a sample of the seller’s product;
5. Temperature monitoring program and documentation;
6. Systems/procedures for detecting adulterated/misbranded product, including systems and procedures to verify that manufacturer-identified anti-tampering devices are intact;
7. Systems/procedures for validating Identifying Statements;

8. Condition of medical product inventory in the warehouse;
9. Compliance with 21 CFR 1304.22 DEA recordkeeping requirements; and
10. Form of payment the seller uses to purchase product.

V. Seller Qualification

Once the site inspection has been completed, the results should be discussed with those employees or representatives of purchaser who are responsible for approving new suppliers. If the seller’s background check, the completed information request, and the site inspection are determined to be satisfactory and the purchaser obtains the appropriate internal approval of the new supplier, the seller should execute signed agreements or contract provisions with language specific to PDMA compliance and compliance with all state and federal laws relating to the purchase and sale of pharmaceuticals and that the purchaser will be notified if the seller receives information that the integrity or legal status of prescription drugs sold to purchaser has been called into question by the manufacturer, retailers, wholesalers, or state or federal authorities. The signed agreements should include language stating that the seller agrees to notify the purchaser of any changes in its information request within 30 days.

VI. Ongoing PDMA Compliance Review

It is recommended that the purchaser conduct ongoing compliance reviews and document all findings. These reviews should include:

1. Verifying that the seller is meeting the requirements for obtaining an “Identifying Statement”, and that the “Identifying Statements” contain the required information;

2. Verifying that the seller has an effective process in place to authenticate the accuracy and integrity of the "Identifying Statement."
3. Performing appropriate supplemental review actions when:
 - a. The "Identifying Statement" has more than three entities on it; or
 - b. The price of the product being sold is substantially less than the prevailing market prices.

VII. Additional Purchaser Responsibilities

In addition to all the previous steps, it is also recommended that the purchaser:

1. Maintain an internal company list of non-complying/at risk companies that are not reputable, or otherwise suspect, whose products prescription drug wholesaler would not purchase, based upon prior experience or other criteria;
2. Maintain an internal list of non-complying/at risk products (i.e. biologics, previously counterfeited drugs) that the prescription drug wholesaler would not purchase from a non-manufacturing vendor (NMV) or non-ADR;
3. Have systems and procedures in place for prompt reporting of any suspected counterfeit, stolen or otherwise unlawful prescription drug products or buyers or sellers of same to the appropriate state and federal authorities and manufacturer(s) of the product(s).
4. Cooperate with state and federal regulatory authorities by promptly providing copies of requested records and other information relevant to administrative, civil and criminal investigations related to prescription drug products.

Definition of Authorized Distributor of Record

1. The distributor appears on the manufacturer's list of ADR's, or
2. The distributor has a written agreement currently in effect with the manufacturer, or
3. The distributor has a verifiable account number with the manufacturer (by phone check or invoices with account numbers), and a minimal transactional or volume requirement as follows:
 - a. 5000 sales units (unit is the manufacturer unit of sale, e.g., bottle of 100 100 mg. tablets) within 12 months, or
 - b. 12 purchases (invoices) from the manufacturer within 12 months