HDA
Healthcare Distribution Alliance

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Lyndsay Hennessey
Center for Drug
Evaluation and Research
Food and Drug Administration
10903 New Hampshire Ave.
Silver Spring, MD 20993

RE: Importation of Prescription Drugs, Proposed Rule, Dkt. No. FDA-2019-N-5711, [84 Fed. Reg. 70796 (Dec. 23, 2019)]

Dear Ms. Hennessey:

The Healthcare Distribution Alliance (HDA) appreciates this opportunity to provide comments to the Food and Drug Administration (FDA) regarding the Proposed Rule: Importation of Prescription Drugs, Dkt. No. FDA-2019-N-5711, 84 Fed. Reg. 70796 (Dec. 23, 2019) (Proposed Rule or Rule).

1. About HDA

HDA represents primary pharmaceutical distributors — the vital link between the nation's pharmaceutical manufacturers and pharmacies, hospitals, long-term care facilities, clinics and others nationwide. Since 1876, HDA has helped its members navigate regulations and innovations to get the right medicines to the right patients at the right time, safely and efficiently. The HDA Research Foundation, HDA's non-profit charitable foundation, serves the healthcare industry by providing research and education focused on priority healthcare supply chain issues.

2. Introduction

As the vital link between manufacturers and pharmacies, wholesale distributors share FDA's commitment to assuring that American patients can access high-quality, safe and effective, affordable medicines. With FDA, HDA also is committed to ensuring that the U.S. pharmaceutical supply chain remains safe and secure. To that end, we offer these comments on the Proposed Rule, covering the following areas:

- The importance of the Drug Supply Chain Security Act (DSCSA) to the safety of American patients.
- Examples of importation that should be distinguished from those that would be conducted under the Proposed Rule.

- How the implementation of Section 804 Importation Programs (SIPs) for the importation of drugs not intended by their manufacturers for the U.S. market[1] jeopardizes the patient protections the DSCSA sought to implement.
- Our belief that importation, as described in this proposal, is unlikely to provide any cost savings to patients given the significant burdens that must be incurred to secure the supply chain and protect patients.[2]
- How the Proposed Rule relies upon the very DSCSA protections it actually undermines and upon assumptions of protections in place that, in fact, do not exist.

HDA recognizes and acknowledges the intense public interest in importation of Canadian products and that patients cannot benefit from drugs they cannot afford. We therefore offer comment on specific elements of the Proposed Rule. While we maintain our longstanding belief that importation cannot be accomplished in a manner that both achieves meaningful cost savings and adequately protects American patients,[3] assuming that the Agency moves forward with a Final Rule, we strongly support the minimum measures proposed and do not support easing the Proposed Rule's safety and security requirements in any way. Further, we offer additional recommendations we believe are vital to supporting the security of the U.S. pharmaceutical supply chain. We conclude with a discussion of areas not touched on in the Proposed Rule that we believe merit evaluation and, potentially, incorporation should the Proposed Rule be finalized.

3. The Importance of the DSCSA to Supply Chain Security

Congress enacted the Drug Quality and Security Act (DQSA) on November 27, 2013. Title II of the DQSA, the Drug Supply Chain Security Act (DSCSA), outlines steps to build an electronic, interoperable system to identify and trace certain prescription drugs as they are distributed in the United States (U.S.). This law provides a federal traceability solution for prescription medicines, which by

[1] The Rule proposes the importation of drugs into the U.S. from Canada of drugs which were originally manufactured with an intent to distribute them to Canadian patients and were not intended by the manufacturer to be imported into the U.S. The imported drugs are not approved by FDA, though. To be eligible for importation, the imported product must meet all conditions of an FDA-approved drug application except for the U.S. labeling. Unless stated otherwise, where we use the term "unapproved drugs" or "unapproved drugs from Canada" we are referring to the products covered in the Proposed Rule. This is in contrast to drugs manufactured in Canada or elsewhere that are approved by the FDA and imported, by the manufacturer, into the U.S. for distribution in the American supply chain and other instances where the manufacturer is the importing entity, such as in drug shortage situations. These distinct instances of importation are discussed further in Section 4 of these comments.

[2] The HDA Research Foundation recently published an analysis of the costs associated with the type of tightly controlled importation that the Proposed Rule contemplates. *The Risks and Realities of Commercial Drug Importation* (2019) is available here ("Foundation Importation Analysis" or "Analysis"). While the Foundation Importation Analysis rests upon assumptions that are not perfectly aligned with the Proposed Rule – for instance, the Analysis assumed importation from five European Union countries in addition to Canada – nevertheless it concluded that importation would result in significant increases in costs to patients.

[3] HDA has long "oppose[d] permitting the importation into the U.S. of pharmaceuticals sold or designated for sale in foreign countries. HDA firmly believes that allowing importation increases the likelihood of counterfeit or adulterated drugs entering the United States and will not ensure meaningful reductions in the cost of prescription drugs." *HDA Issues, Importation of Prescription Medicines* is available here. HDA has frequently presented its views to Congress, such as in a letter to the Senate Health, Education, Labor and Pensions (HELP) Committee Opposing Importation in April 2017 available here.

2023, will lead to the establishment of electronic, unit-level traceability requirements across the entire U.S. supply chain for prescription drug products. Congress had multiple goals in enacting the DSCSA:

- The DSCSA requires that all applicable products be serialized. Serializing products with unique identifiers improves the ability to trace products and identify illegitimate products in the supply chain.

- The DSCSA's standardization of traceability requirements and stringent wholesaler licensing requirements is intended to create national uniformity thereby enhancing the safe and secure distribution of pharmaceuticals.

- The DSCSA imposes controls on who may buy and sell pharmaceutical products. Supply chain participants may only transact with "Authorized Trading Partners." To be authorized, manufacturers must be registered with FDA, and wholesalers, third-party logistics providers, and dispensers/pharmacies must hold appropriate State-issued licenses.

- Each transaction (e.g., purchase or sale) of a DSCSA-covered prescription drug product must include data about the transaction. The transaction data must be provided, received and maintained. Through the interoperable electronic exchange of data, it will be possible to trace each product by its unique serial number throughout the supply chain. While the system will take time to build and mature, it is also anticipated that the information may be leveraged to increase efficiency and provide additional safety benefits, such as improved administration of product recalls. Products that should not be in the supply chain can be more readily identified and removed.

At a public meeting in February 2018, then FDA Commissioner Gottlieb discussed DSCSA implementation, the challenges of securing the U.S. pharmaceutical supply chain, and why the law's protections were so important to protecting American patients.

> Every link in [the pharmaceutical supply] chain must be secure: From the moment finished drug products leave manufacturing facilities to final delivery to pharmacies or providers' offices where medicines are ultimately dispensed to patients. … While the U.S. drug supply chain is among the safest in the world, complacency isn't an option. … ***If we tolerate a single weak link in the system, they'll find it.***[4] (Emphasis supplied)

We believe the Rule, if implemented as proposed, weakens those links in the U.S. closed system of pharmaceutical distribution and creates new vulnerabilities in the supply chain.

4. Matters Outside the Proposed Rule and Section 804 Importation

At the outset, we wish to address important matters that should not be confused with the Proposed Rule and section 804 importation.

[4] *See,* Commissioner Gottlieb, Remarks on Enhancing Drug Distribution Security, February 28, 2018.

First, as explained further below, HDA questions whether redirecting drugs intended for Canadian patients to the U.S. could meaningfully ease cost burdens for American patients without also endangering the patients the importation is intended to serve. HDA, however, in no way impugns the safety, integrity and authenticity of the drugs manufactured for Canadian patients pursuant to Canadian and provincial law.

Our concerns arise with opening up a closed system of distribution protected by the DSCSA to new trading partners and waiving DSCSA requirements, thereby introducing new risks and vulnerabilities to the supply chain. We are concerned with whether it is, in fact, those legitimate Canadian drugs that actually enter the U.S. supply chain, and what opportunities for fraud and abuse arise before, during or after these products enter the U.S. should they be trafficked in by unscrupulous entities. We also believe that the costs to assure the authenticity and traceability of these unapproved drugs from Canada will negate any of the purported cost savings to American patients.

Second, it is important to distinguish a SIP Sponsor's importation program from other forms of legitimate importation. Many drugs are manufactured, in whole or in part, from imported components and may be manufactured outside the U.S. and imported into the U.S. This importation is done by the manufacturer and pursuant to an FDA-approved application or biologics license and the products are manufactured and intended for U.S. patients. Such drugs must meet all applicable requirements of the Federal Food, Drug and Cosmetic (FD&C) Act, including the DSCSA.

Alternatively, a manufacturer may be assisting in alleviating a drug shortage and importing a medically necessary but unapproved product into the U.S. pursuant to a temporary grant of enforcement discretion by FDA. These importations are limited, tightly controlled and, importantly, conducted with the support and under the direction of the manufacturer who intends to introduce the product into U.S. commerce.[5]

5. Section 804 Importation Undermines the DSCSA

The DSCSA and its ten-year commitment to further secure the U.S. supply chain were enacted in 2013, over ten years after the statutory provisions of section 804 were enacted.[6] While we recognize the urgent need for, and public interest in, assuring patient access to affordable medications, the DSCSA is a far more sophisticated and modern statute, reflecting years of discussion among stakeholders and is the culmination of a long effort to further secure the U.S. supply chain and help prevent counterfeit products from entering distribution and injuring patients. HDA and its members believe the Rule, if finalized as proposed, would undermine the work and investment to implement the DSCSA and is fundamentally inconsistent with the DSCSA's goals.

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[5] The efforts FDA undertook in conjunction with manufacturers to alleviate IV fluid shortages after Hurricane Maria, discussed here, are one example of this type of importation.

[6] *See,* 84 Fed. Reg. at 70799: "The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173) was signed into law on December 8, 2003. Section 1121 of the MMA amended section 804 of the FD&C Act… which, among other things, authorizes the Secretary of HHS… to issue regulations permitting pharmacists and wholesalers to import certain prescription drugs from Canada under certain conditions and limitations."

Among other things, one goal of the DSCSA was an interoperable, electronic system for the exchange of data in accordance with widely recognized, international standards[7] and a federally mandated, preemptive, uniform national policy for the tracing of pharmaceuticals and the licensure of wholesale distributors.[8] Prior to the DSCSA, States were free to develop their own requirements for pharmaceutical tracing and trading partner licensure that varied widely in their breadth, protectiveness, and stringency. In the view of Congress and stakeholders, this 50-State patchwork was vulnerable to exploitation — creating too many of the "weak links" of which former Commissioner Gottlieb warned.

Individually developed, submitted, and approved SIPs turn back the clock and undo the beneficial uniformity Congress mandated in the DSCSA. Each SIP a sponsoring State, Territory or Tribal authority establishes would, we believe, become an exception to existing, secure and DSCSA-compliant business processes Congress envisioned, bringing back pre-DSCSA inconsistency, lack of uniformity and the possibility of 50 or more different pharmaceutical supply chains. The uniform, national system the DSCSA establishes would, instead, return to a complex and inefficient patchwork that will introduce many more links that will surely weaken the pharmaceutical supply chain.

The Proposed Rule itself acknowledges the risks of longer, more complex supply chains as FDA considered, and rejected the possibility of authorizing more than one Foreign Seller per supply chain – noting that increasing the number of entities outside the U.S. makes the supply chain "less transparent and more vulnerable to risk."[9] The security that comes with shorter supply chains is embedded in the DSCSA. The statute contemplates and favors direct purchase transactions and imposes additional burdens on longer, more complex transactions.[10] The DSCSA recognizes that adding complexity, more trading partners, more steps, processes, and more exceptions creates a less secure distribution system.

We particularly note the length and complexity of the different steps that must be followed for importation to occur at all. An product imported from Canada, as envisioned under this proposal, would change hands many times – from manufacturer to Foreign Seller to Canadian repackager back to Foreign Seller to U.S. Importer to testing laboratory to U.S. repackager before the product can even enter the commercial U.S. supply chain. To be clear, we adamantly do not support lessening of any of these requirements, as we discuss further below. However, each of these steps, though necessary, also adds complexity and new, vulnerable links in the supply chain that pose opportunities for diversion and wrongdoing.

6. The Proposed Rule's Purported Reliance Upon the DSCSA is Flawed

The Proposed Rule expressly, and in our view mistakenly, relies upon the DSCSA's protections to justify the conclusion that importation from Canada of drugs that were not intended by the manufacturer for the U.S. market would pose no additional risk to American public health and safety. We have three concerns with this reasoning.

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[7] *See, e.g.*, §582(a)(2)(A).
[8] *See, e.g.*, § 585, Uniform National Policy.
[9] 84 Fed. Reg. at 70813.
[10] Direct purchase transactions are those from manufacturer to wholesale distributor to dispenser, or manufacturer to the manufacturer's direct purchase repackager or exclusive distributor to wholesale distributor to dispenser.

a. Security requires investment

As discussed, the DSCSA requires the development of an interoperable, electronic system for tracing pharmaceuticals. That system the DSCSA contemplates is so complex, it requires a 10-year build and gradual phase-in of the law's stringent requirements. HDA and its wholesale distributor members strongly supported passage of the DSCSA because of the vital importance of enhancing the security of the supply chain and the safety of U.S. patients. We continue our support for the DSCSA's ongoing and upcoming implementation.

DSCSA implementation has required commitment and considerable investment across the supply chain. Manufacturers and repackagers have had to build the capability to affix unique identifiers on every product and homogenous case, purchase new equipment, and redesign and validate packaging and labeling operations. Manufacturers and wholesale distributors have had to, among other things, invest in information technology, systems development and capacity, and build, test and implement verification systems. Wholesale distributors have had to purchase new equipment such as scanners capable of reading and parsing data embedded into newly designed two-dimensional DataMatrix barcodes. They have significantly changed existing warehouse configurations, physical structures and operations to help ensure proper alignment between data flow and physical product flow. Trading partners, including those downstream, have had to build the capability to provide, receive, and/or maintain transaction data. Many, if not most, trading partners have had to hire and train additional employees and/or train existing employees in new systems and processes.

Though meeting the DSCSA's requirements is difficult and costly, wholesale distributors willingly shoulder their share of the critically important responsibility of supply chain safety and security. Since the passage of the DSCSA, HDA members have worked tirelessly and made enormous investments to meet both the letter and spirit of the law as they have adapted their systems and business practices. This work continues at an aggressive pace and requires significant and ongoing human, capital, and technology commitments.

HDA estimates that its wholesale distributor members have spent in excess of $500 million, to date, to comply with the DSCSA and begin the migration to interoperable, electronic traceability. This is a very conservative estimate of overall DSCSA implementation costs as it does not include those costs incurred by manufacturers, dispensers and others in the supply chain. Moreover, the costs are likely to increase, perhaps considerably, over the next few years as progress towards full traceability in 2023 advances.

The considerable and ongoing investment made in supply chain security underscores a fundamental conundrum for the importation of drugs from Canada — compliance and supply chain security are an investment in security for the benefit of American patients. Attempting to superimpose these same security protections onto a system for importing unapproved Canadian drugs would be a costly endeavor. Research has recently estimated that the costs of protecting American patients from the risks posed by importation wholly subsume any intended cost savings.

The HDA Research Foundation recently commissioned a study of a type of controlled importation that is similar to what is contemplated in the Proposed Rule. *The Risks and Realities of Commercial Drug Importation* (2019) is available here ("Foundation Importation Analysis" or "Analysis"). The Analysis rests upon assumptions similar to those in the Proposed Rule — for example, the study assumes similar limits upon the drugs that might be imported. In other instances, the Proposed Rule and the Foundation Importation Analysis differ — the Analysis, for instance, assumes importation from five European Union countries in addition to Canada.

Despite the difference in assumptions, we believe the Foundation Importation Analysis highlights risks and costs that are likely to arise should the Rule be finalized as proposed. The Analysis posits that even a highly controlled importation program would both increase risk to patients and impose significant costs due to operational challenges and the need for additional regulatory oversight. Notably, the study highlights that even importation policies subject to specific and well-defined restrictions would likely result in a 5 percent increase in drug-related adverse events and patient costs of up to $1.4 billion due to counterfeits and other sources of unsafe product.

b. The Proposed Rule appears to undermine the protections it relies upon

The Proposed Rule posits that the DSCSA's additional supply chain protections are one reason that importation of unapproved Canadian drugs can now be accomplished safely. For example, the preamble states as justification for the Proposed Rule:

> As wholesale drug distributors and pharmacists actively participate, along with manufacturers and other trading partners, in the development of an interoperable electronic system by 2023 in accordance with standards established by FDA, as required under DSCSA, they have developed processes and methods for complying with requirements in place since 2015 for exchanging transaction information and verifying products. … With the implementation of the DSCSA, supply chain security is maturing due in part to these technological solutions adopted by manufacturers, wholesale distributors, pharmacists, and other trading partners that serve as important links to help protect U.S. consumers from illegitimate products.[11]

Yet, as the Proposed Rule also recognizes, there are certain DSCSA requirements that cannot be imposed upon or cannot be met, at all, by Foreign Sellers and U.S. Importers.

The Rule attempts to fill some of the gaps. It imposes, by regulation, numerous requirements that apply to U.S. licensed wholesalers under the DSCSA. For example, *See,* Proposed 21 C.F.R. § 251.14(c)(1),(2), (6) (proposing verification requirements, transmission of package-level transaction data to U.S. Importer in interoperable format, etc.). Yet, while these important protections are similar to, and based upon, the DSCSA, ***they are not the same as the DSCSA*** because the Foreign Seller is not covered by the DSCSA. The Foreign Seller does not have to capture transaction data from the manufacturer it purchases from and is not subject to the same licensure and inspectional criteria as a U.S. wholesale distributor.

[11] 84 Fed. Reg. at 70801.

Moreover, there are some DSCSA requirements that simply could not be met if importation were to proceed as described in the Proposed Rule. Among other things, the Foreign Seller is not an authorized trading partner, could not provide all the required transaction data when it sells the product to the U.S. Importer, and would be selling product to the U.S. Importer that does not bear the DSCSA-required product identifier. The Rule proposes to exempt the U.S. Importer from these and other DSCSA requirements entirely because, without these exemptions from the DSCSA, the U.S. Importer would not be able to purchase unapproved Canadian drugs from the Foreign Seller at all.[12]

We also note that the products being imported will bear foreign labeling, and then be relabeled by the Foreign Seller and the U.S. Importer. The new product labeling must include a statement identifying the product as imported from Canada.[13] The result can be a product that, in appearance, is very different from the products that typically move through the U.S. supply chain, for instance if the U.S labeling overlays the foreign labeling. A product with these labeling anomalies would be, and should be, flagged by an authorized trading partner as suspect.[14]

While we fully support the rule's relabeling requirements to help assure traceability and inform patients and other members of the supply chain of the provenance of the product, we are concerned that doing so will make it far more difficult to identify a suspect product in the U.S. supply chain. An entity intent on introducing a counterfeit or other unsuitable product into the supply chain might try attaching a "This drug was imported from Canada" section 251.13(b)(6)(i) statement in order to explain its unusual appearance to an unsuspecting purchaser. In this way, the Proposed Rule likely undermines the verification systems and processes trading partners must have in place for the identification and investigation of suspect and illegitimate product.

c. The Proposed Rule should not be implemented without national standards for wholesale distribution licensure and State adoption of those standards

The Proposed Rule posits that the importation programs it envisions would be more secure because the wholesale distributor licensure requirements help provide protection and oversight over the U.S. Importer. The preamble notes, for instance, that "under the DSCSA, FDA, along with the States, exercises oversight over wholesale drug distributors and pharmacists, in addition to manufacturers."[15] It is this oversight authority which leads FDA to conclude that only entities with regulatory authority over wholesale distributors and dispensers, that is, States, Tribes and Territories, should be SIP Sponsors.[16]

The Proposed Rule's reliance upon the DSCSA's licensure standards and SIP Sponsor regulatory oversight is flawed as these standards have been neither promulgated nor implemented, in contravention of the will of Congress.

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[12] *See*, e.g., Proposed 21 C.F.R. § 251.14(d)(6).
[13] *See,* Proposed 21. C.F.R. § 251.13(b)(6)(i).
[14] *See, e.g., Drug Supply Chain Security Act Implementation: Identification of Suspect Product and Notification Guidance for Industry* (Dec. 2016).
[15] 84 Fed. Reg. at 70801.
[16] 84 Fed. Reg. at 70801.

The DSCSA expressly required FDA to issue "national standards" for the licensure of wholesale distributors by November 27, 2015 that would, in turn, be adopted by State licensing authorities.[17] Specifically, the DSCSA states that to "ensur[e] uniformity," these national standards "shall apply to all State and Federal [wholesale distributor] licenses."[18]

Despite repeated assurances that the rules were forthcoming, urgent appeals by stakeholders, and queries from Congress, the Agency has yet to release these standards that are now over four years late. It is deeply concerning that the importation of unapproved drugs from Canada relies upon the State oversight of wholesale distributors and dispensers when a key element of that oversight, mandated by law, has not materialized.

These failures — the lack of both uniform national standards and State implementation of them — has perpetuated a patchwork of licensure and traceability requirements in the States that the DSCSA was supposed to have eliminated. Uncertain as to the law's scope, some States continue to permit pre-DSCSA conduct that might not otherwise be permitted. Some States have chosen to conserve resources and wait until the promulgation of federal standards before they update their own requirements based on the presumption that the federal standards would be timely issued. Without the needed clarity of uniform, national standards that plainly and expressly preempt inconsistent distribution requirements, U.S. patients are vulnerable. We are very concerned that persons intent on introducing counterfeits into the supply chain, or in conducting other illegal actions, will be able to exploit these holes in State licensure requirements.

We do not see how any SIP Sponsor can assure adequate regulatory oversight of the U.S. Importer identified in its plan in a manner that assures compliance with DSCSA standards until those standards are actually promulgated and implemented. We strongly oppose any SIP approval until FDA issues the mandated national licensure standards, all states and U.S. Territories have adopted them, and the SIP Sponsor can demonstrate that it can and will hold its designated U.S. Importer to those standards and enforce them accordingly.

7. The Proposed Rule Sets Out the Minimum Standard That Should Not be Eased in Any Way

For all the foregoing reasons, HDA has grave doubts concerning importation as envisioned in the Proposed Rule. However, should FDA move forward pursuant to section 804 and the Proposed Rule, we fully support the measures FDA has proposed to protect patients and the supply chain from counterfeit and other dangerous products. We do not support any easing of the proposed requirements and, indeed, in the next section, identify specific places where we do not believe the Proposed Rule goes far enough. We specifically support the following protective measures set forth in the Proposed Rule:

- SIPs should only be sponsored by a State, Tribal, or Territorial Governmental entity.[19] We believe it is vital that only entities that can assure adequate regulatory oversight over the U.S. Importer should be able to design and implement a SIP. As discussed above, however, no SIP

[17] *See,* § 583. National Standards for Prescription Drug Wholesale Distributors.
[18] § 583(b).
[19] 84 Fed. Reg. at 70801.

should be approved until after FDA promulgates national uniform licensure standards and the SIP sponsor implements those standards. Both measures are necessary to assure that all SIP Sponsors are properly regulating potential U.S. Importers in accordance with the DSCSA's preemptive national standards.

- The SIP Sponsor must show that its proposed importation plan will pose no additional risk to the public's health and safety and will result in significant cost savings to the American consumer.[20]

- Statutory Testing requirements should not be eased in any way. Statutory Testing must be vigorous and robust to assure that the imported product is authentically the eligible prescription drug it purports to be and has not become degraded or otherwise adulterated during the importation process. *See* proposed 21 C.F.R. § 251.2 (definition of eligible prescription drug as a product that but for the fact that it deviates from the required U.S. labeling, meets the conditions of an FDA-approved drug application, and definition of statutory testing).

- SIPs should, as proposed, be limited to drugs that meet the definition of a DSCSA "product" so that they are subject to all DSCSA identification, tracing, and verification requirements.[21]

- The Foreign Seller and U.S. Importer play a critical role in the SIP. The Proposed Rule properly imposes numerous requirements upon the Foreign Seller, *e.g.*, labeling, recordkeeping, provision of interoperable transaction data, Canadian licensure, etc., and upon the U.S. Importer, *e.g.*, inspection and sampling of products, Statutory Testing, relabeling, licensure, etc.

- The Rule proposes limiting the supply chain by permitting only a single Foreign Seller that purchases a drug or drugs directly from the manufacturer and sells directly to the U.S. Importer. FDA believes, and we agree, that more complex supply chains are less secure and less transparent.[22] HDA does not support allowing longer supply chains under this Rule.

- The Rule proposes requiring the U.S. Importer to maintain records for six years associating the product identifier the repackager affixes to the product with the serial number the Foreign Seller assigned as well as the product's Canadian DIN. FDA notes that this requirement is analogous to the record retention requirement in § 582(e)(2)(A)(iv) for a repackager that associates a product identifier with a manufacturer-affixed product identifier, 84 Fed. Reg. at 70816, and we strongly support this important requirement. Without it, traceability to the manufacturer's original lot and batch records might not be maintained, resulting in limiting the ability to execute recalls and meaningful adverse event reporting.

8. Additional Recommendations for the Proposed Rule

HDA suggests below several additional security measures that we believe are necessary to mitigate the potential security risks posed by importation of unapproved drugs.

[20] 84 Fed. Reg. at 70802, 70821.
[21] 84 Fed. Reg. at 70804.
[22] 84 Fed. Reg. at 70813-14.

- The Proposed Rule already exempts imported products and the U.S. Importer from certain provisions of the DSCSA. Though the DSCSA contains provisions for FDA to grant additional waivers, exceptions and exemptions from compliance with its requirements, we do not support any further easing of DSCSA requirements for any products that would be imported pursuant to this Rule. We urge particular caution if the Agency is asked to waive DSCSA requirements related to SIP products due to financial considerations or "undue economic hardship."[23] As discussed, protecting the U.S. supply chain requires financial investment and we urge FDA to not permit any SIP participant to circumvent the DSCSA's protections with arguments that it is too costly or inconvenient. Should FDA move to finalize the Rule, we recommend including an explanation of the scrutiny that the Agency will apply to any request for a waiver, exception or exemption from DSCSA requirements apart from those already in the Rule.

- The DSCSA requires trading partners, upon determining that a product in their possession or control is illegitimate, to notify FDA and all immediate trading partners (that they have reason to believe may have received the illegitimate product) not later than 24-hours after making the determination. Manufacturers are additionally required to notify FDA and immediate trading partners not later than 24 hours after the manufacturer determines or is notified by FDA or a trading partner that there is a high risk that the product is illegitimate. The Proposed Rule would impose similar requirements on the Foreign Seller, including reporting to FDA if it determines that a suspect product subject to an FDA verification request is not legitimate and reporting to FDA if it is in possession or control of an illegitimate product.[24] We recommend expanding these FDA reporting requirements so that the Foreign Seller must report to FDA and trading partners any suspect product and any product that is at a high risk of illegitimacy.

- Proposed 21 C.F.R. § 251.7 sets out various grounds under which FDA might suspend or revoke a SIP. We recommend that identification of an illegitimate product in the SIP program should be grounds for automatic, temporary suspension and potentially full revocation of the SIP.

- We recommend that the requirements for Foreign Sellers be expanded and clarified. Every DSCSA requirement applicable to a U.S. wholesale distributor also should apply to the Foreign Seller, including compliance with all applicable national standards for wholesale licensure once FDA promulgates them. These standards include, but are not limited to, those set out in section 583, such as procedures for the storage and handling of prescription drugs and maintenance of adequate records, facility requirements, the furnishing of a surety bond, mandatory background checks and fingerprinting of facility managers or designated representatives, and establishment and implementation of qualifications for key personnel. Foreign Sellers also should be subject to the same inspections as U.S. wholesalers and be held to the same standards during those inspections.

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[23] § 582(a)(3)(i) states: "an authorized manufacturer, repackager, wholesale distributor, or dispenser may request a waiver from any of the requirements set forth in [§ 582] … if the Secretary determines that such requirements would result in **an undue economic hardship**…". (Emphasis supplied)

[24] Proposed 21 C.F.R. § 251.14(c)(1)(i)(C) and (c)(2)(i).

- The Proposed Rule states in the preamble that "a Foreign Seller would be capable not only of registering with FDA… but also of…sending package-level information about the product they are selling to the Importer in a format that enables interoperability."[25] We believe this provision should be added to the text of the final Rule and not relegated to the preamble of the Proposed Rule. Nor does the Proposed Rule appear to specify the format of the Transaction Statement the Foreign Seller must provide to the U.S. Importer. We recommend this be added to the final Rule as well.

- The Rule proposes to exempt a dispenser acting as the U.S. Importer from affixing product identifiers to imported products if they will be administered directly to patients.[26] We oppose this exemption and urge FDA to require product identifiers to be affixed on all products imported pursuant to this Rule. We believe excluding products from the product identifier requirements could potentially make the supply chain vulnerable to suspect and illegitimate products. The lack of an identifier also may place these products outside the DSCSA's requirements and protections and may create interoperability challenges, both of which increase risks to patient safety and supply chain security. Should a product be diverted from the SIP and the patients it is intended for, the product identifier may aid in traceability.

- We agree that the imported product, when relabeled, must bear a statement on the labeling identifying the product as imported from Canada.[27] However, we note that patients will not necessarily see/receive the labeling with the importation statement when the product is dispensed or administered. Thus, we believe patients receiving imported drugs should be informed expressly and affirmatively of that fact by the dispenser and urge adding such a requirement to the Rule when finalized.

9. Potential Elements That Were Not Discussed in the Proposed Rule

There are additional legal requirements that may also need to be considered before the Rule is finalized. They include, but are not limited to, the following:

- The Consumer Product Safety Improvement Act (CPSIA) and the Poison Protective Prevention Act (PPPA), both administered by the Consumer Product Safety Commission (CPSC), impose requirements for testing and documentation of the packaging used for a variety of consumer products including certain drug products. Products packaged in the first instance for the Canadian market might not be in compliance with these requirements. Thus, we suggest that FDA consider these statutes, explore the possibility that additional non-FD&C Act and/or non-CPSC-administered statutory requirements may also apply to imported products, and address them appropriately in a Final Rule.

- We urge FDA to address, in a Final Rule, their expectations when a product problem might trigger a recall in the U.S., but not in Canada, and vice versa.

[25] 84 Fed. Reg. at 70815.
[26] 84 Fed. Reg. at 70815.
[27] *See,* Proposed 21. C.F.R. § 251.13(b)(6)(i).

- In some states, manufacturers are required to fund "take backs" under state-directed product stewardship programs. HDA recommends that the Final Rule require SIPs to address take-back requirements where applicable.

10. Conclusion

In conclusion, HDA appreciates this opportunity to provide input to FDA on the Proposed Rule. HDA and its members are committed to continuing efforts to enhance the safety and security of the U.S. pharmaceutical supply chain while also helping to assure that Americans have access to the medicines they need.

If you have any questions, please feel free to contact me at aducca@hda.org or 703-885-0240. Thank you.

Sincerely,

Anita T. Ducca

Anita T. Ducca
Senior Vice President, Regulatory Affairs

cc: Connie T. Jung, R.Ph., PhD
Senior Advisor for Policy
Office of Drug Security, Integrity, and Recalls
Office of Compliance, Center for Drug Evaluation and Research