



NATIONAL ASSOCIATION OF
CHAIN DRUG STORES



September 27, 2004

Captain Michael D. Jones
HFD-005
Food and Drug Administration
5600 Fishers Lane
Rockville, Maryland 20857

Re: Impact on Retail Pharmacy Repackaging of Mandatory Use of Repackager's NDCs in FDA Bar Coding Regulation: Request for Enforcement Discretion

Dear Captain Jones:

As part of our continuing discussions regarding the Food and Drug Administration's (FDA) final rule on bar code label requirements for human drug and biological products,¹ the National Association of Chain Drug Stores (NACDS) and the Healthcare Distribution Management Association (HDMA) want to provide additional information concerning the impact on retail-based repackaged drug products of the final rule's mandated use of repackagers' National Drug Code (NDC) numbers. We respectfully request that the agency exercise its enforcement discretion by continuing its current policy towards use of manufacturer NDC numbers on retail-based repackaged drug products until this issue can be addressed as part of the pending rulemaking to revise the agency's drug establishment registration and product listing regulations.

As you know, the bar coding final rule will require that all drug products include a NDC number in linear bar code format on their product packaging. However, the rule would also require that retail-based repackagers place their own NDC numbers on repackaged drug products, as opposed to original manufacturer NDC numbers. NACDS and HDMA are greatly concerned that implementation of this change in FDA policy will impair, not enhance patient safety. In addition, this change in policy will increase product procurement expenses to pharmacies and, more importantly, result in increased prescription costs to patients. Finally, such a change will create serious administrative and technological issues for the entire pharmaceutical distribution system including pharmacists, pricing database companies, pharmacy software vendors, claims processing switches, and distributors. At worst, we are deeply concerned that these challenges could sharply reduce or jeopardize the current \$3 billion domestic retail repackaging industry.

¹ Food and Drug Administration, Bar Code Label Requirement for Human Drug Products and Biological Products; Final Rule; 69 Fed. Reg. 9120 (February 26, 2004).

FDA Has Historically Sanctioned Use of Manufacturer NDC Numbers on Repackaged Retail Drug Products.

The FDA has historically allowed the use of original manufacturer NDC numbers by repackagers on the product labels of retail-based repackaged drug products. As a consequence of the agency's regulatory guidance to retail pharmacy and the pharmaceutical distribution industry, it has become standard practice in the repackaging industry to use original manufacturer NDC numbers on retail-based repackaged drug products. Today, repackaged drug products are common in all segments of retail pharmacy, and represent a significant proportion of total retail drug product sold.

Pursuant to agency regulatory and enforcement requirements, retail-based repackaged drug products are prepared in strict compliance with drug Current Good Manufacturing Practices (cGMP) regulations in facilities registered with the FDA. Repackaged products are labeled with essentially the same information that appears on the manufacturer's original label, including drug name (proprietary and generic), package insert, and the original manufacturer NDC number. In relevant draft guidance, the agency has confirmed that repackaged drugs are compliant with the Federal Food, Drug and Cosmetic Act (FFDCA) if the "repackaged containers are labeled with the same substantive labeling declarations as the incoming bulk finished drug product concerning the properties and use of the drug product as required under 21 C.F.R. Part 201."²

In *United States v. Kaybell, Inc.*, the Federal Appeals Court found that repackaging is a reasonable practice distinguishable from drug marketing and manufacturing conducted by a manufacturer holding a New Drug Application (NDA), and does not require the repackager to secure approval of a separate NDA for a repackaged drug.³ The use of original manufacturer NDC numbers for repackaged drug products is consistent with the court's view that requiring repackagers to submit their own NDAs "would require an unwarranted distortion of the normally understood meaning of this rather simple language either to characterize the product marketed by the appellants as a drug different from the 'new drug' for which approval already had been obtained or to construe the statute as requiring more than one application and approval for the same 'new drug.'"⁴ The agency also acknowledges in its drug cGMP compliance guidance that:

"[C]onsistent with its enforcement policy subsequent to the *Kaybel* decision, the agency does not intend to initiate regulatory action with regard to the repacking of already-approved, solid oral dosage form drug products if... the drug to be repacked is approved under sections 505 and 507, and... the labeling used for the repacked product is identical

² Center for Drug Evaluation and Research, Compliance Draft Guidance, Repackaging of Solid Oral Dosage Form Drug Products, February 1, 1992, at 5.

³ 430 F. 2d 1346 (3rd Cir. 1970).

⁴ 430 F. 2d at 1347.

to that of the approved drug except for labeling changes necessary for compliance with section 502(b) of the Act.”⁵

To obtain appropriate regulatory guidance on drug repackaging, NACDS initiated a discussion with FDA in 1997 on the specific issue of the use of original manufacturer NDC numbers on retail-based repackaged drug products. At that time, the agency determined that, because 21 C.F.R. 201.2 provides that use of an NDC number is optional, the FDA would “not return repackers drug listing forms that use the manufacturer’s NDC/labeler code on the product label.”⁶ Under FDA regulations, “The National Drug Code (NDC) number is requested but not required to appear on all drug labels and in all drug labeling, including the label of any prescription drug container furnished to a consumer.”⁷ FDA also wrote to NACDS that “we agree that the use of manufacturers NDC/labeler code by repackagers should be thoroughly examined and we are currently reviewing the issue. There will be an opportunity for public comment in this arena at the appropriate time.”⁸

Regrettably, this commitment was not fulfilled during promulgation of the bar coding final rule. Omission of the policy change relating to manufacturer NDC numbers in the March 14, 2003 bar coding proposed rule precluded any opportunity for public comment, and may render imposition of the new requirement violative of notice and comment rulemaking requirements under the Administrative Procedure Act (APA).⁹ The agency arguably failed to provide sufficient detail or rationale to permit “interested parties to comment meaningfully”¹⁰ on the proposed change in FDA policy requiring use of original manufacturer NDC numbers, preventing development of an adequate administrative record on which the agency could rely in substantiating its decision.¹¹

⁵ FDA Office of Regulatory Affairs, Compliance Policy Guides Manual, Chapter 4-Human Drugs, Sec. 446.100 Regulatory Action Regarding Approved New Drugs and Antibiotic Drug Products Subjected to Additional Processing or other Manipulations (CPG 7132c.06), issued January 18, 1991.

⁶ Letter from Kathy P. Miracco, Deputy Director, Division of Prescription Drug Compliance and Surveillance, Center for Drug Evaluation and Research, FDA, to John M. Coster, NACDS, August 24, 1997.

⁷ 21 C.F.R. 201.2

⁸ Letter from Kathy P. Miracco, August 24, 1997.

⁹ The APA requires that a reviewing court “hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” APA § 706(2)(A).

¹⁰ *Fertilizer Institute v. U.S. E.P.A.*, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

¹¹ While judicial review of agency rulemaking is focused and restricted, and does not permit the court to substitute its judgment for that of the agency, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S.402 at 416, 91 S.Ct. at 823 (1971), “[n]evertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicles Manufacturers Ass’n v. State Farm Mutual*, 463 U.S. 29, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983),(citation omitted).

It is notable that no express consideration was given to the substantial economic impact of the policy change in either the proposed or final rules, nor were any comments on the proposed rule submitted concerning the mandatory use of repackager NDC numbers on repackaged drug products in the retail pharmacy setting.

Mandatory Use of Repackager NDC Numbers on Repackaged Retail Drug Products is Not Necessary

While NACDS and HDMA fully acknowledge FDA's authority under the FFDCA and the Public Health Service Act to issue the bar coding final rule, we are greatly concerned by the lack of public discussion of the use of original manufacturer NDC numbers on retail-based repackaged drug products.

Contrary to the commitment made in 1997, and absent discussion of this new requirement in the bar coding proposed rule,¹² the FDA required in its bar coding final rule that:

“As for entities that repack or relabel drugs, if a repacker, relabeler, or private label distributor is subject to the establishment registration requirement at section 510 of the act, then that person would also be subject to the bar code requirements. We would expect that repacker, relabeler, or private label distributor to use its own NDC numbers on its products. In other words, a manufacturer, repacker, relabeler, or private label distributor must not use an NDC number that is not assigned to it. Use of another establishment's NDC number in the bar code would cause the product to be misbranded under section 502(a) of the act (21 U.S.C. 352(a)) because the drug's label would be misleading.”¹³

The agency should be aware that use of repackagers' NDC numbers is not necessary or desirable to identify repackaged products as such. In conformance with FDA's existing regulatory requirements, repackaged drug products are clearly identified as such on their labels. In addition to most of the original manufacturer's information, a repackaged drug product specifically identifies the name of the repackager and its contact information in the event there is an issue or question from retail pharmacies concerning the repackaged product (e.g., complaint, recall, etc.). As FDA acknowledged in the final rule:

“[S]ection 502(b)(1) of the Act declares a drug to be misbranded if its label does not contain the name and place of business of the manufacturer, packer, or distributor, while section 502(e)(1)(A) declares a product to be misbranded if its label does not contain the drug's established name, quantity or proportion of each active ingredient. In short, the bar code, and the NDC number contained in the bar code, act more as a link between the drug, the patient, and the patient's drug regimen and do not act as a surrogate for the drug's label.”¹⁴

¹² 68 Fed. Reg. 12500 (March 14, 2003).

¹³ 69 Fed. Reg. 9123.

¹⁴ 69 Fed. Reg. 9140.

There are also procedures in place that would allow, for example, of recall of only particular lots of an originator manufacturer's product that has been repackaged, rather than all of the originator manufacturer's product lots. That is, if there is a recall (which is usually done by lot number), the repackager knows whether they purchased that product, and to whom it was resold. Pharmacies then would be able to identify whether the repackaged product is subject to the recall because the repackager included the originator manufacturer's lot number, or unique lot number traceable to the manufacturer's original lot number, on the repackaged product. This would allow for a recall of only certain lot numbers of the product, which obviates the need to recall all manufacturer's product from the market.

Mandatory Use of Repackager NDC Numbers on Repackaged Retail Drug Products Cannot Be Implemented Without Potentially Degrading Patient Safety and Creating Additional Excessive Costs to Patients, Providers and Payers

In retail pharmacy settings, repackaging provides many significant benefits to the practice of pharmacy and to patients. Requiring a repackager to place its own NDC number in a bar code format on products repackaged for retail use will adversely affect or eliminate those benefits. NACDS and HDMA agree that the use of the appropriate NDC number in a bar code format for prescribed drugs can still add value. But to achieve these benefits, the NDC number must be correctly read by pharmacy computer systems to identify the specific drug being prescribed.

A. Retail Pharmacy Supply, Dispensing, Payment and Reimbursement Systems Cannot Be Modified Without Excessive Cost, Delay and Potential For New System Errors

Today, as the result of longstanding FDA guidance and universal commercial practice, retail pharmacy supply, dispensing, payment and reimbursement systems rely upon use of the original manufacturer's NDC number. Retail pharmacy computer systems use the original manufacturer's NDC number to determine what product is identified for dispensing purposes. At this time, in the retail pharmacy setting, repackager NDC numbers cannot be used in these systems, nor can these systems be modified to accommodate use of such numbers without lost savings and efficiencies, substantial costs, delay and unnecessary potential for system errors affecting patient safety.

It has been suggested that retail pharmacy systems might be technologically modified to automatically link repackager NDC numbers to original manufacturer NDC numbers. An analogy has been made to the ability of pharmacy systems to list all different versions of generic drugs in the computer system by simply entering in the generic name of the drug. While conceptually attractive, it is essential to recognize that at this point, there are several technological reasons why this cannot be implemented for repackaged brand name drugs. First, each generic company has an assigned NDC code which it maintains, and which is recognized by database companies, software vendors, and third party payers as useable and billable codes for the dispensing of generic drugs. This is not the case with repackaged drugs.

Second, standard codes exist among database companies and software vendors that allow for the listing of all the various generic and branded versions of a multiple source drug through what is known as a “GCN”, or a generic sequence number. Thus, as a new generic version comes to market, this new generic not only has its own NDC, but it is also assigned into a GCN that lists all the generic versions together.

When a specific generic version is chosen from among the list by the pharmacist filling the prescription, that specific generic is recognized by the system based on the NDC number for patient safety checks, and is then billed to the third party payor. This NDC number is recognized by database companies, PBMs, insurance companies, Medicaid, and pharmacy software systems.

For this to be accomplished for repackaged drugs, each would have to be assigned an NDC number, and this number would have to be maintained by the repackagers and recognized by database companies, PBMs, insurance companies, Medicaid, and pharmacy software systems. This is generally not the case. That is because the entire pharmacy distribution system has been using the originator manufacturer’s number for these billing purposes. Pharmacies do not want to be placed in the position of dispensing one repackager’s product but billing for the originator because that would be the only product recognized by the system.

Introduction of these multiple repackagers into the marketplace, for which no reimbursement metrics exists (i.e. AWP, WAC, etc.) would create significant disruption in the pharmacy supply chain. Pharmacies cannot bill and payers cannot reimburse without these metrics, which these repackagers do not establish, and are not included in pharmaceutical pricing database sources.

Moreover, there are literally dozens of diverse systems used by the retail pharmacy sector, ranging from highly sophisticated, integrated nationwide information systems to numerous unique, stand-alone systems used by independent pharmacies. In addition, listing repackaged products manually (until a standard link could be developed) would introduce another measure of error into the patient safety system, since all these repackaged products would have to be manually linked and continuously updated.

In theory, a technological solution to this problem is possible. However, in addition to substantial expense, which could be prohibitive to smaller retail pharmacies, it is unreasonable to expect retail pharmacies and the repackaging industry to restructure or adopt these many systems in the near future, thus necessitating the need for more time to determine the feasibility of such an approach. Moreover, there is some serious questions as to whether repackagers could remain in the market and afford to pay rebates to Medicaid (which are based on NDC codes), which may result in the elimination of retail-based repackaging.

B. Mandatory Use of Repackager NDC Numbers Will Eliminate Potential Transactional Efficiencies and Hinder Third-Party Reimbursements

If retail repackagers are required to use their own NDC numbers in a bar code format, there would be a marked increase in the number of identical products on the market with multiple NDC numbers.

Where pharmacies would potentially gain tremendous efficiencies by scanning a drug's bar code into the pharmacy computer system to automatically "populate the fields" with information relating to drug name, NDC number, and appropriate billing information for third party payers, this will not be possible if repackagers are required to use their own NDC numbers. Under the FDA's proposed change in policy, all third party health care payers will have to load multiple NDC numbers to adjudicate and reimburse prescriptions. With different repackaged products bearing different cost bases for such entities, it would be difficult if not impossible to restructure prescription payment systems nationwide to accommodate this change.

Moreover, with different NDC numbers referring to the same drug product, third party payors will also more frequently reject payment for previously authorized and dispensed products when they are submitted for refill. The dramatic increase in legitimate NDC numbers in use will correspondingly increase the likelihood in processing errors due to a failure to recognize repacker NDC numbers, causing claim rejections and putting patients in the position of paying out-of-pocket for covered medications or doing without their maintenance medications.

C. Mandatory Use of Repackager NDC Numbers Will Increase Potential For Medication Errors and Diminish Benefits to Patient Safety From FDA's Bar Code Rule

Similarly, use of multiple NDC numbers for repackaged drug products will serve to diminish the potential benefits to patient safety through NDC-based record checks and drug use review operations, such as ensuring against overdosing and underdosing, adverse reactions with other medications, and therapeutic duplications. Systemic use of multiple NDC numbers may greatly increase the potential for medication errors. Pharmacists will be required to inefficiently and manually choose between multiple options of the same product, e.g., Motrin 800mg by Pharmacia or Motrin 800mg repackaged by 5 different repackagers. The more NDC numbers in use for the same product across the country, the greater the chance that data entry errors will occur across the many pharmacies that use repackaged products.

The existence of multiple NDC numbers for the same manufacturer's product will render it impossible for many pharmacy prescription processing systems to determine that these are all essentially the same product, only repackaged. The process of refilling prescriptions will also be greatly complicated and unnecessary opportunities for confusion may be created. Where a prescription today may be filled with one repackaged product, upon a patient's return, a different repackaged product (or the original manufacturer's product) may be the only item available.

By scanning the bar code, pharmacists should be able to determine that a drug product to be dispensed matches the product that was originally dispensed to that patient. Under the FDA's proposed change in policy in relation to NDC numbers, however, pharmacists will be unable to use the bar code to validate whether these are the same products. In fact, using the bar code will give the pharmacist no information or, worse yet, wrong information, e.g., that these products are not the same.

Use of multiple NDC numbers in drug product bar codes will also greatly complicate the ability of retail pharmacists to update patient records to reflect the use of repackaged products.

Prescription records may be rendered inaccurate because new records would have to be created to reflect use of different products with different NDC numbers. This will create confusion on the part of pharmacists and patients alike, create substantial unnecessary work for understaffed pharmacists, and potentially compromise patient safety.

The FDA's proposed change in policy towards NDC numbers will also result in additional complications with respect to adverse event reporting and use of MedWatch by retail pharmacies, and could raise novel questions by state regulators concerning state pharmacy recordkeeping or dispensing requirements. For example, some states require pharmacies to list NDC numbers on the patient labels of dispensed drugs. Should a patient interpret a different NDC number on a refilled prescription to be a medication error, the patient may not take or delay taking an essential medication. All of these issues are avoidable consequences of a change in FDA policy that may diminish the potential benefits to patient safety and health care efficiency from the agency's bar code final rule, and render it more difficult for retail pharmacists to provide better, more efficient care and services to patients.

D. Mandatory Use of Repackager NDC Numbers Will Trigger Medicaid Drug Rebate Requirements to Detriment of Retail Repackagers, States and Federal Government

Mandatory use of repackager NDC numbers will also place an insuperable burden on retail repackagers due to the Medicaid drug rebate requirements under section 1927 of the Social Security Act. Because state Medicaid payments and calculations are linked to NDC numbers, repackagers would be newly obliged to pay substantial rebate fees, at a statutory minimum of 15.1 percent of original manufacturer sales price. Congress intended drug manufacturers, not retail repackagers, to bear the obligation to pay quarterly rebates on single source and innovator multiple source drugs to the states and the Medicaid program. In 2003, the median profit margin of nine large drug firms on the Fortune 500 was 14 percent to 15 percent;¹⁵ in contrast, retail repackager net profits currently range from 1 to 2 percent.

It is likely that the change in FDA policy will also create complications in accurate billing, rebate collection and reconciliation for manufacturers, repackagers, state Medicaid programs and the Centers for Medicare and Medicaid Services (CMS). Moreover, because Medicaid drug payments cannot be made without a rebate agreement between manufacturers -- or, under the change in FDA policy, retail repackagers -- and CMS, retail repackagers will either be denied Medicaid payments for their products or simply forced out of this business by economically prohibitive Medicaid rebate obligations.

We are deeply concerned that requiring retail repackagers to place their own NDC numbers in a bar code format (or otherwise) on repackaged drug product labels most likely will result in the sharp reduction or elimination of this type of repackaging.

¹⁵ Fortune, "The Fortune 500," April 5, 2004.

Drug inventory is one of the most costly pharmacy expenses, and elimination of retail drug repackaging would substantially increase the average pharmacy's costs of doing business, raise the cost of buying drug product, and impair the efficiency of the pharmaceutical distribution system. As the Office of Management and Budget acknowledged in 2001:

“There is a possible risk that some manufacturers and repackagers... would eliminate such types of packaging and only supply their products in bulk containers... Consequently, a manufacturer or repackager who wanted to reduce its expenses might decide to reduce the number of packages, particularly individual unit dose packages, that would be subject to a bar coding requirement.”¹⁶

Alternatives to the Mandatory Use of Repackager NDC Numbers on Repackaged Retail Drug Products Would Better Serve Patient Safety and Fulfill FDA's Policy Objectives

In follow up to our discussions with the agency, NACDS and HDMA will convene a Technical Working Group to collaborate with and provide the FDA with various policy alternatives to address this situation.

For example, in the course of our discussions with the FDA, several potential policies have been discussed, including the possibility of labeling repackaged drug products with two NDC numbers. But as the FDA noted in the context of hospital bar coding of drug products, the use of two sets of bar codes “could result in labeling errors”.¹⁷ NACDS and HDMA believe the use of two human readable NDC numbers would still create a novel and unavoidable potential for pharmacist or system errors in retail pharmacy supply, dispensing, payment and reimbursement.

We believe that other possibilities warrant consideration, including enhancements to the agency's current policies for the creation and assignment of NDC numbers,¹⁸ and consequently the inclusion of more descriptive or useful NDC numbers in the UCC/EAN standard bar code format. As the FDA stated in the preamble to its March 2003 bar coding proposed rule¹⁹ and in the final rule, the agency “intend[s], through a separate rulemaking, to change the NDC number so that it becomes a unique identifying number for listed drugs.”²⁰ Development of a numeric suffix or prefix or changes to the coding of NDC numbers may accomplish the FDA's desired policy with respect to repackaged drug products; as noted in the Uniform Code Council's recent comments to the FDA, NDC numbers already allow for the identification of varying packaging

¹⁶ 66 Fed. Reg. 61125 (December 3, 2001) at 61174.

¹⁷ 69 Fed. Reg. at 9131.

¹⁸ “[W]e have not yet issued a drug establishment registration and listing proposal (which would include provisions regarding possible regulatory changes to the NDC number)...” 69 Fed. Reg. at 9147.

¹⁹ 68 Fed. Reg. at 12507.

²⁰ 69 Fed. Reg. at 9132.

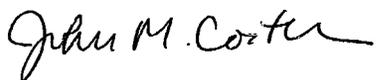
of the same medical products.²¹ Our Technical Working Group will be evaluating these proposals expeditiously and will seek to interact with relevant agency staff developing the drug listing rule to suggest alternatives. In the interim, NACDS and HDMA respectfully suggest that the FDA exercise its enforcement discretion by continuing its longstanding policy towards use of manufacturer NDC numbers on repackaged drug products until it can review the issue in greater detail, provide an opportunity for public comment as promised to the retail pharmacy and pharmaceutical distribution sectors in 1997, and address the issue comprehensively as part of its pending rulemaking to revise the agency's drug establishment registration and listing regulations. As the agency disclosed in the bar coding final rule,²² it:

“intend[s] to revise our drug establishment registration and listing regulations to make the NDC number unique and more useful to informational databases, whether those databases are created to prevent medication errors, to obtain the latest information about a drug, or to track drug use and distribution. We are still preparing the proposed rule, and when we publish it in the Federal Register, we will invite comment on our proposed NDC number changes.”

Conclusion

NACDS and HDMA greatly appreciate your willingness to discuss these issues of mutual concern, and plan to work diligently with you to address this issue in a more comprehensive manner. We would welcome the opportunity to assist the agency in developing alternatives to use of original manufacturer NDC numbers on retail repackaged drug products and in addressing this issue conclusively in the pending rulemaking on drug establishment registration and product listing. We look forward to discussing this information with you, and please contact John Coster at NACDS or Jane Clowers at HDMA with any questions or concerns.

Sincerely,



John M. Coster, Ph.D., R.Ph.
Vice President, Policy and Programs
National Association of Chain Drug Stores



Lisa Clowers
Senior Vice President, Industry Relations
Healthcare Distribution Management Assoc.

cc: Tom McGinnis, FDA Office of Policy

²¹ Uniform Code Council, Comments on Bar Code Label Requirements for human drug products, Docket No. 02N-0204, August 29, 2002. (“The Indicator in an EAN/UCC-14 identification number allows... identifying similar trade units in different packaging configurations. One NDC can be used on different packaging levels of the same item by varying the Indicator.”)

²² 69 Fed. Reg. 9133.