

NACDS

NATIONAL ASSOCIATION OF
CHAIN DRUG STORES

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December 22, 2003

Docket Management Branch (HFA-305)
Food and Drug Administration
5630 Fishers Lane, Rm. 1061
Rockville, MD 20852

RE: Docket No. 2003D- 0478; Draft Guidance Marketed Unapproved Drugs—Compliance Policy Guide

To whom it may concern:

The National Association of Chain Drug Stores (NACDS) is pleased to submit comments regarding the draft compliance policy guide (CPG) for Marketed Unapproved Drugs that will describe how the FDA intends to exercise its enforcement discretion regarding these products. NACDS is the national trade association representing chain community pharmacy. Our members include over 210 retail chain community pharmacy companies that operate more than 35,000 pharmacies and dispense about 70 percent of the 3.2 billion prescriptions dispensed nationwide.

Target Drugs with Potential or Demonstrated Safety or Effectiveness Problems

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NACDS appreciates the agency's detailed description of its enforcement policies for manufacturers of prescription drugs containing one or more ingredients that have not been approved for marketing (e.g., DESI drugs), and may lack data demonstrating safety and effectiveness. Many of these ingredients are often used in combination to create "new products", when in fact they are simply a new combination of existing ingredients.

It would appear that the validation of safety and effectiveness for many of these products, while never officially recognized through the FDA approval process, has come through years of actual clinical experience. To that end, we concur with the agency that the criteria for enforcement actions should include drugs that present potential safety risks, those that lack evidence of effectiveness and those that constitute health fraud.

Economic Impact Should be Considered

We agree with FDA's position that if some of these products are to be removed from the market, or required to obtain approval to continue to be marketed, the process should be completed without adversely affecting public health or the quality of health care, imposing undue burdens on patients, or unnecessarily disrupting the market. Obviously, products that are clearly harmful to patients, or that represent fraud, should have highest priorities for enforcement action.

We also believe, however, that the agency should assess the economic impact of its enforcement action on patients. Removal of certain prescription products from the market could result in economic hardship for some patients. While never receiving official FDA marketing approval, many patients could be stabilized on some of these medications, and alternative products could be more costly.

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We realize that the FDA might not always consider economic factors when planning and implementing enforcement action. However, since many of the products that may be targeted are available as alternatives are likely more cost-effective than more expensive brand name drugs, we urge you to consider the impact that their removal will have on the overall cost of health care.

Process Should Not be used to Seek Competitive Advantage

The enforcement process outlined in this draft compliance guide should not be used by manufacturers to seek competitive advantage in the market by eliminating competitor products. For example, manufacturers of unapproved drugs may voluntarily seek approval of their product through an NDA or paper NDA route to try and eliminate competition. That is, by obtaining approval of the first NDA for the unapproved product, it requires that other similar products go through the approval process or be removed from the market.

By eliminating the availability of less expensive prescription products, patients may be forced to use more expensive prescription or brand name products. Other companies that make or distribute these products – many of which are smaller and may only have limited financial resources – may not have the financial ability to file an ANDA with the agency to remain on the market once the filer of the NDA has been approved. This reduces competition, limits options, and increases health care costs. All this may result without any increase in safety, given that the products in question may have already demonstrated safety in years of clinical experience.

Process Must Allow Sufficient Time to Remove Products from System

We understand that the FDA intends to review the products and proceed with enforcement action on a case by case basis. In the past, the FDA has used various enforcement timelines in removing unapproved drugs from the market when products compete with a newly-approved product that had also been previously unapproved. For example, the enforcement actions taken against manufacturers producing single-ingredient long acting guaifenesin was different from the enforcement action taken when levothyroxine was removed from the market. While both instances involved approval of manufacturer NDAs for drugs that had been unapproved and marketed under DESI standards in the past, the grace period extended to unapproved manufacturers to remove the product from their shelves and for patients to be switched to a different product was different. According to the draft guidance, levothyroxine was phased out over a longer period of time because they were considered to be medically necessary products. While levothyroxine may be used to treat a more serious medical condition than cough preparations, the definition of “medically necessary” really is a function of the needs of patients. Many physicians, pharmacists, and patients may consider long-acting guaifenesin products to be “medically necessary.”

Nevertheless, medical necessity should not be the only criteria used in determining the length of the grace period, since in many instances patients and pharmacies purchase and return products in the same manner regardless of the usefulness or indication of the product.

Therefore the FDA should phase products out of the market in a manner that is logical and reflective of market. The process should provide retailers with some recourse to dispose of remaining products. Furthermore, we encourage continued publication of the Agency's intentions in the *Federal Register* to allow for appropriate responses by patients, physicians and pharmacists.

Actions Could Impair Quality of Care, Create Confusion

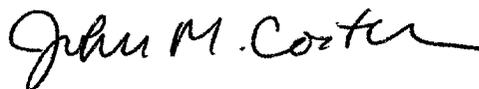
NACDS is sensitive to the FDA's concerns about the integrity of the approval system to avoid risks associated with potentially unsafe or ineffective drugs. Actions to remove certain unapproved drugs from the market could disrupt the pharmaceutical marketplace, resulting in more confusion regarding product formulation changes, and the potential for patient harm. Although enforcement actions may be intended to halt marketing of unapproved drugs, the result may simply be an interruption. In fact, the removal of certain drugs may result in more safety problems, not less.

A case in point is the recent marketing of a new combination of DESI ingredients by a pharmaceutical company whose original product had to be withdrawn because of the approval of another manufacturer's similar product's NDA. This occurred in response to the recent removal of all long-acting single ingredient guaifenesin products from the market. Another company, which did not seek approval for its original product, simply changed its formulation to add another DESI drug to its product, but did not change the name of the product. Thus, the company is marketing a different combination of DESI drugs under the same name as another single ingredient DESI product that it had to remove from the market. This can create a dangerous situation for physicians, pharmacists and patients who may still assume that the drug contains the original ingredients since the company did not change its name.

Companies should be required to change the name of the product as well as the NDC number any time there is a formula change. This will help avoid the confusion that will result after FDA makes a determination that certain products have to be removed from the market. Unfortunately, patients are not always aware of the exact product that has been approved, and payers who pay claims based on NDC numbers may end up paying for products that are unapproved and unsafe. Enforcement actions must be thorough enough to prevent simple interruption and reintroduction of potentially unsafe products as well.

We appreciate the opportunity to comment on this important issue. Please contact me directly at 703-837-4126 if you have any questions.

Sincerely,



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