American Pharmacists Association

November 23, 2022

Dockets Management Staff (HFA–305)
Food and Drug Administration (FDA)
5630 Fishers Lane, Rm. 1061
Rockville, MD 20852

RE: Docket No. FDA–2021–N–0862: Nonprescription Drug Product With an Additional Condition for Nonprescription Use, Proposed Rule

Submitted via w**ww.regulations.gov for** Docket No. FDA–2021–N–0862

Dear FDA staff:

The American Pharmacists Association (APhA) is pleased to submit comments on the FDA's proposed rule entitled "Nonprescription Drug Product with an Additional Condition for Nonprescription Use." Under this proposed rule, FDA would establish requirements for marketing a nonprescription drug product with an additional condition for nonprescription use (ACNU) that ensures patients can self-select and/or appropriately use a medication without the supervision of a healthcare practitioner. APhA supports FDA's efforts to allow greater access to certain prescription and nonprescription medications, however, we have significant concerns with the proposed rule as written. The proposed rule fails to recognize the essential role a pharmacist plays in assessing appropriate use and dispensing of medications and it does not adequately address the significant operational and logistical issues associated with implementation of the proposed rule as written.

APhA is the only organization advancing the entire pharmacy profession. APhA represents pharmacists, student pharmacists, and pharmacy technicians in all practice settings, including but not limited to community pharmacies, hospitals, long-term care facilities, specialty pharmacies, community health centers, physician offices, ambulatory clinics, managed care organizations, hospice settings, and government facilities. Our members strive to improve medication use, advance patient care, and enhance public health.

We outline our concerns with the proposed rule below:

Simultaneous marketing of prescription and non-prescription drug products and failure to include a pharmacist creates confusion and limits access

Proposed 314.56(d) would allow concurrent marketing of a prescription and nonprescription

version of the same drug. Although the proposed rule anticipates this provision "would ensure greater access to needed drugs by providing flexibility in how to obtain them," implementation faces many challenges and is currently unworkable. The proposed rule states on page 38319 that if a patient cannot access the ANCU or live near a pharmacy that has the product and a kiosk or is not comfortable with technology, they may find it easier to get the drug though a prescription. On page 38319, the proposed rule states that "[p]atients who had not previously used the drug may also feel more comfortable initiating treatment and obtaining the drug with the involvement of their healthcare providers." However, a recent study confirms that 9 out of 10 Americans live within 5 miles of a community pharmacy.[1] Community pharmacies are significantly more accessible than other healthcare providers and prescribers and an appointment is often not required. A pharmacist is a licensed and trained healthcare provider and the medication expert on patient care teams. A pharmacist can perform an assessment of the patient and ask appropriate questions to determine if the nonprescription drug is appropriate for use for a specific patient. No technology is needed for such an assessment. In fact, across the country, most state laws authorize pharmacists under their license to initiate treatment independently, or under statewide protocol, for a host of drugs and conditions, including hormonal contraception, testing and treating certain infectious diseases (e.g., flu, strep, COVID-19) and uncomplicated minor ailments, tobacco cessation, HIV PEP/PrEP, opioid antagonists, and more. If FDA has confidence that a patient with no medical training can answer questions to self-assess, then it is unclear why a pharmacist would not be an appropriate healthcare provider to determine appropriate use based on their training and expertise.

The need for a patient seeking medication to have to meet qualifying criteria of the ACNU to self-select, when there is another marketed version of the same drug that requires a prescription, underscores the patient safety imperative for involving pharmacists in the delivery of care in this new self-selection process. As an essential member of the comprehensive healthcare team, APhA believes pharmacists must play an integral role in assisting patients to determine whether a particular nonprescription drug product with an ACNU is appropriate for each individual patient's healthcare needs.

In fact, what is set up under this effort is a type of "restricted distribution," for certain nonprescription drugs relying on various sections of the Food Drug and Cosmetic Act (FD&C

[1] Berenbrock, L, Access to community pharmacies: A nationwide geographic information systems cross-sectional analysis, Journal of the American Pharmacists Association 62 (2022) 1816e1822, July 12, 2022. https://doi.org/10.1016/j.japh.2022.07.003 (accessed 11/22/2022).

Act), in particular 502(f). The legal theory described in the proposed rule supports an ACNU self-assessment process as a condition of adequate conditions for use. Accordingly, we urge the agency to consider applying this exact theory to support including the pharmacist in the patient assessment process to determine appropriate and/or actual use and access to the appropriate drug product.

Proof that a patient fulfilled an ACNU creates logistical and operational issues

The proposed rule states, in several places, that the ACNU must be fulfilled before the patient can access the nonprescription drug approved with an ACNU. For example, at 201.130(a)(1), FDA states "You must complete this extra step to see if the drug is safe for you before you use it. Do not take this drug without completing this step." and alerts consumers that the nonprescription drug with an ACNU has a requirement that must be fulfilled to ensure safe and effective use.[2] Furthermore, the preamble states that "[u]nder the proposed rule, a nonprescription drug with an ACNU must only be made available to the consumer after the ACNU has been fulfilled by the consumer"[3] and that it would be a violation of the FD&C Act to make it available without an ACNU.[4] However, the proposed rule does not describe how this would or should be confirmed prior to a sale.

For the reasons stated immediately above, as well as other references in the proposed rule, it appears that patients would be required to provide proof they have done the self-assessment. As such, if pharmacies/sellers would need to verify that a patient has appropriately fulfilled an ACNU for a drug product, steps would need to be taken to confirm proof the patient completed the ACNU self-assessment to comply with the regulation. This would require significant modifications to point-of-sale systems to create a "stop," for the sale. Alternatively, pharmacies/sellers would put these products behind the counter. If they are behind the counter, patients would not have access to read the labeling, or know that the product is available, or that it has an ACNU and how to access the ACNU.

The proposed rule is unclear about whether the pharmacy/seller is required to document that they have received or seen proof that the patient successfully fulfilled the ACNU. It is also unclear if FDA intends these products to only be sold in pharmacies, or any retail establishment. There are several places in the proposed rule that seem to infer that these drug products will be sold in a pharmacy setting, but it is not explicitly clear. Questions regarding suitability of a drug product for individual patients cannot be answered by a convenience store attendant, who

[2] *See e.g.*, 87 Fed. Reg. at 38323.
[3] *Id.* at 38324.
[4] *Id.*

likely will not understand the importance of fulfilling the ACNU prior to purchase. In addition, outside of a pharmacy setting, the patient's medication history would be unknown, which could lead to potential medication errors as retailers without pharmacists would not be in a position to assess whether the product is appropriate for the patient.

Lack of a standard ACNU implementation creates operational challenges

The proposed rule sets up a program that could create chaos in the marketplace for ACNU products. Although 314.56(c)(1)(vii) proposes to require the applicant to describe the specific way an ACNU will be operationalized, the preamble states that "[t]he ACNU can be operationalized in different ways provided it reliably meets the objective."[5] The preamble notes the ACNU can be operationalized as a questionnaire at a kiosk in a pharmacy, on a mobile app, over the telephone, or website, and the patient could get a coupon, voucher, or barcode to prove that they fulfilled the ANCU and the product is appropriate for them. The preamble also states it is acceptable for an applicant for a generic product to propose a different way to operationalize the ACNU than the reference listed drug (RLD) holder.[6] Pharmacies do not have room or floor space to put in place multiple kiosks from different manufacturers. Additionally, if there are generic versions of the same product in the marketplace with an ACNU, it is unclear if a patient can purchase a product if a pharmacy/seller stocks a different brand than the ACNU the patient fulfilled. It is unreasonable to tell a patient that they cannot purchase a product that is in stock because they took the wrong self-assessment test and expect them to go without needed treatment, which is another reason that a pharmacist should be involved in the patient's assessment for appropriate use. APhA requests FDA provide clarification or guidance in this situation. FDA should also provide guidance to standardize the self-selection process, questionnaires/assessment forms, the format (bar or QR code, coupon, voucher, etc,.) for patient proof of fulfilling the ACNU, and technological or other automation solutions that patients will utilize to receive medications under an ACNU.

APhA also urges manufacturers and FDA to include pharmacists' input in the development and adoption of the technology and standardized processes under this new ACNU category of drugs under FDA's defined conditions of safe use. We also encourage FDA to revise the proposed rule to involve practicing pharmacists in the ACNU assessment process for nonprescription drug products with ACNU information that will support pharmacists in assessing and counseling patients seeking these drugs.

[5] *Id.* at 38320.
[6] *Id.* at 38321.

Liability burden shift to pharmacies/sellers is unclear

We also have concerns for potential liability pharmacists and/or pharmacies and other sellers may incur if nonprescription drugs with an ACNU are sold without proper pharmacists' oversight and assessment. The proposed rule states "a nonprescription drug product approved with an ACNU would be an unapproved new drug if it is made available to consumers without the ACNU," recognizing that it would be a violation of sections 301(d) and 505(a) of the FD&C Act to introduce or deliver for introduction into interstate commerce an unapproved drug.[7] It is unclear by this statement if a pharmacist, pharmacy, or other seller would be held legally responsible if they sold a product without accepting proof that an ACNU was fulfilled by the patient and that the product was appropriate for them.

Proposed section 201.67(e)(2) states that the product is misbranded under the FD&C Act if the ACNU is not implemented by the applicant as approved by FDA in the application. It is unclear what FDA means to "implement the ACNU." Does this mean that the applicant only has to make the ANCU available, or does it mean that implementation includes the steps the pharmacy/seller must take to ensure the ANCU was fulfilled? In addition, if the ANCU is fulfilled, does this mean the product is appropriate for the patient? What if a pharmacist is aware that the patient has an underlying condition or drug interaction, but the patient presents proof that they fulfilled the ACNU and attempts to purchase the product? Could the pharmacist withhold access, or would that then create a barrier to access that is reportable to the FDA? APhA requests FDA address these questions before moving forward with an ACNU.

Reporting and recordkeeping burden on pharmacies/sellers is unreasonable

Section 314.81(b)(3)(v) in the proposed rule would establish reporting and recordkeeping requirements related to the ACNU, including "any event that results from a deviation in an applicant's implementation of the ACNU that may cause or lead to inappropriate medication use or consumer harm." All failures would need to be reported, and under section 314.81(b)(3)(v)(A)(iv), this would include whether "(1) the consumer accessed or used the drug product without successfully fulfilling the ACNU; (2) the consumer successfully fulfilled the ACNU but could not access or use the drug product; or (3) the consumer was unable to make an attempt to fill the ACNU..." Furthermore, the proposed rule would require each pharmacy/seller to report and record each and every individual failure. FDA is placing a tremendous burden on the pharmacy/seller to report and record each incident of failure, or lack of access for any product they sell that has an ACNU. Not only will the pharmacy/seller have to keep track of how to report ACNU failures for each manufacturers' products, and set up a

[7] *Id.* at 38325.

recording system, if finalized, this proposal exposes pharmacies to multiple audits, by each manufacturer, which creates logistical and operational interruptions and distractions from patient care. FDA must simplify this proposal and the burden to document each failure should not be placed on the pharmacy/seller.

Lack of clarity if ACNU must be fulfilled with each purchase

The proposed rule anticipates that an ANCU product could be one that is for a chronic condition. If that is the case, the patient would likely be a frequent purchaser of an ACNU product. Requiring the patient to complete the self-assessment process every time they need to refill their medication adds an unnecessary step and barrier to access. Including the pharmacist in the ACNU process would alleviate this burden. APhA requests FDA clarify or provide additional guidance on this issue.

Perpetuating health inequities and barriers to care

This proposed rule fosters health inequity and barriers to care. Product labeling for nonprescription drugs is typically in English. However, there are many patients in this country whose first language is not English, or who have cognitive impairments. Furthermore, access to the technology necessary to fulfill the ACNU may not be economically feasible for many communities. APhA requests clarity from FDA on whether another individual can complete the self-assessment for patients who are unable to complete it themselves due to language barriers, cognitive and/or other impairments. FDA should also ensure access for those who do not speak English, have cognitive or other impairments, or lack access to the technology necessary to fulfill the ACNU.

Conclusion

APhA supports FDA's goal of improving patient access to needed medications. However, by leaving the pharmacist out of the patient selection process, and not addressing the multiple issues outlined in our comments related to patient access creates barriers that will only impede the success of this initiative and create confusion in the marketplace. While the proposed rule may seem logical, it is far from easy for FDA and pharmacies/sellers to implement. There are significant issues FDA needs to address related to operations and logistics for the patient and the pharmacies/sellers as the agency considers finalizing this rule.

APhA urges FDA to address the issues we raise and to provide additional guidance and opportunities for feedback. APhA looks forward to continuing to support FDA's efforts to broaden access to safe medications with the inclusion of the pharmacist in any self-selection

process. If you have any questions or require additional information, please contact Heather Boyd, Director, Health Policy at hboyd@aphanet.org.

Sincerely,

Ilisa BG Bernstein, PharmD, JD, FAPhA
Interim Executive Vice President and CEO
American Pharmacists Association