

October 18, 2009

MEMORANDUM

To: Marjorie Powell, PhRMA
From: Erika Lietzan & Jennifer Schwartz
Re: Federal and Vermont Regulation of Drug Samples

The Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 301 *et seq.* (2006), and FDA's implementing regulations impose strict requirements on the distribution, handling, labeling, and donation of prescription drug samples. The state of Vermont does not specifically regulate drug samples. Instead, manufacturers and distributors of drug samples in Vermont are subject to the general regulations applicable to drug distributors in the state.

I. Federal Regulation of Prescription Drug Samples

A. Background

The Prescription Drug Marketing Act of 1987 (PDMA), as amended by the Prescription Drug Amendments of 1992, established requirements for the wholesale distribution of prescription drugs. Pub. L. No. 100-293, 102 Stat. 95 (codified in scattered sections of 21 U.S.C.). Among other things, Congress intended that the PDMA remedy the insufficient safeguards in the drug sample distribution system. The PDMA was designed to ensure that drug products purchased by consumers are safe and effective by eliminating the risk that adulterated, misbranded, or expired drugs are sold in the United States. *Id.* To combat these problems, the PDMA placed several requirements and limitations on the distribution of drug samples.

Federal law defines a drug sample as a drug unit that is "intended to promote the marketing of a drug," and that "is not intended to be sold." 21 U.S.C. § 353(c)(1). As explained in the key report that accompanied House passage of the bill, "pharmaceutical manufacturers and distributors have a long-established practice of providing samples of their prescription drugs to physicians and other practitioners licensed to prescribe such drugs who, in turn, provide them for their patients." H.R. Rep. No. 100-76, at 12 (1987). Although samples are intended primarily as a promotional tool, Congressman Dingell, then Chairman of the House Energy & Commerce Committee, noted also that the "distribution of drug samples to patients . . . is a useful medical tool because the use of samples enables doctors to more quickly identify the appropriate drug therapy for a patient at less cost." 133 Cong. Rec. 3023-24 (1987). He added that the availability of samples can be beneficial in acute care situations and in circumstances where access to a pharmacy is difficult because of distance, time of day, or lack of transportation." *Id.*

Although FDA has not issued many formal statements about the purpose of prescription drug samples, its regulatory definition of "drug sample" tracks the statutory

definition. Specifically, a “drug sample” is “a unit of a prescription drug that is not intended to be sold and is intended to promote the sale of the drug.” 21 C.F.R. § 203.3(i). The agency’s exclusion of starter packs from the definition of “drug sample” is consistent with its wholesale adoption of the statutory definition. FDA noted that a starter pack would satisfy the second part of the definition because it is given to pharmacists free of charge and therefore intended to promote the sale of a drug. 59 Fed. Reg. 11842, 11855 (Mar. 14, 1994). A starter pack fails to satisfy the first part of the definition, however, because the manufacturer intends that the pharmacist later sell the starter pack to a consumer. *Id.* Drugs provided free of charge to physicians for their indigent patients are similarly excluded from the definition of “drug sample,” because they fail to satisfy the second part of the definition. *See* 64 Fed. Reg. 67720, 67743 (Dec. 3, 1999) (where “manufacturers make arrangements to provide prescription drugs to licensed practitioners to prescribe and dispense at no cost or at a reduced cost to indigent patients, such drugs will ordinarily not be considered samples”). The agency explained that the main objective in these situations is to ensure that patients in need of prescription drugs have access to them, rather than to promote the drug. *Id.*

B. Distribution and Donation

Only the manufacturer of a prescription drug and its authorized distributor¹ may distribute drug samples, and these persons may distribute the samples only “to practitioners [who are] licensed to prescribe” that drug. *Id.* § 353(d). The practitioner in question must complete, in advance, a written request form for the drug sample. *Id.* § 353(d)(2)–(3). The request must include the practitioner’s address, state licensing number, and signature; it must also identify the sample requested, the quantity requested, and the name of the manufacturer; and it must include a signature and date. 21 C.F.R. §§ 203.30–203.31, 203.33. A manufacturer and its authorized distributor may distribute drug samples by mail, by common carrier, or through a sales representative.² Regardless of the method of delivery, the recipient must execute a receipt form upon delivery of the sample, and the receipt form must be returned to the manufacturer or distributor. *Id.* §§ 203.30–203.31, 203.33. The manufacturer or distributor must maintain, for a period of three years, both the request and receipt forms for that distribution. 21 U.S.C. § 353(d)(2)(C).

Although a manufacturer and its authorized distributor may provide samples only to licensed practitioners, a licensed practitioner may in turn donate drug samples to a charitable institution. 21 C.F.R. § 203.39. In this situation, the donor must deliver the samples in a sealed carton, but it may deliver the samples by mail or common carrier. *Id.* Any authorized agent of the recipient institution may accept the donation. *Id.* The recipient institution must maintain a

¹ An authorized distributor is a “distributor with whom a manufacturer has established an ongoing relationship to distribute” that manufacturer’s products. 21 C.F.R. § 203.3.

² The term “distribution” does not include a licensed practitioner’s provision of a drug sample to a patient, provision by a health care professional acting under the supervision of that practitioner, or provision by a pharmacy of a hospital or other health care entity that is acting at the direction of that practitioner. 21 U.S.C. § 353(d)(1).

donation record and conduct an annual inventory of its prescription drug sample stocks. *Id.* Prior to dispensing a drug sample that has been donated, a licensed practitioner must determine that: (1) the drug is not out of date; (2) its labeling has not become mutilated, obscured, or detached from its packaging; and (3) it does not show evidence of having been stored or shipped under conditions that might adversely affect its integrity or effectiveness. *Id.* If the donated sample turns out unsuitable, the recipient institution must dispose of it. *Id.*

C. Labeling, Storage, and Handling

The label and the outside container or packaging of every sample unit must include a lot control number to enable tracking of the sample unit. 21 C.F.R. § 203.38. Each manufacturer and authorized distributor must maintain records of lot or control numbers sufficient to permit tracking of sample units to the point of the licensed practitioner. *Id.* The label of a sample unit must also clearly denote the sample unit's status as a drug sample (with phrases such as "sample," "not for sale," or "professional courtesy package"). *Id.*

Manufacturers, authorized distributors, and their representatives must "store and handle all drug samples under conditions that will maintain their stability, integrity, and effectiveness, and ensure that the drug samples are free of contamination, deterioration, and adulteration." *Id.* § 203.32.

D. Inventories and Audits

Every manufacturer and authorized distributor that distributes drug samples by means of sales representatives must conduct an annual physical inventory of its drug samples. 21 C.F.R. § 203.31(d). It must reconcile the results of each inventory with its most recently completed prior inventory. *Id.* And it must implement a sample distribution security and audit system, including conducting random and for-cause audits of sales representatives by personnel independent of the sales force. *Id.* § 203.34.

E. Investigation and Notification Requirements

A manufacturer or authorized distributor that has reason to believe that any person has falsified drug sample requests, receipts, or records, or is diverting drug samples must: (1) notify FDA by telephone within five working days; (2) immediately initiate an investigation; and (3) provide the agency with a complete written report, including the reason for and results of its investigation. 21 C.F.R. § 203.37.

A manufacturer or authorized distributor must also notify FDA within five working days of becoming aware of a "significant loss" or known theft of drug samples. *Id.* The manufacturer or authorized distributor should simultaneously initiate an investigation of the loss or theft and report the results to FDA. *Id.* A "significant loss" refers to "actual physical losses [and] not insignificant accounting mistakes." 64 Fed. Reg. at 67741. Each manufacturer or distributor establishes its own threshold for determining when inventory not accounted for is "significant." *Id.*

F. Policies and Procedures

Any manufacturer or authorized distributor that distributes drug samples must maintain policies and procedures describing the systems in place for: (1) distributing drug samples by mail, by common carrier, or by representative; (2) conducting the annual physical inventory for a reconciliation report; (3) implementing its sample distribution security and audit system, including conducting for-cause audits of sales representatives by personnel independent of the sales force; (4) storage of drug samples by representatives; and (5) monitoring any loss or theft of drug samples. 21 C.F.R. § 203.34.

G. Enforcement

Federal law prohibits the sale, purchase, or trade of any drug sample. 21 U.S.C. § 353(c)(1). Any sales representative or physician who knowingly sells, purchases, or trades a drug sample, or who knowingly offers to do the same, may be imprisoned for no more than ten years, fined no more than \$250,000, or both. *Id.* § 333(b)(1). A manufacturer or distributor may be subject to a civil penalty of no more than \$50,000 for each of the first two violations resulting in a conviction of any of its sales representatives in any ten-year period, and no more than \$1,000,000 for each violation resulting in a conviction of any representative after the second conviction in any ten-year period. *Id.* § 333(b)(2). Each manufacturer or authorized distributor must notify FDA if any of its sales representatives is convicted for the sale, purchase, or trade of a drug sample. *Id.* § 333(d)(3)(E). FDA regulations require this notification within thirty days. 21 C.F.R. § 203.37(c)(1). Any manufacturer or distributor who fails to report such a conviction is subject to a civil penalty of not more than \$100,000. 21 U.S.C. § 303(b)(3).

H. Summary of Reporting and Recordkeeping Requirements

The regulations described in the prior paragraphs impose a variety of reporting and recordkeeping obligations on manufacturers and their authorized distributors, with respect to prescription drug samples. These requirements include, for example: (1) the requirement to use and maintain request and receipt forms; (2) the requirement to investigate falsified drug sample records; (3) the requirement to investigate significant loss and known theft of drug samples; (4) the requirement to notify FDA if a sales representative has been convicted of certain offenses; (5) the obligation to verify that a person requesting a drug sample is licensed or authorized by the appropriate state authority to prescribe the product; (6) the requirement to maintain inventory records and reconciliation reports for drug samples distributed by representatives; (7) the obligation to maintain records of drug sample distributions by lot number; and (8) the obligation to maintain written policies and procedures describing various administrative systems in place.³

³ Under the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520 (2006), federal agencies must regularly obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. “Collection of information” includes agency requirements that members of the public submit reports, keep records, or provide information to a third party, *id.* § 3502(3), and it therefore includes the reporting and

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II. Vermont Regulation of Prescription Drug Samples

The Vermont definition of a “drug sample” tracks the federal definition; a drug sample is “a unit of prescription drug that is not intended to be sold and is intended to promote the sale of the drug.” Vt. Stat. Ann. tit. 26, § 2022(8). Vermont law imposes a special rule with respect to distribution of samples of “regulated drugs,” which include narcotics, depressants, and stimulants. We have identified no other special rules relating to the distribution of prescription drug samples in Vermont, although the state’s general laws relating to prescription drug distribution presumably apply to the distribution of samples. Some of the relevant laws are described below.

A. Licensing

No person may engage in wholesale distribution of prescription drugs in Vermont without a license from the Board of Pharmacy. Vt. Stat. Ann. tit. 26, § 2061(b); Bd. of Pharmacy Adm. Rules § 17.1–4. Wholesale distribution means “the distribution of prescription drugs to persons other than a consumer patient,” Vt. Stat. Ann. tit. 26, § 2022(17), and it is interpreted by the Board of Pharmacy to include the distribution of prescription drug samples by manufacturers and their authorized distributors.⁴ This means that distribution of prescription drug samples requires a wholesaler license, although in practice each prescription drug manufacturer already obtains a license to engage in distribution of trade product.⁵

B. Controlled Substances and Regulated Drugs

Vermont law imposes special requirements with respect to wholesale distribution of controlled substances and sampling of “regulated” drugs. In order to distribute a controlled substance, in addition to having a wholesale distribution license, a person must register with the federal Drug Enforcement Administration. Vt. Stat. Ann. tit. 26, § 2061(b); Bd. of Pharmacy Adm. Rules § 17.25. And in order to distribute samples of a “regulated drug”⁶ through a sales representative, a manufacturer or wholesaler must: (1) ensure there is no charge for the sample, either direct or indirect; (2) limit the distribution to no more than “ten times the manufacturer’s

recordkeeping requirements in part 203 of FDA’s regulations. The PRA requires FDA periodically to provide notice in the Federal Register of its proposed collection(s) of information, and the agency recently published notice of the collection of information in its PDMA regulations. *See* 74 Fed. Reg. 12365 (Mar. 24, 2009); 74 Fed. Reg. 45216 (Sept. 1, 2009). Although this Federal Register publication provides stakeholders with an opportunity to comment on the agency’s estimate of the burden imposed by its regulations, it does not signify any new reporting or recordkeeping obligations.

⁴ This conclusion is based on a discussion with a member of the Vermont Board of Pharmacy in April of 2006.

⁵ Because the distribution of drug samples by a representative is excluded from the definition of wholesale distribution, Vt. Stat. Ann. tit. 26, § 2022(17)(G), a sales representative of a wholesale distributor may lawfully distribute samples without a wholesaler license.

⁶ Vermont law defines a regulated drug as: (1) a narcotic drug; (2) a depressant or stimulant; (3) a hallucinogenic drug; (4) ecstasy; (5) marijuana; or (6) methamphetamine. Vt. Stat. Ann. tit. 18, § 4201(29).