DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
Washington, DC 20204

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MAR 13 2002

Mr. Dennis M. Gronek
Gronek & Armstrong
98th Floor - Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

Dear Mr. Gronek:

This is in response to your letters of October 15, 2001 to the Food and Drug Administration (FDA) on behalf of Source Naturals, Scotts Valley, California. Your letter is in response to our letters dated August 24 and August 28, 2001 concerning a submission made by Source Naturals pursuant to 21 U.S.C. 343(r)(6) (section 403(r)(6) of the Federal Food, Drug, and Cosmetic Act (the Act)) for its products **Beta Sitosterol Complex** and **Calcium Citrate**. In your letter, you asserted that the claims that we identified as disease claims or health claims, that is the claims "...help support and maintain a healthy skeletal system, especially during the menopausal years when bone loss increases" and "...maintain normal cholesterol levels when consumed as part of a low cholesterol dietary program" are appropriate structure or function claims.

We disagree that the claim "...help support and maintain a healthy skeletal system, especially during the menopausal years when bone loss increases" is a structure or function claim. In the preamble to the January 6, 2000 final rule on structure/function claims for dietary supplements (see 65 FR 1000 at 1018), FDA stated that a claim to "maintain normal bone density in post-menopausal women" is a disease claim because post-menopausal women characteristically develop osteoporosis, a disease whose principal sign is decreased bone mass. The claim that your client is making, namely "maintain and support a healthy skeletal system" in the "menopausal years when bone loss increases" clearly implies that the product is intended to prevent loss of bone mass that occurs in women as a consequence of menopause and is not materially different in meaning than the claim used as an example of a disease claim in the January 6, 2000 final rule.

For this reason, we are not persuaded that the conclusion expressed in our August 28, 2001 letter is incorrect and we stand by our original determination that the claim proposed by your client in its original submission is a disease claim that subjects its product to regulation under the drug provisions of the Act.

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As noted in our August 28, 2001 letter, FDA has authorized a health claim for calcium and reduced risk of osteoporosis. See 21 CFR 101.72. FDA-authorized health claims may be made in the labeling of a dietary supplement without subjecting the product to regulation as a drug. If your client wishes to make a claim about calcium and reduced risk of osteoporosis, it may do so by complying with the general requirements for health claims in 21 CFR 101.14 and the specific requirements for the calcium-osteoporosis health claim in 21 CFR 101.72.

In our August 24, 2001 letter, we stated that the claim "...maintain normal cholesterol levels when consumed as part of a low cholesterol dietary program" would not be an appropriate structure/function claim under 21 U.S.C. 343(r)(6). In the preamble to the January 6, 2000 final rule, FDA stated that health maintenance claims that do not imply disease treatment or prevention would be acceptable structure function claims. We added, however, that if the health maintenance claim used terms that are closely identified with a specific disease or that clearly referred to a particular at-risk population, such a claim would be an implied disease claim (see discussion at 65 FR 1018).

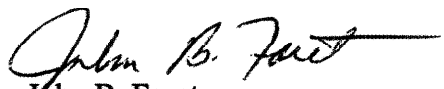
You stated in your letter that you believe that your client's claim is an appropriate structure/function claim that does not imply disease treatment, prevention, or mitigation because, in part, we stated in the preamble to the final rule that a claim such as "use as part of your diet to help maintain a healthy blood sugar level" would be an acceptable structure/function claim. We disagree. We believe that, because many people think of cholesterol solely in terms of the negative role of elevated cholesterol in heart disease, an unqualified claim that a product is intended to maintain normal (or healthy) blood cholesterol levels is an implied disease claim.

As you point out, a claim that a product is important or plays a role in the maintenance or regulation of blood cholesterol that is already normal or within normal limits may be an appropriate structure/function claim, depending on the context. As we discussed in the preamble to the final rule, the context in which a particular claim is made is important in determining whether a claim is a disease claim or a structure/function claim. Consequently, if the context of a claim about a product intended to affect blood cholesterol makes clear that the product is not intended to have an effect on abnormal blood cholesterol (for example, the claim "helps maintain cholesterol levels that are already within the normal range" from the preamble of the January 6, 2000 final rule, which you quoted in your letter), then such a claim may be an acceptable structure/function claims under 21 U.S.C. 343(r)(6). But, the claim that your client submitted to us does not contain such context and therefore it differs materially from the claim in the preamble that was quoted in your letter. In contrast to that claim, your claim implies that the product itself will help bring about normal cholesterol levels. Whether the product achieves this effect as part of a low cholesterol dietary program or not is not the point; the claim does not make clear that the product's intended effect is on "blood

cholesterol levels that are already within the normal range." Consequently, we are not persuaded that the position taken in our August 24, 2001 letter is incorrect, and we continue to believe that the cholesterol claim is a disease claim that subjects your client's product to regulation as a drug.

Please contact us if we may be of further assistance.

Sincerely,



John B. Foret
Director
Division of Compliance and Enforcement
Office of Nutritional Products, Labeling
and Dietary Supplements
Center for Food Safety
and Applied Nutrition

Copies:
FDA, Center for Drug Evaluation and Research, Office of Compliance, HFD-300
FDA, Office of the Associate Commissioner for Regulatory Affairs, Office of Enforcement, HFC-200
FDA, Los Angeles District Office, Compliance Branch, HFR-SE240

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BY:

October 15, 2001

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John B. Foret, Director
Division of Compliance and Enforcement
Office of Nutritional Products, Labeling
and Dietary Supplements
Center for Food Safety and Applied Nutrition
Food and Drug Administration
Washington, DC 20204

Re: Beta Sitosterol Complex Courtesy Letter

Dear Mr. Foret:

This firm represents Source Naturals, Scotts Valley, California. Our client requested that we respond to your August 24, 2001 Courtesy Letter concerning claims made for its Beta Sitosterol Complex product.

In your letter, you object to the claim "...maintain normal cholesterol levels when consumed as part of a low cholesterol dietary program." You assert that this statement suggests that the product is intended to treat, prevent, or mitigate diseases and is intended for use as a drug, and therefore, does not meet the requirements of 21 U.S.C. 343(r)(6). We disagree that this is a disease claim and maintain that it is a structure/function claim subject to 21 U.S.C. §403(r)(6).

In the preamble to the final regulation concerning structure/function claims for dietary supplements (65 FR 1000, January 2000), the Food and Drug Administration ("FDA") stated that it does not agree that claims concerning maintenance of normal cholesterol levels necessarily constitute implied disease claims, and that Congress intended to permit dietary supplements to carry claims of this type under section 403(r)(6) of the Federal Food, Drug and Cosmetic Act ("FDC Act") (65 FR 1018, 65 FR 1019). The agency stated that it has no intention to preclude structure/function claims that refer to the maintenance of normal or healthy structure or function (65 FR 1018). According to the FDA, claims concerning the

maintenance of "normal" or "healthy" structure or function do not imply disease prevention in the context of dietary supplement labeling, unless *other* statements in the labeling imply prevention of a specific disease or class of diseases (65 FR 1018).

The claim made by Source Naturals, "...maintain normal cholesterol levels when consumed as part of a low cholesterol dietary program", is a claim concerning the maintenance of "normal" structure or function, and since you have not cited any other claim which appears in the labeling of its Beta Sitosterol Complex product, we are perplexed at your conclusion that the statement is a disease claim. The labeling statement you have cited was not made in conjunction with other label statements or representations that imply disease or abnormality. Accordingly, the statement made by Source Naturals falls within the universe of acceptable structure/function claims.

In the preamble to the final regulation concerning structure/function claims, the FDA stated that when determining whether a statement is a structure/function claim or a disease claim, the focus should be on whether the labeling suggests that the product will produce a *change* in the characteristic signs or symptoms of a specific disease or class of diseases (e.g., "lower cholesterol") (65 FR 1016). The statement made by Source Naturals in relation to its Beta Sitosterol Complex product does not claim to increase or decrease or otherwise change cholesterol levels, but rather simply states that the product is intended to *maintain* normal cholesterol levels. Because the statement does not suggest that the product will produce a change in the characteristic signs or symptoms of a specific disease or class of diseases, the claim, according to the FDA, should be considered a structure/function claim and not a disease claim.

According to the FDA, a cholesterol level within a normal range is not a sign or risk factor for disease, and maintaining cholesterol levels within the normal range is essential to the structure and function of the body for reasons other than prevention of heart disease (65 FR 1018). While many people perceive of cholesterol only in terms of the negative role of elevated cholesterol in heart disease, the FDA maintains that normal cholesterol levels play a positive role in maintaining a healthy body (65 FR 1018). According to the FDA, cholesterol is a necessary constituent of cell membranes and of myelin. Cholesterol is also required for the synthesis of steroid hormones, which are essential for life. Finally, cholesterol is required for the production of bile in the liver, making the absorption of dietary fat and fat soluble vitamins possible. Therefore, the FDA acknowledges that cholesterol and maintenance of normal cholesterol levels is essential for reasons other than disease treatment or prevention, and that consumers perception of cholesterol only in terms of the negative role of elevated cholesterol in heart disease is wrong. As stated above, only when accompanied by another statement in the labeling of a dietary supplement product which implies prevention of a specific disease or class of diseases will a claim concerning the maintenance of "normal" or "healthy" structure or function be considered a disease claim (65 FR 1018). You have not cited any such statement in the labeling of Source Naturals Beta Sitosterol Complex product.

In the preamble to the final regulation concerning structure/function claims the FDA provided the statement "helps maintain cholesterol levels that are already within the normal range" as an example of an appropriate structure/function claim for maintaining cholesterol (65 FR 1019). The FDA did not state that this would be the only acceptable claim concerning cholesterol maintenance and that no other similar variations of the claim would not also be accepted as appropriate structure/function claims. Nonetheless, the claim made by Source Naturals in relation to its Beta Sitosterol Complex product is substantially the same as the statement cited by the FDA as one example of an appropriate structure/function claim concerning cholesterol maintenance.

It should be noted that in the preamble to the final regulation concerning structure/function claims for dietary supplement products the FDA stated that the claim "use as part of your diet to help maintain a healthy blood sugar level" would be considered an acceptable structure/function claim (65 FR 1028). While the claim made by Source Naturals in relation to its Beta Sitosterol Complex product concerns cholesterol levels rather than blood sugar levels, and uses the word "normal" instead of "healthy", the claims are substantially the same. It is inconceivable that the FDA would contradict its own position concerning maintenance of "normal" and "healthy" structure/function claims particularly in light of its incontrovertible acceptance of the claim cited above and declare that the claim made by Source Naturals is a disease claim.

We are unaware of any disease associated with normal cholesterol levels. A claim that a product maintains, not increases or decreases, normal cholesterol levels does not refer to any disease or any sign or symptom of a disease, and therefore cannot be reasonably construed as a disease claim.

The statement made in connection with Source Natural's Beta Sitosterol product is entirely consistent with structure/function claims permitted for dietary supplements under DSHEA and 21 CFR §101.93.

Please provide us further information concerning you conclusion that "...maintain normal cholesterol levels when consumed as part of a low cholesterol dietary program" is a disease claim. Until we receive some reasonable explanation that enables us to reconcile you conclusion with DSHEA and 65 FR 1000 and its preamble, we cannot recommend any modification to this label statement.

Sincerely,
GRONEK & ARMSTRONG

Dennis M. Gronek

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RECEIVED 1/9/02

October 15, 2001

John B. Foret, Director
Division of Compliance and Enforcement
Office of Nutritional Products, Labeling
and Dietary Supplements
Center for Food Safety and Applied Nutrition
Food and Drug Administration
Washington, DC 20204

Re: Calcium Citrate Courtesy Letter

Dear Mr. Foret:

This firm represents Source Naturals, Scotts Valley, California. Our client requested that we respond to your August 28, 2001 Courtesy Letter concerning claims made for its Calcium Citrate product.

In your letter, you object to the claim "...help support and maintain a healthy skeletal system, especially during the menopausal years when bone loss increases." You assert that this statement is a health claim about the relationship between calcium and osteoporosis and is not a structure/function claim. We disagree that this is a health claim and maintain that it is a structure/function claim subject to 21 U.S.C. §403(r)(6).

Pursuant to Section 403(r)(1)(B) of the Federal Food, Drug and Cosmetic Act ("FDC Act"), a health claim is defined as one which "characterizes the relationship of any nutrient to a disease or health-related condition." The claim submitted by our client does not discuss any disease or health-related condition, but merely describes the role of the product in helping to maintain and support a healthy skeletal system.

In the preamble to the final regulation concerning structure/function claims made in relation to dietary supplement products (65 FR 1000, January 2000), the Food and Drug Administration ("FDA") clearly states that it does not intend to preclude claims that refer to the maintenance of healthy structure or function, unless they imply disease treatment or prevention (65 FR 1018). The FDA also states that mild conditions commonly associated

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with particular stages of life or normal physiological processes will not be considered diseases, and that treating as diseases the common, mild symptoms associated with normal life stages or processes would not be consistent with the intent of the Dietary Supplement Health and Education Act ("DSHEA") (65 FR 1020). Lastly, the FDA states that claims about diminishing the normal symptomatology of menopause would be acceptable structure/function claims, if they did not suggest, for example, prevention or treatment of osteoporosis, or another disease associated with these states (65 FR 1021).

Therefore, the issue is whether the claim "...help support and maintain a healthy skeletal system, especially during the menopausal years when bone loss increases" suggests or implies treatment or prevention of a disease, namely osteoporosis. We believe it does not. The claim simply refers to the maintenance of healthy skeletal structure and function. It also refers to an increase in bone loss associated with menopause, which is a normal, common symptom of menopause (and the aging process in general) and does not suggest prevention or treatment of any disease, including osteoporosis.

In the preamble to the final regulation the FDA states that the claim "maintain normal bone density in post-menopausal women" is a disease claim because, according to the FDA, "post-menopausal women characteristically develop osteoporosis, a disease whose principal sign is decreased bone mass" (65 FR 1018). This position taken by the FDA not only contradicts the FDA's position as pronounced in the preamble to the proposed rule concerning the calcium/osteoporosis health claim (56 FR 60689), but also contradicts the position taken by the highly regarded National Institutes of Health ("NIH").

The FDA has adopted the definition of "osteoporosis" set forth by the NIH. According to the FDA and the NIH, the term "osteoporosis" is defined as "a disease characterized by low bone mass, where the internal structure of the bone has been eroded to the extent that even slight trauma will cause the bone to fracture easily" (56 FR 60689). Therefore, according to the NIH and FDA, the disease osteoporosis is characterized not only by low or decreasing bone mass (which the FDA explicitly acknowledges is normal with age), but also by a bone structure which is so eroded and porous that even slight trauma will cause the bone to fracture easily. So not only must bone mass be affected for the disease of osteoporosis to exist, but also the structure of the bone tissue must be deteriorated. Thus, according to the FDA, osteoporosis only exists when bone mass has deteriorated to the extent that internal structure of the bone is eroded thereby easily causing fractures. This is distinguishable from the decrease in bone mass or increase in bone loss that is a normal consequences of menopause and the aging process.

The FDA acknowledges that all persons lose bone with age and that an increase in bone loss is a normal consequence of the aging process. (21 CFR §101.72; 56 FR 60689). However, not all persons develop osteoporosis. Therefore, bone loss or a decrease in bone density is not synonymous with the disease of osteoporosis, and as such, a claim that a product decreases bone loss associated with aging is not a disease or health claim unless it suggests or implies that the product is intended to treat or prevent bone mass that has

deteriorated to the extent that internal structure of the bone is eroded thereby easily causing fractures.

Even amongst post-menopausal women (the group most susceptible to developing the disease) the risk of developing osteoporosis is low. According to the NIH, researchers estimate that only about 23% of American women over the age of 50 have osteoporosis (www.nlm.nih.gov). Therefore, simply because a woman is menopausal or post-menopausal does not mean she suffers or will suffer from osteoporosis. As such, the FDA's statement in the preamble to the final regulation that "post-menopausal women characteristically develop osteoporosis" is not true. In fact, the odds of post-menopausal women not developing osteoporosis are greater than the odds that they will develop the disease. Also, the FDA acknowledges risk factors for osteoporosis other than age, gender and hormonal status, including nationality, cigarette smoking and alcohol intake (56 FR 60689).

Therefore, bone loss or a decrease in bone mass in menopausal or post-menopausal women is not a disease and does not suggest or imply treatment or prevention of osteoporosis unless and until bone mass has deteriorated to the extent that internal structure of the bone is eroded thereby easily causing fractures, and a statement concerning an increase in bone loss or decreased bone mass or bone density does not become a disease claim simply because it mentions menopausal or post-menopausal women.

It must be noted that Source Naturals does not claim that its Calcium Citrate product will "maintain normal bone density" or have any affect on bone density or bone mass whatsoever. Our client simply states that its product will "help support and maintain a healthy skeletal system" especially during the menopausal years when bone loss increases. Maintaining a healthy skeletal system does not imply disease treatment or prevention. The fact that our client's claim includes the statement "...especially during the menopausal years when bone loss increases" does not imply disease treatment or prevention, but rather, simply states the universally accepted physiological fact that women lose bone during their menopausal years. As stated above, the FDA has made clear that it does not intend to preclude claims that refer to the maintenance of healthy structure or function (65 FR 1018) or claims concerning mild conditions commonly associated with particular stages of life or normal physiological processes, and that treating as diseases the common, mild symptoms associated with normal life stages or processes would not be consistent with the intent of DSHEA (65 FR 1020). FDA also states that claims about diminishing the normal symptomatology of menopause are acceptable structure/function claims, if they do not suggest, for example, prevention or treatment of osteoporosis, or another disease associated with these states (65 FR 1021). As described above, bone loss is not synonymous with osteoporosis.

The statement "...help support and maintain a healthy skeletal system, especially during the menopausal years when bone loss increases" does not claim a relationship between calcium and osteoporosis. The claim does not mention osteoporosis nor does it imply that this product will treat or prevent that disease. Rather the claim refers to maintaining and supporting a healthy skeletal system and the biological fact that bone loss increases during the

menopausal years. This statement refers to the normal physiological process of bone loss and not to the disease of osteoporosis or any health-related condition. Accordingly, the statement is not a health claim subject to 21 CFR §101.72.

We respectfully request that the Courtesy Letter of August 28, 2001 directed to our client be immediately retracted and an appropriate correspondence acknowledging the propriety of this claim reported for the Calcium Citrate product be directed to the undersigned at your earliest convenience.

We look forward to your response to this communication. If your have any questions or desire additional information contact me immediately.

Sincerely,
GRONEK & ARMSTRONG

Dennis M. Gronek