

Before the
DEPARTMENT OF HEALTH AND HUMAN SERVICES
Public Health Service
Food and Drug Administration

In re: Dietary Supplements;)
Center for Food Safety and) Docket No. 99N-1174
Applied Nutrition Strategy;)
Public Meeting)

COMMENTS OF
AMERICAN PREVENTIVE MEDICAL ASSOCIATION;
MYCOLOGY RESEARCH LABS, LTD.;
DURK PEARSON AND SANDY SHAW;
PURE ENCAPSULATIONS, INC.;
WEIDER NUTRITION INTERNATIONAL, INC.;
JULIAN M. WHITAKER, M.D.; and
XCEL HEALTHCARE

The American Preventive Medical Association; Mycology Research Labs, Ltd.; Durk Pearson and Sandy Shaw; Pure Encapsulations, Inc.; Weider Nutrition International, Inc.; Julian M. Whitaker, M.D.; and XCEL Healthcare (collectively, "Joint Commenters"), by counsel and in response to the agency's request contained in a May 13, 1999 Notice, 64 Fed Reg 25889 ("Notice"), hereby submit their comments, answering each of the questions posed by the agency. The development of appropriate dietary supplement regulatory priorities is indispensable to the proper functioning of the agency. The public, Congress, and the Courts have lost confidence in the FDA. That loss in confidence results from the agency's failure to fulfill its essential statutory mission and constitutional obligations and from its expenditure of resources on investigative and enforcement activities having little or nothing to do with protecting the public from actual health risks.

These comments call upon the agency to rededicate itself to complying fully and faithfully with the directives given it by Congress and the Courts. In particular, these

99N-1174

C25

comments call upon the agency to devote its dietary supplement regulatory resources to fulfillment of its essential statutory mission and constitutional obligations, currently left unfulfilled, and to discontinue misapplication of those resources to tasks that detract from or contradict that mission and those obligations. These comments call upon FDA to concentrate its efforts, attention, and resources on (1) investigating and prosecuting instances of misbranding and adulteration that actually threaten bodily harm and (2) implementing fully and faithfully the *Pearson v. Shalala* decision (164 F.3d 650 (D.C. Cir. 1999) *reh'g denied*, 172 F.3d 72 (D.C. Cir. 1999)).¹ All agency dietary supplement regulatory activities that draw resources from the aforementioned two essential functions and direct resources to other functions having little or no immediate relationship to protection of public health should be abandoned.

There are at least three overt manifestations of the loss in public confidence over the agency's ability and willingness to pursue its statutory and constitutional obligations: (1) the widely held view among the public and in Congress that far from stemming the flow of adulterated products, the agency devotes much of its time and effort to instances of misbranding not directly linked to public health harms; (2) the widely held perception in Congress that FDA cannot be trusted to fulfill faithfully its essential statutory obligations and to adhere to the strictures of the First Amendment to the United States Constitution; and (3) the burgeoning view in the judiciary that FDA frequently oversteps its statutory and constitutional bounds (*Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999) *reh'g denied*, 172 F.3d 72 (D.C. Cir. 1999); *Washington Legal Foundation v.*

¹ Consistent with *Pearson*, FDA must create and maintain a constitutional health claims review regime, one that provides dietary supplement consumers access to health information at the point of sale necessary to exercise informed choice and counteract fraud.

Shalala, 13 F. Supp. 2d 51 (D.D.C. July 30, 1998); 880 F. Supp. 26 (D.D.C. 1995), and *Pharmanex, Inc. v. Shalala*, 35 F.Supp. 2d 1341 (C.D.UT. 1998)).

Below, the Joint Commenters respond to each of the agency's queries seriatim. Their recommendations, if followed, will improve the agency's effectiveness and fulfillment of its essential statutory mission and constitutional obligations. Those recommendations will also simultaneously restore the confidence and trust of the public, the Congress, and the Courts in the agency's willingness and ability to implement that mission and those obligations without the FDA itself violating the law.

1. In addition to ensuring consumer access to safe dietary supplements that are truthfully and not misleadingly labeled, are there other objectives that an overall dietary supplement strategy should include?

Effective regulation of dietary supplements under the Dietary Supplement Health and Education Act (DSHEA) involves expenditure of agency resources to combat actual instances of adulteration and misbranding that pose a likely or demonstrable harm to public health. They also involve expenditure of agency resources to ensure implementation of a health claims review process that complies with constitutional and statutory requirements and permits consumers to receive health information at the point of sale necessary to exercise informed choice in the dietary supplement marketplace.

The universe of rule violations necessarily includes a substantial number of "technical" violations, i.e., those that violate the letter of the law but do not involve any likely or demonstrable harm to public health. Vigorous enforcement of technical violations not only taxes agency resources that could be better spent on combating violations that do pose a likely or demonstrable harm to public health (when used as directed) but also results in violation of civil liberties, speech and property rights. An

example of vigorous enforcement of technical violations would be a health claim not approved by FDA that is nevertheless backed by significant scientific agreement (e.g., the claim that “.8 mg of folic acid in a dietary supplement is more effective in reducing the risk of neural tube defects than a lower amount in foods in common form,” found in *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999) *reh'g denied*, 172 F.3d 72 (D.C. Cir. 1999), to be constitutionally protected speech).² Numerous such claims exist in the dietary supplement market and ought not be suppressed with agency resources that could otherwise be devoted to stemming adulteration and misbranding of direct consequence to public health. Indeed, the suppression of such claims actually deprives consumers of health information indispensable to the exercise of informed choice. In the case of the folic acid comparative claim, above, the absence of that information works a fraud on all women of childbearing age, inducing them to believe, erroneously, that levels of folate sufficient to reduce the risk of neural tube defect births can be reliably obtained through foods in common form alone. The consequences of this ill-advised rule are tragic, thousands of preventable serious birth defects.

FDA should dedicate its limited resources to pursuit of inherently false and misleading representations that pose a likely or demonstrable threat to public health. Because FDA cannot expect to prevent all instances of rule violations, it must selectively determine which rule violators to investigate and prosecute. To fulfill its primary statutory mission of protecting public health, FDA should focus its resources on thorough

² Another example exists in the form of the folic acid/neural tube defect claim, which the Senate Committee on Labor and Human Resources found prohibited by FDA despite the existence of “significant scientific agreement” to support the claim. In the Senate Report 105-43 at 50, the Committee wrote: “Despite the significant scientific agreement among qualified experts concerning the evidence supporting the recommendation, manufacturers of foods containing folic acid were prohibited from making claims about the benefit of folic acid in reducing the risk of neural tube defects until FDA approved the claim . . .”

investigation and prosecution of rule violators whose transgressions actually do threaten public health. An example of this latter kind of rule violation occurs (1) when a substance--represented to be a dietary supplement--if consumed in accordance with labeling instructions will cause harm to the body; (2) when a substance--represented as a substitute for a drug used to treat a serious or life-threatening condition--has no therapeutic efficacy; and (3) when a substance is adulterated and threatens public health.

To ensure fulfillment of its primary statutory mission, FDA should make investigation and prosecution of rule violators whose transgressions involve likely or demonstrable threats to public health a priority over all other enforcement and should not expend agency resources on pursuit of other activities to the extent that such activities tax agency resources needed to ensure to the maximum extent possible its achievement of the agency's primary public health mission.

Public confidence in the FDA hinges on its ability to exercise discretion wisely, to distinguish harmful from harmless law violations and punish the former while prudently conserving resources that would otherwise be expended on the latter. Public confidence in the FDA also hinges on its ability to avoid civil liberties violations. **If the public perceives FDA to be misdirected, pursuing law violators who do not cause harm in lieu of those who do or transgressing statutory and constitutional bounds in lieu of fulfilling statutory and constitutional requirements, the public will continue to lose confidence in the agency, question its direction, and—ultimately--question its legitimacy.** For example, the agency's history of condemnation of health claims that are demonstrably truthful and nonmisleading (including the folic acid/neural tube defect claim) cost the agency dearly in public support and does not advance the agency's

mission but detracts from it (causing the agency to countenance rather than combat preventable neural tube defect births).

2. Are the criteria for prioritizing the tasks within the supplement strategy appropriate? Which specific tasks should FDA undertake first?

In the CFSAN 1999 Program Priorities document, the agency lists the following as “A” list priorities in this order of comparative significance: (1) completing the ephedrine rulemaking; (2) reviewing premarket notifications for supplements containing new dietary ingredients within statutory timeframes (75 days); (3) publishing a proposed rule on the applicability to dietary supplements of the FDA Modernization Act provisions on nutrient content/health claim notifications based on authoritative statements; (4) developing an overall strategy for distinguishing dietary supplements from foods and drugs; for claims; for good manufacturing practices; for adverse event reporting, review, and follow-up; for laboratory capability; for research needs; for enforcement; and for resource needs; (5) ensuring effective communication with stakeholders; and (6) responding to the citizens petition 98P-0509 regarding FDA’s jurisdiction over publications associated with dietary supplements.³ In the CFSAN 1999 Program Priorities document, the agency lists the following as a “B” list priority: elevating the priority of field assignments on dietary supplements, such as dieter’s teas and folic acid-containing products.

Omitted from the agency’s list of priorities is implementation of the *Pearson v. Shalala* decision. That decision imposes on the agency an immediate constitutional obligation to favor disclosure over suppression and to see that health claims are authorized with such disclaimers as are reasonably necessary to avoid any potentially

³ FDA has already responded to this petition, so the point is moot.

misleading connotation. It also compels the agency to authorize with reasonable disclaimers each of the four health claims there in issue.⁴ Moreover, it compels the agency to define in a manner comprehensible to the regulated class the principles which guide the agency under its “significant scientific agreement” review of claims. Without question, fulfilling the constitutional imperatives imposed upon the agency by the U.S. Court of Appeals for the D.C. Circuit in *Pearson v. Shalala* must be a top priority task for FDA in 1999, taking precedence over all other non-constitutional matters until full implementation is achieved. Failure to implement the decision fully, faithfully and promptly invites intolerable, continuing First Amendment civil rights and statutory violations, further lawsuits, and further loss of public confidence in the agency.

The agency’s current list of priorities not only omits reference to *Pearson v. Shalala*, it also includes matters that should not be listed. As explained in comments filed with the agency in the ephedrine rulemaking, FDA substantially relies on adverse event reports as the “scientific” basis for its proposed rule on ephedrine-containing dietary supplements. Those reports are not a competent and reliable scientific basis for the proposed rule. By the agency’s own admission the AER’s are unverified complaints received from consumers. They do not establish a causal nexus between particular substances and physiological responses nor do they rule out other possible causative factors. They do not distinguish abuse from use as directed on the label. In short, they are of little reliability and are certainly not the kind of evidentiary basis FDA needs to overturn the statutory presumption in favor of the lawful status of an entire class of

⁴ The four claims are: (1) Consumption of antioxidant vitamins may reduce the risk of certain kinds of cancers; (2) consumption of fiber may reduce the risk of colorectal cancer; (3) consumption of omega-3 fatty acids may reduce the risk of coronary heart disease; and (4) .8 mg of folic acid in a dietary supplement is more effective in reducing the risk of neural tube defects than a lower amount in foods in common form.

dietary supplements. Thus, withdrawing, not completing, the proposed rule should be a priority. Instead of adopting a rule that imposes a prior restraint upon all who sell a class of dietary supplements, the agency would do well by adhering to the enforcement priorities mentioned above, focusing its regulatory efforts upon investigation and prosecution of individual instances of misbranding and adulteration that cause bodily harm.

Reviewing premarket notifications for new dietary ingredients within statutory timeframes should be an agency priority because it is the agency's statutory obligation. Likewise, publishing a proposed rule on the applicability of FDAMA Sections on health and nutrient content claims based on authoritative government statements should be a priority, albeit the agency must accept the need to adhere strictly to its statutory and constitutional obligations as defined expressly in FDAMA and in *Pearson v. Shalala*. Its current Interim Final Rules conflict with the plain language and meaning of FDAMA and, thus, further undermine the confidence of Congress and the public. Under FDAMA, FDA must authorize every health claim that accurately represents an authoritative statement published by a federal government health or nutrition research agency. Even if FDA finds that a health claim based on an authoritative statement does not satisfy its FDAMA standard of review (once that is defined), it must, consistent with *Pearson v. Shalala*, nevertheless allow the claim to appear on labels and in labeling, relying on disclaimers to correct any potentially misleading connotation. Moreover, FDA should be sure to avoid adding to or subtracting from the plain statutory language defining an authoritative statement. For purposes of the statute, an authoritative statement of a government health or nutrition research agency constitutes a statement of association

between a nutrient and a disease published by the agency and not by an agency employee acting in his or her individual capacity. Had Congress wanted FDA to include greater restrictions, it would have authorized that discretion in the statute. It did not do so. Indeed, the plain intent of Congress in the legislative history is to use the FDAMA Sections to create an expeditious alternative to “significant scientific agreement” (currently undefined) review, not a redundancy.

Developing an overall strategy for distinguishing dietary supplements from foods and drugs is an historic and continuing statutory obligation for the agency but one the agency abuses in its proposed rule that would redefine the meaning of “disease” within the health claims rule to expand its scope. See 63 Fed.Reg. 23624 (April 29, 1998). The agency’s intended effect is to reduce dramatically the number of statements of nutritional support (including structure/function claims) that are permitted without FDA pre-approval, thereby flouting the overall meaning and import of the Dietary Supplement Health and Education Act. Consequently, FDA should make it a priority to withdraw that proposed rule. Moreover, in light of the fact that FDA is under a judicial mandate to implement the *Pearson v. Shalala* decision, which pertains directly to the regulation of dietary supplements, FDA should ensure that it proceeds with that implementation as expeditiously as possible and not maintain a rulemaking that conflicts with the constitutional mandate of *Pearson*. Faithful and complete implementation of *Pearson v. Shalala* must be an FDA priority.

In light of the far greater safety of dietary supplements than that of foods in common form, the agency’s consideration of good manufacturing practices criteria for dietary supplements is not appropriate. Consistent with certain comments filed in that

proceeding, FDA should avoid adoption of the proposed one-size-fits-all cGMPs. Those cGMPs (1) are inappropriate in light of the extraordinary diversity in the supplement market; (2) will unnecessarily tax agency resources away from its primary public health mission; and (3) will impose an unjustified new and expansive regulatory regime over dietary supplement companies. The cGMPs will have a particularly negative effect on the small companies that comprise the vast majority in the dietary supplement industry. Instead of adopting cGMPs, FDA should consider voluntary Hazard Analysis and Critical Control Points for dietary supplement companies, allowing each company in this multi-faceted industry to develop creative solutions to minimizing its own identified risks.

3. What factors should FDA consider in determining how best to implement a task (i.e., use of regulations, guidance, etc.)?

The agency should proceed with formal rulemaking proceedings whenever it seeks to take an action that may affect an entire class of regulatees or consumers. Moreover, whenever the agency contemplates promulgating a rule or its personnel contemplate implementing a task, the following factors should be evaluated whether or not the subject is part of a formal rulemaking: (1) the extent to which the action will affect the exercise of constitutional and statutory rights by regulatees and consumers⁵; (2) the extent to which the action comports with or fulfills the mandates of Congress and the courts; (3) the extent to which the action will increase the risk of bodily harm to third parties⁶; (4) the incentives and disincentives on regulatee and consumer behavior any

⁵ The *Pearson v. Shalala* decision involved litigation over four health claims unconstitutionally prohibited by the agency for a period of eight years.

⁶ A classic example of the agency's failure to weigh this factor appropriately arises in its four year long refusal to authorize a health claim associating consumption of folic acid with a reduction in the risk of neural tube defect births. In pertinent part, the House Committee on Commerce laid blame for preventable neural tube defect births squarely on the agency's refusal to allow a claim. Wrote that committee in Report 105-306 at 16:

proposed action may create; (5) the extent to which the action will reduce competition in the marketplace and restrict the availability of legal products; (6) the costs that the proposed action will impose on regulatees (including small businesses), consumers, and the agency; and (7) the likelihood that the action will succeed in achieving the agency's objective. Analysis of those seven factors should be undertaken in public to allow the affected parties notice and an opportunity to be heard. Where the analysis precedes enforcement action, it should nevertheless be recorded for later public release and to ensure that the agency remains accountable to Congress and the American people. Restoration of public and congressional confidence and trust in the agency depends in part on its public accountability for all actions taken that affect rights.

4. What tasks should be included under the various dietary supplement program elements in the CFSAN 1999 Program Priorities document?

Under every program element concerning nutrient content/health claims, and labeling generally, FDA should include the task of fully and faithfully implementing the

In 1992, the Centers for Disease Control and Prevention (CDC) issued the following recommendation to women of childbearing age, aimed at reducing the risk of pregnancies affected by neural tube birth defects: "All women of childbearing age in the United States who are capable of becoming pregnant should consume 0.4 mg of folic acid per day for the purpose of reducing their risk of having a pregnancy affected with spina bifida or [other neural tube defects]."

* * * *

Despite this recommendation, foods containing folic acid could not include on their labels truthful, nonmisleading claims about the folic acid/birth defect connection until the FDA approved the claim through an arduous and costly notice and comment rulemaking procedure. In January 1993, the FDA promulgated a rule prohibiting claims concerning the relationship. In the wake of the controversy that met the FDA's actions, and despite the absence of any change in the scientific evidence, the agency reversed course, proposing to authorize such claims in October 1993. Final regulations authorizing the claim were promulgated in March 1996. **The Committee has expressed in the past, and remains concerned, that many children may have suffered preventable neural tube defects as a result of this delay in authorizing health claims based on the 1992 CDC recommendation.**

(Emphasis added). Likewise, the Senate Committee on Labor and Human Resources placed the blame for preventable neural tube defect births squarely on the agency's refusal to authorize a claim, writing in

mandate of the U.S. Court of Appeals for the D.C. Circuit in *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999) *reh'g denied*, 172 F.3d 72 (D.C. Cir. 1999).

In addition, under the program element concerning “adverse event reporting, review, and follow-up,” the FDA should include the task of developing a mechanism to corroborate adverse effect claims prior to posting them, thereby precluding the wrongful anti-competitive use of misleading complaints to injure the reputations and good will of businesses. FDA’s failure to verify AERs before posting them makes the agency an unwitting promoter of abuses in the reporting system. Moreover, the unverified AERs are occasionally used by FDA as “scientific evidence” to support regulatory action (e.g., the case of the proposed rule for ephedrine-containing products) and are sometimes discounted by FDA as not “scientific evidence” to avoid taking regulatory action (e.g., the thousands of complaints received on aspartame), resulting in an ever fluctuating standard of review. Unverified complaints should not be accepted as evidence in any circumstance.

5. Are there current safety, labeling, or other marketplace issues that FDA should address quickly through enforcement actions to ensure, for example, that consumers have confidence that the products on the market are safe and truthfully and not misleadingly labeled?

The dietary supplement market is characterized by an extraordinary history of safe use. The track record for dietary supplements is far superior to foods in common form, and incomparably superior to drugs, in that regard. Harms associated with dietary supplement use are typically the product of individual abuses of products or of isolated instances of misbranding or adulteration. Consequently, the most responsible, efficient,

Senate Report 105-43 at 50: “Undoubtedly, many children suffered from preventable neural tube defects as a result of FDA’s delay in authorizing health claims based on the 1992 CDC recommendation.”

and fair use of agency resources is to focus them on specific wrongdoing by regulatees in the market. Broad, prophylactic restraints on the dietary supplement industry fail to stop current instances of abuse and misbranding because those are already unlawful. In lieu of broad, prophylactic restraints, FDA should favor case-by-case enforcement narrowly focused and tailored to remove identified, targeted harms.

6. Toward what type or area of research on dietary supplements should FDA allocate its research resources?

Under apposite commercial speech precedent, FDA must not simply allege without proof the existence of harm stemming from proposed health claims it deems inherently misleading but must prove the harms with empirical data. In that regard, as a condition precedent to regulatory action that may affect commercial speech, FDA must conduct consumer research and prove, rather than speculate, that the harms it recites are real.

7. Given FDA's limited resources, what mechanisms are available, or should be developed, to leverage FDA's resources to meet effectively the objective of the strategy?

FDA must prioritize its essential statutory missions and constitutional obligations over all other, non-essential tasks, and it must exercise its enforcement discretion prudently. The agency must be first and foremost law-abiding if it expects others to abide by its laws. The agency must adhere strictly to the Constitution, including the First Amendment, and to the intended meaning of the Food Drug and Cosmetic Act as amended. Only if the agency is true to its legal obligations can it serve as a respected example for regulatees to follow. Artful circumvention of statutory mandates and constitutional obligations through the promulgation and adoption of regulations that

undermine the FDCA as amended or suppress commercial speech inevitably cause the agency to suffer a loss of honor, integrity, and trust. FDA must obey the rule of law.

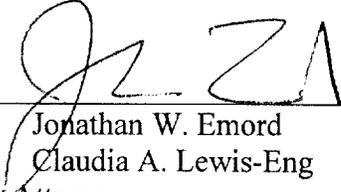
As explained above, the agency should devote its dietary supplement resources to investigating and prosecuting specific instances of adulteration and misbranding that pose a likely or demonstrable threat to public health. That is the agency's essential statutory mission. FDA must also fully and faithfully implement the mandates from Congress and the Courts to regulate claims for dietary supplements in a constitutional manner. If the agency devotes its resources to those tasks, and does so in a public way fully accountable for its actions, it will achieve the goals of Congress and the Courts consistent with the Constitution and the Act, without unnecessarily restricting or restructuring the market, without restraining trade in an anticompetitive manner, and without harming consumers—all within the confines of its existing budget. If the agency fails to devote its resources to those tasks and continues redirecting them away from fulfillment of its essential statutory and constitutional obligations and toward unessential enforcement and to actions that transgress civil liberties, it will continue to lose the public trust, will continue to antagonize Congress, and will continue to lose battles in the Courts and in

Congress. By following the recommendations above, FDA can restore its public image, can bolster public confidence, and can better serve its ultimate mission of protecting public health.

Respectfully submitted,

AMERICAN PREVENTIVE MEDICAL ASSOCIATION;
MYCOLOGY RESEARCH LABS, LTD.;
PURE ENCAPSULATIONS, INC.;
DURK PEARSON AND SANDY SHAW;
WEIDER NUTRITION INTERNATIONAL, INC.;
JULIAN M. WHITAKER, M.D.;
and XCEL HEALTHCARE,

By



Jonathan W. Emord
Claudia A. Lewis-Eng

Their Attorneys

Emord & Associates, P.C.
1050 17th Street, N.W.
Suite 600
Washington, D.C. 20036

Burke Professional Center
5282 Lyngate Court
Burke, VA 22015

P: (202) 466-6937
F: (202) 466-6938
E-mail: Emordal1@erols.com

Dated: July 1, 1999