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Division of Dockets Management (HFA-305)
Food and Drug Administration
Department of Health and Human Services
5630 Fishers Lane, Rm. 1061
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Re: *Request for Information on OTC Drugs*
FDA Docket No. 2003N-0539
68 Fed. Reg. 75585 (December 31, 2003)

The Cosmetic, Toiletry, and Fragrance Association (CTFA) submits these comments in response to FDA's request for data and information in connection with the agency's review of over-the-counter (OTC) drug products, published in 68 Fed. Reg. 75585 (December 31, 2003).

CTFA is a national trade association representing the personal care product industry. Founded in 1894, CTFA represents nearly 600 companies involved in the manufacture and distribution of cosmetics, toiletries, and fragrances. CTFA member companies account for the majority of personal care product sales in the United States. Members include manufacturers and distributors of finished personal care products as well as suppliers of ingredients, raw materials, packaging, and services used in the production and marketing of finished products. Since its inception, CTFA has strived to foster a fair and responsible marketplace for cosmetic products and has worked to support the industry's commitment to safe and effective personal care products for consumers.

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Summary

FDA should restrict the OTC Drug Review to products that are promoted as OTC drugs. The agency should not include under the OTC Drug Review products that have traditionally been marketed as cosmetics. For nearly a century, Congress and FDA have treated drugs and cosmetics as two distinct categories, with separate regulatory regimes. Only those products that are promoted as OTC drugs are regulated as drugs and subject to an OTC drug monograph or drug application. Products that have long been marketed as cosmetics, including products with ingredients such as alpha and beta hydroxy acids, have always been regarded as cosmetics and subject to regulation solely under the cosmetic provisions of the Federal Food, Drug, and Cosmetic Act (FD&C Act). If an individual cosmetic manufacturer crosses the line by making a drug claim for a traditional cosmetic product, FDA should employ its customary enforcement tools to require that the product be properly labeled. The agency should not respond to isolated compliance issues by attempting to reclassify entire product categories as drugs. Accordingly, several categories of cosmetic products, including antiwrinkle products, nasal moisturizers, and vaginal lubricants and moisturizers, should not be the subject of an OTC drug monograph.

Background

The FDA seeks data “for certain categories of ingredients in over-the-counter (OTC) drug products that are eligible for the original OTC drug review but have not been reviewed by FDA to date.” The request for data includes the following categories:

- Nasal moisturizer drug products
- Urinary analgesic/antiseptic drug products

- Urinary acidifiers and alkalinizers
- Aloe vera and urea products
- Antiwrinkle products
- Lubricants and vaginal moisturizers

Several of these categories -- in particular, antiwrinkle products, nasal moisturizers, and vaginal moisturizers -- have traditionally been labeled and marketed as cosmetics.

In regard to antiwrinkle products, the Agency acknowledged that “Whether a wrinkle remover product should be regulated as a drug or a cosmetic depends on the claims the manufacturer makes for the product.” This is a correct statement of the FD&C Act and judicial precedent. The FDA notice went on to say, however, that “Manufacturers should determine if the ingredients in [antiwrinkle] products affect the structure of the skin in some physiological way and, thus, should be submitted for review as drug ingredients.” This is an erroneous statement of the FD&C Act and judicial precedent. The FDA notice specifically identified alpha hydroxy acids and beta hydroxy acids as “ingredients ... included in this request for data and information,” even when only cosmetic claims are made for the ingredients.

Similarly, the FDA notice identified a number of cosmetic claims traditionally made for lubricants and vaginal moisturizers that FDA may consider to be drug claims. The notice stated that such cosmetic claims as “replenishes your natural moisture for days at a time” and “with regular use, provides continuous vaginal moisture for most women” may be drug claims because “FDA does not consider these uses ... to be cosmetic claims because they do not relate to ‘cleansing, beautifying, promoting attractiveness, or altering the appearance.’”

In regard to nasal moisturizers, the request for data stated that the “agency considers nasal moisturizer products to be drugs when they contain the following or similar

ingredients: Sodium chloride, normal saline, buffered isotonic saline solution, saline phosphate buffer solution, glycerin.” This is an erroneous statement of the FD&C Act and judicial precedent. The request also identified examples of the types of traditional cosmetic claims that have been made for nasal moisturizers and stated that “FDA considers many of these claims to be drug claims and believes these products should be marketed as OTC nasal moisturizers.”

FDA invited interested parties to submit data and information, including published or unpublished studies or other pertinent information, to “Facilitate FDA’s review and aid in its determination of whether these OTC drugs for human use are generally recognized as safe and effective and not misbranded under their recommended conditions of use.” The request for data, however, omits consideration of the more fundamental question -- whether what FDA describes as “these OTC drugs” are, in fact, properly regulated under the FD&C Act as cosmetics and not as OTC drugs. As will be demonstrated, these products have traditionally been classified as cosmetics, and cannot properly be swept into OTC drug monographs under the provisions of the FD&C Act.

Discussion

I. FDA Regulation of Drugs and Cosmetics

To put it simply, substances that are promoted using medicinal claims are drugs and substances that are promoted as having an effect on external appearance are cosmetics. This distinction, recognized by Congress and federal regulators for nearly a century, has served as a bedrock principle separating the regulation of drugs from the regulation of cosmetics. To this day, the “intended use” for a product continues to be the key principle distinguishing cosmetics from drugs. Classification of a product under the FD&C Act cannot lawfully be based upon the inherent nature of the ingredients contained in it or incidental effects on the body.

A. The Statutory Background

Federal regulation of drugs and cosmetics traces its roots to the early part of the last century. The first major federal statute aimed at regulating drug products was the Federal Food and Drugs Act of 1906.¹ Early versions of the 1906 Act expressly defined the term “drug” to include cosmetics, but in a legislative compromise the final version of the Act did not include cosmetics.² The 1906 Act defined a drug to include:

all medicine and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals.³

This definition expressly relied on the concept of “intended use.” Only those substances “intended to be used” for prevention or treatment of disease were classified as drugs.

With the passage of the Federal Food, Drug, and Cosmetic Act of 1938 (FD&C Act), Congress provided FDA with statutory authority over cosmetics as well as drugs. The FD&C defined cosmetics as articles:

intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance⁴

Drugs were defined as:

(1) articles recognized in the official United States Pharmacopeia, official Homeopathic Pharmacopeia of the United States, or the official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to

¹ 34 Stat. 768 (1906).

² H.R. 9154, 55th Cong. 2d Sess. (1898); S. 4144 55th Cong. 2d Sess. (1898).

³ Section 6, 34 Stat. 768, 769 (1906).

⁴ FD&C Act § 201(j); 21 U.S.C. § 321(i). This definition has not been altered since 1938.

affect the structure or any function of the body of man or other animals
...⁵

The definition of a drug in the 1938 Act is substantially broader than in the 1906 Act. The 1906 Act defined drugs as products intended to prevent or treat disease. The FDA was concerned, however, that this definition did not allow it to regulate substances promoted for conditions that were not classified as diseases. For example, although FDA could regulate food products that made weight reduction claims, it could not exert jurisdiction over nonfood chemicals promoted for the same use because obesity was not regarded as a disease. Accordingly, the FD&C Act expanded the definition of a drug to include articles “intended to affect the structure or function of the body of man or other animals.”⁶

As with the 1906 Act, Congress relied on the concept of intended use for the definition of both a cosmetic and a drug. The 1935 Senate Report on the legislation that became the FD&C Act elaborates on this concept:

The use to which the product is to be put will determine the category into which it will fall. If it is to be used only as food it will come within the definition of food and none other. If it contains nutritive ingredients but is sold for drug use only, as clearly shown by the labeling or advertising, it will come within the definition of drug, but not that of food. If it is sold to be used both as a food and for the prevention or treatment of disease it would satisfy both definitions and be subject to the substantive requirements for both.⁷

The manner in which a product is promoted by its manufacturer determines the classification of the product:

⁵ FD&C Act § 201(g) ; 21 U.S.C. § 321(g). Although parts of this definition have been revised since 1938, the central core of the definition remains unchanged.

⁶ *American Health Prods. Co., Inc. v. Hayes*, 574 F. Supp. 1498 (S.D.N.Y. 1983) (reviewing the legislative history of this prong of the drug definition); *affirmed on other grounds*, 744 F.2d 912 (2d Cir. 1984) (per curiam).

⁷ S. Rep. No. 361, 74th Cong., 1st Sess. 4 (1935).

The manufacturer of the article, through his representations in connection with its sale, can determine the use to which the article is to be put. For example, the manufacturer of a laxative which is a medicated candy or chewing gum can bring his product within the definition of drug and escape that of food by representing the article fairly and unequivocally as a drug product.⁸

B. The OTC Drug Review

Prior to 1962, the FD&C Act required only that a new drug application (NDA) show that a new drug was safe. There was no requirement that an NDA include data on effectiveness. Under the Drug Amendments of 1962, FDA was required to review every NDA that had become effective between 1938 and 1962 in order to determine that the drug was effective for its intended uses.⁹ For OTC drugs, FDA established advisory committees to review all of the pharmacological categories of OTC drugs and prepare reports on the safety, effectiveness, and labeling for all existing OTC drugs.¹⁰ After FDA review and public comment, FDA promulgates a tentative and final monograph establishing the conditions for safe and effective use for each category of OTC drug.

Although the OTC Drug Review raised questions about the distinctions between cosmetics and drugs, FDA made clear that the review was strictly limited to drug products and drug claims. As a result, in many of the advisory committee reports and preambles to tentative or final monographs, there was substantial discussion about the dividing line between drug claims and cosmetic claims. In several instances, FDA explicitly stated that a final monograph

⁸ The legislative history of the FD&C Act also demonstrates that Congress recognized that the definitions of food, drugs, and cosmetics were not mutually exclusive. Because the classification for a product was within the sole control of the seller (by the seller's claims for a product), Congress concluded that the regulation for any product should be commensurate with its marketing claims. Sen. Rep. No. 361, 74th Cong., 1st Sess. 4 (1935).

⁹ 76 Stat. 780 (1962).

¹⁰ 21 C.F.R. Part 330.

covered only products making drug claims and did not cover claims for the product making only cosmetics claims.¹¹

C. FDA's Continued Reliance on Intended Use to Classify Products Under the FD&C Act

Drug and cosmetic products continue to be classified according to their intended uses, and courts have consistently followed this congressional mandate. As the United States Court of Appeals for the Fourth Circuit recognized in the 1998 tobacco litigation, no court has ever found that a product is intended for a drug use “absent manufacturer claims as to that product’s use.”¹² For example, the United States Court of Appeals for the Second Circuit on two occasions overruled FDA regulations purporting to classify high doses of vitamins A and D as drugs, based solely on the level of those nutrients in a product.¹³ The court ruled that, when labeled as dietary supplements to maintain optimal health, high levels of these vitamins are properly classified as foods rather than as drugs unless FDA can demonstrate that they are taken “almost exclusively” for therapeutic purposes.

A recent authoritative opinion from FDA Chief Counsel, Daniel Troy, confirms the central importance of this concept.¹⁴ Although this letter was in response to the classification

¹¹ *E.g.* 48 Fed. Reg. 46694, 46701-46702 (October 13, 1983) (vaginal products); 54 Fed. Reg. 13490, 13491 (April 3, 1989) (astringent products); 56 Fed. Reg. 63554, 63555 (December 4, 1991) (dandruff products).

¹² *Brown & Williamson Tobacco Corp. v. Food & Drug Administration*, 153 F.3d 155, 163 (4th Cir. 1998), quoting from *Coyne Beahm, Inc. v. United States Food & Drug Administration*, 966 F. Supp. 1374, 1390 (M.D.N.C. 1997), *affirmed on other grounds, Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

¹³ *National Nutritional Foods Association v. Weinberger*, 512 F.2d 688 (2d Cir. 1975); *National Nutritional Foods Association v. Mathews*, 557 F.2d 325 (2d Cir. 1977).

¹⁴ Letter to Jeffrey N. Gibbs, Esq., Hyman, Phelps & McNamara (October 17, 2002).

of a medical device, the principles are equally applicable to the distinction between a drug and a cosmetic.

In October 2002, Daniel Troy issued a letter to an attorney representing VeriChip Corporation regarding a request from the manufacturer for a determination that the VeriChip is not a medical device (copy attached). The VeriChip is a micro transponder that may be inserted by hypodermic needle under the skin in humans. The chip can be read through the skin by a scanner and can be used (1) to access medical information to assist medical personnel in diagnosing or treating disease, and (2) for personal identification and security.

Employing a lengthy analysis, FDA concluded that when the VeriChip is intended to be used in the diagnosis of a disease or other condition, it is classified as a medical device. In contrast, when the VeriChip is intended for personal identification and security purposes, it is not properly classified as a medical device even though, as an implant, it clearly has an effect on the human body. According to FDA, "In the language of the statute itself, the product must be 'intended to' affect the structure or a function of the body. It is well settled that intended use is determined with reference to marketing claims." Thus, only to the extent that VeriChip is promoted to assist in the diagnosis or treatment of injury or illness will it be regulated as a medical device.

FDA expressly rejected the argument that an intended use for a product can be established based on the "foreseeable use" of a product, absent marketing claims for that use. Even if it is foreseeable that a product will affect the structure or function of the body, FDA cannot regulate the product as a medical device unless it is promoted for such purposes.

It is, of course, foreseeable that any implant, such as the personal ID\security VeriChip, will have an effect on the structure and function of the body; indeed, it will be permanently embedded under a person's skin.

However, ... a foreseeable effect on the structure or function of the body does not establish an intended use.¹⁵

If foreseeability were a permissible basis for finding an intended use, FDA's jurisdiction would extend over a wide range of products that Congress never intended to reach.

Hiking boots; shirts, pants, and coats; exercise equipment; insulated gloves; airbags, and chemical sprays can be said to affect bodily structure or function. Clothing or gloves, for example, keep the body warm. It is for this reason that FDA's regulations discuss objective, as opposed to subjective intent. Foreseeability by the manufacturer does not suffice to establish intended use. Rather, there must be "objective intent" in the form of marketing claims.¹⁶

Following the VeriChip opinion, FDA took action to reclassify decorative lenses as cosmetics rather than as medical devices, applying the same interpretation of the "intended use" doctrine.¹⁷ Even though these lenses unquestionably have an effect on the eye, they were intended only to alter the appearance of the eye (rather than to correct the user's vision) and thus are properly classified by the agency solely as cosmetics.

In sum, for nearly a century, Congress has regulated products according to their intended uses. Only when a product makes drug or device claims will the product be regulated as a drug or device. In fact, on the website of the Center for Food Safety and Applied Nutrition (CFSAN), which regulates cosmetics, CFSAN notes that "legal difference between a cosmetic and a drug is determined by a product's intended use. . . Firms sometimes violate the law by marketing a cosmetic with a drug claim...." Accordingly, when FDA requests data for monographs for OTC drugs, it must restrict its analysis to products which are promoted using drug claims.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 68 Fed. Reg. 16520 (April 2, 2003).

II. FDA's Request for Data Includes Products Traditionally Labeled as Cosmetics

FDA's most recent request for data includes products that have traditionally been labeled using cosmetic claims. Accordingly, these products cannot be subject to an OTC drug monograph.

A. Antiwrinkle Products

The classification of antiwrinkle products has a long history extending back prior to the OTC Drug Review process. Throughout this history, as long as manufacturers promoted their products as cosmetics, FDA has treated these products as cosmetics. Even with the advent of new technologies, such as alpha hydroxy acids and beta hydroxy acids, FDA has continued to regulate antiwrinkle products as cosmetics.

1. Antiwrinkle Cases of the 1960s

In the 1960s, the cosmetic industry developed a line of products, broadly characterized as "wrinkle remover" products, containing ingredients intended to smooth, firm and tighten the skin temporarily and thus to make wrinkles less obvious. In 1964, FDA seized several of these products, alleging that their claims brought them within the definition of a drug under the FD&C Act.¹⁸ The manufacturers opposed FDA's characterization, and challenged FDA's interpretation of the statute. The suits resulted in three decisions by U.S. District Courts and two decisions by U.S. Courts of Appeals. First, in a case involving the product "Line Away," both the District Court and the Court of Appeals concluded that, by intending to smooth and tighten skin, the product was intended to affect the structure of the skin.¹⁹ Citing the "strong

¹⁸ Peter Barton Hutt, *The Legal Distinction in the United States Between a Cosmetic and a Drug*, in Peter Elsner and Howard Maiback, Eds., *Cosmeceuticals: Drugs v. Cosmetics* (2000).

¹⁹ *United States v. An Article ... "Line Away,"* 284 F. Supp. 107 (D. Del. 1968); *affirmed*, 415 F.2d 369 (3d Cir. 1969).

therapeutic implications” of the promotional materials, the courts concluded that Line Away should be classified as a drug.

A second case involving the product “Sudden Change” produced a somewhat different result. The District Court concluded that the product merely claimed to alter the appearance of the skin and thus was a cosmetic.²⁰ In a split panel, the Court of Appeals disagreed, citing claims that the product would give a “face lift without surgery,” and concluded that the product was a drug.²¹ However, even the majority explicitly recognized that traditional cosmetic claims -- e.g., that a product will soften or moisturize the skin -- remain within the cosmetic category.²²

Finally, the District Court in a case involving the product “Magic Secret” determined that the product was a cosmetic, not a drug, based on the conclusion that the claims for the product were less exaggerated than in either *Line Away* or *Sudden Change*.²³ The court concluded that a claim that a product caused an “astringent sensation” would not be regarded by consumers as doing anything other than altering appearance.

As a result of these cases, the cosmetic industry modified its claims for antiwrinkle products to bring them within the boundaries established by the courts for cosmetics. Nearly two decades passed without FDA taking any major regulatory initiatives in regard to antiwrinkle products. In the late 1980’s, however, FDA issued approximately 40 regulatory

²⁰ *United States v. An Article ... “Sudden Change,”* 288 F. Supp. 29 (E.D.N.Y. 1968).

²¹ *United States v. An Article ... “Sudden Change,”* 409 F.2d 734 (2d Cir. 1969).

²² *Id.* at 745.

²³ *United States v. An Article ... “Helene Curtis Magic Secret,”* 331 F. Supp. 912 (D. Md. 1971).

letters to cosmetic manufacturers warning that the agency considered current claims to be drug claims²⁴:

we consider a claim that a product will affect the body in some physiological way to be a drug claim, even if the claim is that the effect is only temporary claims that a product “counteracts,” “retards,” or “controls” aging or the aging process, as well as claims that a product will “rejuvenate,” “repair,” or “renew” the skin are drug claims ...²⁵

In contrast, in a letter to the cosmetic industry that was prompted by the resulting litigation, FDA said that claims that a product will temporarily improve the appearance of outward signs of aging would not be considered drug claims. The agency also stated that “we would consider a product that claims to improve or to maintain temporarily the appearance or feel of the skin to be a cosmetic.”²⁶ The FDA letter gave as one example that “a product that claims to moisturize or soften the skin is a cosmetic.”²⁷

2. Alpha Hydroxy Acid and Beta Hydroxy Acid Products

In the early 1990s, the cosmetic industry developed and marketed a line of products containing alpha hydroxy acids (AHAs) -- such as glycolic, lactic acid and citric acid that occur naturally in food -- to cleanse dead cells from the surface of the skin and assist moisturization.²⁸ More recently, the industry has developed a line of products that use beta hydroxy acids (BHAs) for similar purposes.²⁹

²⁴ Peter Barton Hutt, *The Legal Distinction in the United States Between a Cosmetic and a Drug*, in Peter Elsner and Howard Maiback, Eds., *Cosmeceuticals: Drugs v. Cosmetics* (2000).

²⁵ Letter from FDA Associate Commissioner for Regulatory Affairs John M. Taylor (November 19, 1987).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Alpha Hydroxy Acids in Cosmetics, <http://www.cfsan.fda.gov/~dms/cos-aha.html>.

²⁹ Beta Hydroxy Acids in Cosmetics, <http://www.cfsan.fda.gov/~dms/cos-bha.html>.

AHAs have been formulated into skin products, make-up, hair products, nail products, bath products, colognes, and suntan preparations. Most AHA-containing products for personal use by consumers are intended for daily use on the skin or mucous membrane.³⁰

Since their introduction, the cosmetic industry has been engaged in a dialogue with the FDA Center for Food Safety and Applied Nutrition (CFSAN) about AHA products. In 1994, the Cosmetic Ingredient Review (CIR) program convened an Expert Panel of independent academic scientists to review the safety of AHA-containing products.³¹ After reviewing all published and unpublished data, including testing undertaken by both FDA and CTFA, the CIR Expert Panel made the following safety determination with respect to cosmetic products for personal use:

Based on available information ..., the CIR Expert Panel concludes that glycolic and lactic acids, their common salts and their simple esters, are safe for use in cosmetic products at concentrations less than or equal to 10 percent, at final pHs greater than or equal to 3.5, when formulated to avoid increasing the skin's sensitivity to the sun, or when directions for use include the daily use of sun protection.³²

On June 29, 2000, CTFA submitted a citizen petition requesting that FDA adopt a regulation requiring AHA-containing products to use labeling that alerts consumers to the potential of increased sun sensitivity. As a result, CFSAN published a draft guidance document

³⁰ FDA Guidance for Industry (Draft): Labeling for Topically Applied Cosmetic Products Containing Alpha Hydroxy Acids as Ingredients (December 2, 2002).

³¹ *Id.*

³² FDA, Memoranda of Meetings of AHA Review Committee, May 6, 1997, and February 12, 1997.

in 2002 addressing the safety concerns of AHAs and providing guidance on labeling for such products.³³ The final guidance is still under consideration.

BHA products have been introduced into the market only in the past several years. Most BHA products contain salicylic acid and are lipid soluble, as opposed to AHAs which are water soluble.³⁴ Because BHAs concentrate their exfoliation on the top layers of the skin, they are even less likely to cause skin irritation than AHAs. Like AHAs, BHA products have been reviewed by the CIR Expert Panel and determined safe.³⁵ In February 2000, the CIR Expert Panel for BHAs reached the tentative conclusion that the use of salicylic acid and related substances in cosmetics are “safe as used when formulated to avoid irritation and when formulated to avoid increased sun sensitivity.”³⁶ The CIR added that “when sun sensitivity would be expected, directions for use [should] include the daily use of sun protection.”³⁷

Throughout the history of antiwrinkle products generally and AHA and BHA products specifically, these products have been treated as cosmetics. CFSAN itself is in the process of working with industry on the proper regulation of these products as cosmetics.³⁸

FDA’s recent request for data is improper under the FD&C Act in two respects. First, it requests data for products that make only cosmetic claims. Second, it requests data on ingredients labeled for cosmetic use solely because FDA regards them as “drug ingredients.” As

³³ FDA Guidance for Industry (Draft): Labeling for Topically Applied Cosmetic Products Containing Alpha Hydroxy Acids as Ingredients (December 2, 2002).

³⁴ Bryan A. Liang and Kurt M. Hartman, *It’s Only Skin Deep: FDA Regulation of Skin Care Cosmetics Claims*, 8 Cornell J. Law & Pub. Policy 249, 272 (1999).

³⁵ Beta Hydroxy Acids in Cosmetics, <http://www.cfsan.fda.gov/~dms/cos-bha.html>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Alpha Hydroxy Acids in Cosmetics, <http://www.cfsan.fda.gov/~dms/cos-aha.html>; Beta Hydroxy Acids in Cosmetics, <http://www.cfsan.fda.gov/~dms/cos-bha.html>.

explained above, the FD&C Act, judicial precedent, and recent FDA administrative precedent demonstrate that products and ingredients intended only for cosmetic use cannot be subjected to the OTC Drug Review process.

This FDA notice purports to apply to all AHA- and BHA-containing products, despite that these ingredients have traditionally been regarded as cosmetic ingredients and that the claims for such products are cosmetic claims. The notice does not apply the proper standard for determining whether a product is a drug or a cosmetic. The relevant inquiry should be whether these products are being promoted as drugs, or whether they are being promoted as cosmetics. As will be discussed below, if some manufacturers cross the line and promote a product using drug claims, the appropriate response is to use FDA's array of enforcement authorities. Just as it did in the 1960s and 1980s, FDA has the ability to regulate antiwrinkle products that make drug claims without resorting to a wholesale reclassification of the entire product line.

B. Vaginal Lubricants and Moisturizers

Like antiwrinkle products, vaginal lubricants and moisturizers have long been regarded and promoted as cosmetics. FDA's notice, however, encompasses many claims that have been used for cosmetic products for decades. For example, the notice concludes that the following claims are drug claims:

- “for personal lubrication when vaginal dryness causes discomfort”;
- “acts as a moisturizers for vaginal dryness”;
- “enhances the comfort of vaginal dryness”;
- “provides continuous vaginal moisture”;

- “safe immediate relief of vaginal dryness.”³⁹

These claims are cosmetic claims. In fact, in the past, FDA has characterized similar claims for vaginal products as cosmetic claims. In 1983, FDA published a proposed monograph for OTC vaginal drug products.⁴⁰ In doing so, FDA recognized that a wide range of vaginal products could be promoted and sold as cosmetics. FDA wrote:

The Panel decided that certain labeling claims for vaginal products more properly fall within the cosmetic category, while other claims fit more accurately into the drug category. In this regard, the Panel recognizes that vaginal douches and suppositories may be viewed by a consumer as either cosmetics or drugs.⁴¹

In the preamble to the proposed monograph, FDA determined that claims that a product will “produce a beneficial effect by removing secretions and changing the vaginal flora either by suppressing or actually eliminating specific pathogens” are drug claims.⁴² FDA concluded that, because these claims promise a therapeutic effect and treatment of disease, they are properly considered drug claims. In contrast, claims that a product “produces only transitory changes in an essentially normal vagina by the removal of secretions and bacteria for example, it is then considered as having only a cleansing effect.” In such situations, the product “thus may be classified as a cosmetic.”⁴³

To the extent that product promotions make medicinal benefit claims, the products are correctly classified as drugs. When the promotions for a product claim effectiveness against diseases or pathogens, or otherwise claims to alter the structure or function

³⁹ *Id.* at 75588-75589.

⁴⁰ 48 Fed. Reg. 46694 (October 13, 1983).

⁴¹ *Id.* at 46701.

⁴² *Id.*

⁴³ *Id.*

of the body, the product is a drug. For example, claims that a product protects “against unplanned pregnancy” are drug claims. When claims for a product focus only on temporary cleaning, moisturizing or lubrication, however, the product is properly considered a cosmetic rather than a drug. Accordingly, many of the claims that FDA cites in its request for data are traditional cosmetic claims. For example, “acts as a moisturizer for vaginal dryness” is a cosmetic claim because it does not claim to treat a disease or alter the structure or function of the body. Similarly, a claim that a product relieves vaginal dryness is properly a cosmetic claim. All of these claims relate to temporary cleansing and moisturizing, and do not cross the line into structure or function claims.

C. Nasal Moisturizers

Like vaginal moisturizers, nasal products that claim to cleanse or moisturize the nasal cavity or relieve dryness are properly regulated as cosmetics, not as drugs. FDA has long held that claims for temporary relief of dryness are cosmetic claims. For example, in the preamble to the final monograph for suntan products, FDA concluded that if a product is intended to be used solely as a moisturizer, “the product may be marketed as a cosmetic.”⁴⁴ Similarly, the FD&C Act provides that products that are intended to “cleanse” are cosmetics.⁴⁵

The federal courts have concluded that products that are promoted as moisturizers are cosmetics. For example, in *United States v. An Article ... “Sudden Change,”*⁴⁶ the Court of Appeals for the Second Circuit concluded that a product sold as a moisturizer was understood by

⁴⁴ 64 Fed. Reg. 27666 (May 21, 1999).

⁴⁵ FD&C Act § 201(i); 21 U.S.C. § 321(i).

⁴⁶ 409 F.2d 734, 742 (2d Cir. 1969).

consumers to be a cosmetic. The court determined that, because such claims were not structure or function claims, the products promoted using these claims should be considered cosmetics.

Accordingly, when nasal moisturizer products claim to relieve nasal dryness, provide moisture, or cleanse the nasal cavity, the product can only be regarded and regulated as a cosmetic. If the promotions promise clinical or medicinal benefits in regard to particular diseases, however, then the product is rightly classified as a drug.

III. FDA Enforcement Against Cosmetic Products For Drug Claims

FDA should use its resources to prepare OTC drug monographs for true drug products. The agency has no authority to develop drug monographs for products that are traditionally promoted as cosmetics. If a manufacturer occasionally crosses the line and promotes a product using drug claims, FDA has a wide array of enforcement tools at its disposal to correct the problem.

As an initial matter, FDA has the statutory authority to require manufacturers to submit an NDA to substantiate drug claims. If a manufacturer promotes a product as a drug without an approved NDA, the product is illegal and is subject to seizure, injunction, and criminal prosecution.⁴⁷ As FDA has done on many occasions over the past three decades, the agency can issue warning letters to manufacturers who make unsubstantiated medical claims.⁴⁸

A warning letter has two primary effects. First, it puts the recipient on notice that FDA believes it is promoting its products using drug claims and that it must either cease doing so or be prepared to defend itself. Second, a warning letter serves as a notice to the industry of

⁴⁷ FD&C Act §§ 301(a) 302, 304(a); 21 U.S.C. §§ 332(a), 333(a). 334(a).

⁴⁸ Warning Letter to Raymond J. Francis, President & CEO, University Medical Products USA, Inc. (January 22, 2004).

FDA's views on when a claim crosses the line between a drug and a cosmetic. The industry recognizes the seriousness of these issues and the gravity of an FDA warning letter. Just as FDA's actions during the 1960s (seizure of antiwrinkle products) and the 1980s (warning letters), FDA's traditional enforcement tools will have the effect of notifying the industry of FDA's views.

Congress provided FDA with these enforcement tools for precisely this reason. Since the Food and Drugs Act of 1906, Congress created two separate regulatory structures for drugs and cosmetics. When individual manufacturers cross the line between these categories, FDA is empowered to take action through the agency's various enforcement tools. Congress did not, however, authorize FDA to reclassify entire lines of cosmetic products as drugs because some manufacturers occasionally make improper drug claims.

Conclusion

CTFA supports FDA's effort to complete the OTC Drug Review. This effort, however, should respect the longstanding distinctions between drugs and cosmetics. In the FD&C Act, Congress created two distinct regulatory systems for drugs and cosmetics, and provided FDA with enforcement tools to regulate the promotion of each category. FDA should use this authority, rather than attempting to reclassify entire product categories because some manufacturers cross the line.



E. Edward Kavanaugh
President

cc: Charles J. Ganley, M.D. (HFD-560)
Gerald M. Rachanow (HFD-560)



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the General Counsel

Office of the Chief Counsel
Food and Drug Administration
5600 Fishers Lane, GCF-1
Rockville, MD 20857

October 17, 2002

VIA FACSIMILE

Jeffrey N. Gibbs, Esq.
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700 Thirteenth Street, N.W.
Suite 1200
Washington, D.C. 20005-5929

Dear Mr. Gibbs:

This responds to your letters concerning Applied Digital Solutions (ADS)'s two separate written requests submitted to the Center for Devices and Radiological Health (CDRH or the Center) under Section 513(g) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) requesting a determination that the VeriChip is not a medical device under the FD&C Act for the intended uses described in the requests. Your requests cover two different intended uses of the product. The first is for use of the VeriChip in health information applications ("health information VeriChip"). The second is for security, financial, and personal identification\safety applications ("personal ID\security VeriChip"). For the reasons discussed below, FDA believes that the health information VeriChip is a medical device subject to FDA's jurisdiction. FDA agrees, however, that the personal ID/security VeriChip is not covered by the FD&C Act.

Background

Since 1986, Digital Angel Corporation, which is working with VeriChip Corporation, has sold more than 20 million implantable RFID transponders for animals, including companion animals such as dogs and cats; livestock animals such as pigs and cattle; fish and a variety of other species. VeriChip is one of those same chips, with the same internal components, the same glass envelope, and a slightly revised number system. The transponders provide access to information necessary to identify the animal.

In January of 1984, the Center for Veterinary Medicine (CVM) within FDA issued a letter to the manufacturer of this product stating: "This product is a microminiature transponder that is embedded in non-reactive plastic and may be inserted by hypodermic needle into animals of all sizes. The device does not have a medical\therapeutic function. Therefore, we have no objection to marketing of this identification device for use in animals."

In 1986, FDA again wrote the company stating:

"This is in response to your March 21, and July 8, 1986 letters concerning the status of your product 'System I.D.' with the use of R6 Soda Lime glass for encapsulation rather than non-reactive plastic as originally proposed. . . . "

"This product is a microminiature transponder inserted by hypodermic needle into animals of all sizes. The device does not have a medical\therapeutic function. That has not changed by the use of glass for encapsulating instead of plastic. Therefore, we have no objection to marketing of this device for use in animals."

ADS has determined to market in the United States a version of the microminiature transponder, known by the trade name "VeriChip," for a variety of uses in human beings. We understand from ADS that the VeriChip is a microminiature transponder that is encapsulated in medical grade glass that may be inserted by hypodermic needle under the skin of the upper arm in humans. The chip\transponder stores a unique identification number only. A small, handheld introducer is used to place the chip subcutaneously. A small, handheld battery-powered scanner can read the identification number on the chip. That number enables access to a database providing individual identity and access rights to information or facilities. The personal ID\security VeriChip would allow access, via the database, to information related to security, financial, and personal safety applications only. You have represented that it will not contain any medical information. By contrast, ADS and its representatives have explained, the health information VeriChip would allow access, via the database, to medical history and other information to assist medical personnel in diagnosing or treating an injury or illness.

Regulatory Status of the VeriChip

We believe that the health information product, which facilitates access to information for use by medical professionals in treating the individual with the VeriChip embedded in his or her arm, is "intended for use in the diagnosis of disease or other conditions, or in the cure [or] mitigation of disease." The information in the database is meant to be used by medical professionals in diagnosing a disease or other condition. Indeed, the entire purpose of this product is for a medical professional to employ when treating a stricken individual. For example, information about whether the person is allergic to a particular medicine, or has an implanted pacemaker, which is accessed in connection with the VeriChip, is intended for use in treating the person. Accordingly, FDA has determined that the health information VeriChip is a medical device within the meaning of Section 201(h)(2) of the FD&C Act.¹

¹ The health information VeriChip does not meet any of the three broad categories of computer products not subject to regulation as a medical device. It is not used for a traditional library function, it is not used as a general

By contrast, as CVM recognized with respect to the use of the VeriChip predecessor in animals, it does not appear that the personal ID/security VeriChip is a medical device, even though it is an "implant." It is of course true that virtually any product that comes into contact with the body—and many that do not—could be said to have an effect on the structure or a function of the body. However, as you note in your Section 513(g) submission, FDA's medical device jurisdiction under Section 201(h)(2) extends only to such products that are marketed by their manufacturers or distributors with claims of effects on the structure or a function of the body. In the language of the statute itself, the product must be "intended to" affect the structure or a function of the body. It is well settled that intended use is determined with reference to marketing claims.

As early as Bradley v. United States, 264 F. 79 (5th Cir. 1920), courts were finding "intended use" based upon marketing claims. In 1953, the Second Circuit held that claims are essential to establish an "intended use." FTC v. Liggett & Myers Tobacco Co., 203 F.2d 955 (2d Cir. 1953) (per curiam), aff'g 108 F. Supp. 573 (S.D.N.Y. 1952). "The real test is how . . . this product [is] being sold[.]" United States v. Nutrition Serv., Inc., 227 F. Supp. 375, 386 (W.D. Pa. 1964), aff'd, 347 F.2d 233 (3d Cir. 1965). The courts "have always read the . . . statutory definitions employing the term 'intended' to refer to specific marketing representations." American Health Prods. Co. v. Hayes, 574 F. Supp. 1498, 1505 (S.D.N.Y. 1983) (citations omitted), aff'd on other grounds, 744 F.2d 912 (2d Cir. 1984). This is what has traditionally been understood as "objective intent." 21 C.F.R. §§ 201.128 & 801.4.

Indeed, just four years ago, the United States Court of Appeals for the Fourth Circuit found that "no court has ever found that a product is 'intended for use' or 'intended to affect' within the meaning of the [FD&C Act] absent manufacturer claims as to that product's use." Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155, 163 (4th Cir. 1998) (internal quotation marks omitted) (citing Coyne Beahm, Inc. v. FDA, 966 F. Supp. 1374, 1390 (M.D.N.C. 1997)), aff'd, 529 U.S. 120 (2000); see also United States v. Undetermined Quantities . . . "Pets Smellfree," 22 F.3d 235, 240 (10th Cir. 1994) ("PSF's claims [in labeling and promotional materials] . . . bring Smellfree within the scope of § 321(g)(1)(C)."); United States v. Storage Spaces Designated Nos. "8" and "49," 777 F.2d 1363, 1367 n.6 (9th Cir. 1985) (relying on "the manner in which the products [were] promoted and advertised" in finding that the products were drugs under Section 321(g)(1)(C)); United States v. An Article of Device . . . Amblvo-Svntonizer, 261 F. Supp. 243, 244 (D. Neb. 1966) (articles were sold to "only those optometrists who take courses [from the distributor] concerning the purpose and use of the device").

In a 1994 case, FDA stated that it "does not claim that a device which has no medical application could 'qualify as a device under the FD&CA.'" United States v. Undetermined

accounting or communications function, and it is not solely for educational purposes. FDA Policy for the Regulation of Computer Products (November 13, 1989) (emphasis added).

Jeffrey N. Gibbs, Esq.

October 17, 2002

Page 4

Number of Unlabeled Cases, 21 F.3d 1026, 1030 (10th Cir. 1994) (Cook, J., concurring in part and dissenting in part) (quoting Brief for the United States at 16) (emphasis added).² Courts have held that Section 201(h)(3) only encompasses products claimed to affect the body "in some medical—or drug-type fashion, i.e., in some way other than merely altering the appearance." An Article . . . "Sudden Change," 409 F.2d at 742 (internal quotation marks omitted) (emphasis added). See E.R. Squibb & Sons, Inc. v. Bowen, 870 F.2d 678, 682-83 (D.C. Cir. 1989) (Section 201(h)(3) is interpreted to be "relatively narrow.>").

The pertinent legislative history supports this interpretation. Specifically, the Senate Report accompanying the legislation that became the Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, 52 Stat. 1040 (1938), states:

The use to which the product is to be put will determine the category into which it will fall. . . . The manufacturer of the article, through his representations in connection with its sale, can determine the use to which the article is to be put.

S. Rep. No. 74-361, at 240 (1935) (emphasis added); see also Foods, Drugs, and Cosmetics: Hearings on S. 2800 Before the Sen. Comm. on Commerce, 73d Cong. 517-18 (1934) (a table would be subject to FDA jurisdiction only if claimed to have medical application). As the D.C. Circuit found, that intended use is determined by manufacturer marketing claims "has now been accepted as a matter of statutory interpretation" by the federal courts. Action on Smoking and Health v. Harris, 655 F.2d 236, 238-39 (D.C. Cir. 1980).

Accordingly, assuming that no medical claims are made for the personal ID\security VeriChip, and the product marketed for that purpose contains no health information, FDA can confirm that it is not a medical device.

It is, of course, foreseeable that any implant, such as the personal ID\security VeriChip, will have an effect on the structure and function of the body; indeed, it will be permanently embedded under a person's skin. However, as the Fourth Circuit recently held, a foreseeable effect on the structure or function of the body does not establish an intended use. Sigma-Tau Pharmaceuticals, Inc. v. Schwetz, 288 F.3d 141 (4th Cir. 2002) (rejecting the contention that under 21 C.F.R. § 201.128, FDA must consider evidence of likely post-approval use), aff'g 2001 U.S. Dist. LEXIS 11247 (D. Md. Aug. 3, 2001). If the foreseeability theory had been accepted by the courts, FDA would have won several cases that it lost. See, e.g., United States v. Articles of Drug for Veterinary Use, 50 F.3d 497 (8th Cir. 1995); National Nutritional

² Indeed, as a 1937 Report from the House Interstate and Foreign Commerce Committee noted, "[s]peaking generally, 'devices' within the terms of the act means instruments and contrivances intended for use in the cure or treatment of disease. 'Devices' are included within the bill because of their close association with drugs as a means for the treatment of physical ills." H.R. Rep. No. 75-1613, at 2.

Jeffrey N. Gibbs, Esq.
October 17, 2002
Page 5

Foods Ass'n v. Mathews, 557 F.2d 325 (2d Cir. 1977); National Nutritional Foods Ass'n v. FDA, 504 F.2d 761 (2d Cir. 1974).

Also, if foreseeability were a permissible basis for finding an intended use as that term is used in Section 201(h)(3), FDA's jurisdiction would encompass many articles having foreseeable physical effects. Yet FDA only regulates products if they are marketed with claims of medical or therapeutic utility. For example, FDA only regulates exercise equipment as a medical device when it is marketed with claims to prevent, treat, or rehabilitate injury or disability. Otherwise, it is a consumer product. See Letter from Thomas Scarlett to James V. Lacy (May 6, 1988); 21 C.F.R. §§ 890.5350-890.5380; see also Pillow Used To Aid Sleep or Rest (Mother's Pillow)—Device Status (updated Jan. 31, 2002) (available at <www.fda.gov/cdrh/devadvice/21aaa.html>); Sun Protective Fabrics/Articles of Clothing (updated Apr. 15, 1998) ("FDA has decided that it is not the appropriate agency to regulate SPC [(sun protective clothing)] for which no medical claims are made and which are only intended for general use.") (available at <www.fda.gov/cdrh/devadvice/21a.html>); Letter from Richard M. Cooper, Chief Counsel, FDA to Stephen Lemberg, Ass't Gen. Counsel, CPSC (May 14, 1979) (available at <<http://www.cpsc.gov/library/foia/advisorv/276.pdf>>) (electrostatic air cleaners).

In addition, if foreseeable effects were cognizable under Section 201(h)(3), FDA's legal authority would intrude into consumer product regulation—an area of responsibility delegated by Congress to another federal agency. CPSC's jurisdiction extends to "consumer products," which means "any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise" 15 U.S.C. § 2052(a)(1). The definition expressly excludes "drugs, devices, or cosmetics (as such terms are defined in sections 201(g), (h), and (i) of the Federal Food, Drug, and Cosmetic Act . . .)." Id. § 2052(a)(1)(H).

Similarly, if Section 201(h)(3) of the FD&C Act were interpreted to give FDA jurisdiction over any product foreseeably having an effect on the structure or a function of the body, then regulatory authority would shift from the CPSC to FDA for a host of non-health-related products. Hiking boots; shirts, pants, and coats; exercise equipment; insulated gloves; airbags; and chemical sprays can be said to affect bodily structure or function. Clothing and gloves, for example, keep the body warm. It is for this reason that FDA's regulations discuss objective, as opposed to subjective, intent. 21 C.F.R. §§ 201.128 & 801.4. Foreseeability by the manufacturer does not suffice to establish intended use. Rather, there must be "objective intent" in the form of marketing claims.

Moreover, for FDA to treat as "intended" every foreseeable effect on the structure or a function of the body would subject off-label use to unintended regulation. Off-label use of

medical products is ubiquitous, often comprising the standard of care. See, e.g., Janet Woodcock, A Shift in the Regulatory Approach, 32 Drug Info. J. 367, 367 (1998); GAO, Report to the Chairman, Sen. Comm. on Labor and Human Resources: Off-Label Drugs: Reimbursement Policies Constrain Physicians in Their Choice of Cancer Therapies 19 (Sept. 1991).³ Given that many off-label uses are foreseeable, for FDA to require pre-approval for every use of a product made in the absence of claims would dramatically harm the public health. As one court put it,

New uses for drugs are often discovered after FDA approves the package inserts that explain a drug's approved uses. Congress would have created havoc in the practice of medicine had it required physicians to follow the expensive and time-consuming process of obtaining FDA approval before putting drugs to new uses.

United States v. Algon Chem. Inc., 879 F.2d 1154, 1163 (3rd Cir. 1989) (quoting Chaney v. Heckler, 718 F.2d 1174, 1180 (D.C. Cir. 1983), rev'd on other grounds, 470 U.S. 821 (1985)).

Finally, adoption of a foreseeability theory of intended use would undermine the generic drug approval process. The abbreviated new drug approval (ANDA) process, created by the Drug Price Competition and Patent Term Restoration Act of 1984 (the Hatch-Waxman Act), Pub. L. No. 98-417, 98 Stat. 1585, provides for FDA approval of a generic drug based on a showing of bioequivalence to the innovator counterpart. Approval is authorized only if the generic drug's labeling is substantially identical to the labeling for the innovator. 21 U.S.C. § 355(j)(2)(A)(v), (j)(4)(G); 21 C.F.R. § 314.94(a)(3). Because the medical community's experience with an innovator product following approval frequently reveals clinically useful off-label uses, by the time the generic version is approved it is likely to have foreseeable uses that its innovator predecessor did not have. If foreseeable use constituted intended use, then FDA would lack authority to approve a generic drug because all foreseeable uses would have to be in the labeling, and the additional uses would cause the generic labeling to differ from the innovator labeling. The generic drug manufacturer could only obtain approval of the new indications by developing the clinical and other data required in a full NDA. Interpreting "intended use" to include foreseeable use would thus utterly defeat the purposes of the generic drug legislation, with ill effects for the cost and availability of drugs.

Conclusion

³ According to a 1991 report of the General Accounting Office, 33 percent of all drugs being administered to treat cancer were being prescribed "off label," and 56 percent of the cancer patients surveyed were given at least one drug for an unapproved use. GAO, Report to the Chairman, Sen. Comm. on Labor and Human Resources: Off-Label Drugs: Reimbursement Policies Constrain Physicians in Their Choice of Cancer Therapies 19 (Sept. 1991).

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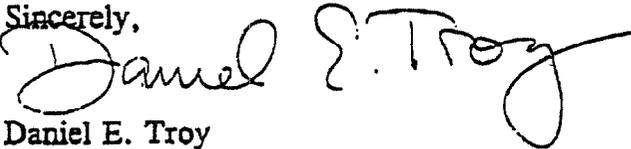
October 17, 2002

Page 7

For the reasons set forth above, FDA has determined that the VeriChip, when marketed to provide information to assist in the diagnosis or treatment of injury or illness, is a medical device. CDRH will be in touch with you shortly as to what its expectations are with respect to that product. In the meantime, we expect that you will not market that product. So long as no medical claims are made for the personal ID\security VeriChip, FDA can confirm that it is not a medical device.

Please do not hesitate to contact us if you have any questions or wish to discuss this matter further.

Sincerely,

A handwritten signature in cursive script that reads "Daniel E. Troy". The signature is written in black ink and is positioned above the typed name and title.

Daniel E. Troy

Chief Counsel

Food and Drug Administration

cc: Mark B. McClellan, M.D., Ph.D.
Lester Crawford, D.V.M., Ph.D.
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