

Attachment 1
Proposed Form of Notice

SUMMARY: The Food and Drug Administration ("FDA") has received information to suggest that products containing dehydroepiandrosterone ("DHEA") may not legally be marketed as "dietary supplements" under the Federal Food, Drug, and Cosmetic Act ("FFDCA" or "the Act"). All interested persons are hereby notified of the process FDA will use to determine whether DHEA-containing products may legally be marketed as "dietary supplements" under the Act.

DATES: [INSERT DEADLINE FOR SUBMISSION OF COMMENTS AND FDA REVIEW TIME FRAMES]

ADDRESSES: [INSERT ADDRESSES]

SUPPLEMENTARY INFORMATION.:

I. Background

As provided in the Dietary Supplement Health and Education Act of 1994, Pub. L. No. 104-417 (the "DSHEA"), Section 201(ff)(1) of the Act defines a "dietary supplement" as a product intended to supplement the diet that bears or contains one or more of a list of specified dietary ingredients. Those ingredients are: (A) a vitamin; (B) a mineral; (C) an herb or other botanical; (D) an amino acid; (E) a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or (F) a concentrate, metabolite, constituent, extract, or combination of any ingredient described in clause (A), (B), (C), (D), or (E).

Even if a product satisfies Section 201(ff)(1), however, it may nevertheless be excluded from the definition of the term “dietary supplement” by Section 201(ff)(3)(B)(ii). That section excludes from the term “dietary supplement”:

an article authorized for investigation as a new drug ... for which substantial clinical studies have been instituted and for which the existence of such investigations has been made public, which was not before such . . . authorization marketed as a dietary supplement or a food unless the Secretary, in the Secretary’s discretion, has issued a regulation, after notice and comment, finding that the article would be lawful under this Act.

FFDCA Section 201(ff)(3)(B)(ii).

II. Information Submitted by Genelabs Technologies, Inc.

On April __, 2000, Genelabs Technologies, Inc. (“Genelabs”) formally petitioned FDA to determine whether products containing DHEA are excluded from the definition of “dietary supplement” pursuant to Section 201(ff)(3)(B)(ii) of the Act. Genelabs asserts that DHEA falls squarely within the Section 201(ff)(3)(B)(ii) exclusion from the definition of a “dietary supplement” because: (1) DHEA has been authorized by FDA for clinical investigation as a new drug; (2) substantial clinical investigations of DHEA have been instituted; (3) the existence of these clinical investigations has been made public; (4) DHEA was not marketed as a dietary supplement or a food prior to the authorization of the substantial clinical trials involving DHEA (and the initiation and public disclosure of those clinical studies); and (5) FDA has not issued a regulation finding that the marketing of DHEA as a dietary supplement is lawful. Moreover, Genelabs asserts that the exclusion of DHEA from the definition of “dietary supplement” pursuant to Section 201(ff)(3)(B)(ii) is consistent with the public policy goals underlying this statutory provision, which seeks to balance the interests of health food consumers against the needs of patients.

In support of its request, Genelabs submitted evidence to the Agency to establish that DHEA has been authorized by FDA for investigation as a new drug pursuant to numerous investigational new drug (“IND”) exemptions dating back to 1988; that substantial clinical investigations were instituted pursuant to these INDs beginning no later than 1988; and that these clinical investigations were made public beginning in 1988. Genelabs also submitted evidence purporting to establish that DHEA was not legally marketed as a dietary supplement or a food prior to the issuance of the IND exemptions authorizing study of DHEA, as well as the initiation and public disclosure of those clinical trials.

To show that DHEA was not legally marketed as a dietary supplement or a food prior to the issuance of the IND exemptions authorizing study of DHEA, Genelabs submitted evidence to demonstrate that prior to the passage of the DSHEA in October 1994, FDA had deemed the marketing of DHEA without an approved new drug application a violation of the FFDCAs prohibition against marketing an unapproved new drug. In addition, Genelabs submitted the results of a survey which shows the absence of any legitimate marketing of products containing DHEA as foods or dietary supplements prior to 1995. Finally, Genelabs asserts that the Secretary has not issued a regulation, after notice and comment, finding that DHEA would be lawful under the Act. Genelabs’ full submission, including all data and information submitted in support thereof, has been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

III. Opportunity to Submit Comments on Whether DHEA is Excluded from the Definition of Dietary Supplement

FDA has determined that the evidence submitted by Genelabs establishes a *prima facie* case that DHEA is excluded from the definition of “dietary supplement” under Section 201(ff)(3)(B)(ii) of the Act. The purpose of this notice is to provide any interested person who opposes a determination by FDA that DHEA is excluded from the

definition of dietary supplement under FFDCa Section 201(ff)(3)(B)(ii) an opportunity to submit information demonstrating that DHEA should not be so excluded. Therefore, any interested person may, within 60 days of the publication of this notice, submit to FDA evidence to demonstrate that DHEA was marketed as a dietary supplement or a food before authorization for investigation of DHEA as a new drug, or any other evidence or information to establish that DHEA is not excluded from the definition of dietary supplement under Section 201(ff)(3)(B)(ii) of the Act.

Any submission under this notice shall contain:

- (1) The name and complete address of the person making the submission;
- (2) The nature of the interest the person making the submission has in whether DHEA is defined as a dietary supplement;
- (3) A statement signed by the person responsible for such submission, that all appropriate records have been searched and to the best of that person's knowledge and belief, the submission represents a true, accurate and complete presentation of the facts.

In addition to the requirements specified above, a submission pursuant to this notice providing evidence that DHEA is not excluded from the definition of dietary supplement under FFDCa Section 201(ff)(3)(B)(ii) because DHEA was marketed as a dietary supplement or a food prior to the authorization for study of DHEA as a new drug is required to be supported by evidence of past and present labeling and evidence of marketing. A person who makes such a contention should submit the labeling and evidence of marketing in the following format:

I. Labeling

A. A copy of each pertinent document or record to establish the identity of each item of written, printed, or graphic matter used as labeling on the date the article was initially marketed.

B. A statement whether such labeling has at any subsequent time been discontinued or changed in any manner. If such discontinuance or change has been made, the exact date, nature, and rationale for each discontinuance or change and a copy of each pertinent document or record to establish each such discontinuance or change should be submitted, including, but not limited to, the labeling which resulted from each such discontinuance or change. If no such discontinuance or change has been made, a copy of representative documents or records showing labeling at representative points in time should be submitted to support the statement.

II. Marketing History

A. A copy of each pertinent document or record to establish the exact date on which the article was initially marketed.

B. A statement that the article has been continuously marketed in the United States since the date of initial marketing, together with a copy of representative documents or records showing labeling at representative points in time to support the statement.

Dated: [INSERT DATE]

[SIGNATURE]