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Dockets Management Staff (HFA-305)
U.S. Food and Drug Administration
5630 Fishers Lane, Rm. 1061
Rockville, MD 20852

RE: Docket No. FDA-1995-N-0062 for "Food Standards; General Principles and Food Standards Modernization" (Publication Date: April 17, 2020)

Dear FDA Desk Officer:

The Natural Products Association (NPA) is submitting this letter as general comment to FDA-1995-N-0062 (Docket Name: Food Standards; General Principles and Food Standards Modernization). The NPA was founded in 1936 to promote and protect the unique values and shared interests of retailers and suppliers of natural nutritional foods and natural products, including conventional foods, medical foods, dietary supplements, and foods for special dietary use. The NPA is a non-profit 501(c)(6) association whose mission is to advocate for the rights of consumers to have access to products that will maintain and improve their health, and for the rights of retailers and suppliers to sell these products. We are the oldest and largest trade association in the natural products industry representing over 1,100 members accounting for almost 10,000 retail, manufacturing, wholesale, and distribution locations of natural products, including foods, dietary supplements, homeopathic products, and health/beauty aids. Therefore, NPA has an interest to submit comments on this topic. Thank you for the opportunity to comment.

Background

The Agency recently reopened the comment period on the proposed rule that published in the Federal Register of May 20, 2005 (70 FR 29214). This proposed rule was the Agency's first step towards modernizing the definitions and standards of identity consistent with section 401 of the Federal Food, Drug, and Cosmetic Act. This effort was intended to impact upon three goals, two of which the NPA will be commenting on today, including: (1) protect consumers against economic adulteration and (2) promoting industry innovation and provide flexibility to encourage manufacturers to produce more healthful foods.

Addressing Economic Adulteration

The Agency made a statement that consumers should be protected from economic adulteration and invited comment on how that might occur. NPA is concerned about this issue and agrees that the Agency should be working to protect consumers from disreputable firms that pursue various forms of economic adulteration with a total disregard for potential harm to consumers. The commercial popularity of many ingredients and the increasing globalization of the food supply chain has led to a significant increase in the occurrence of economically-motivated adulteration. The short-term gains of substituting a more expensive ingredient for a less

expensive alternative or mislabeling products so that consumers are led to believe that they contain something that they do not, leads to an increased prevalence of health risks for consumers. These risks could include: microbial contamination, chemical contamination, inappropriate substitution of food additives, genetically modified foods (undeclared), adulteration through addition of other ingredients or excipients, or mislabeling of "use-by-dates"[1].

U.S. Definition of Adulteration of Food

The United States Code, 2006 Edition, Supplement 5, Title 21 – Food and Drugs, Chapter 9 – Federal Food, Drug, and Cosmetic Act; Subchapter IV – Food; Section 342 – Adulterated Food[2] provides a definition for adulteration of food. Our comments will focus on a specific portion of the definition, specifically, an adulterated food "contains poisonous or otherwise insanitary ingredients; if any of its constituents have been omitted in whole or in part, or if any substance has been substituted wholly or in part, or if any substance has been added to or mixed in so as to increases its bulk, weight or reduce its quality or strength, or to make it appear better or of greater value than it is". For dietary supplements specifically, adulteration has been defined as occurring when a dietary supplement "is or contains a dietary ingredient that presents a significant or unreasonable risk of illness or injury under conditions of use recommended or suggested in the labeling, or if not conditions of use are suggested or recommended in the labeling, under ordinary conditions.[2]" Furthermore, ingredients are also considered to be adulterated if they are a new dietary ingredient for which there is inadequate information to provide reasonable assurance that such ingredient does not present a significant or unreasonable risk of illness or injury.

Economic adulteration is often associated with a purely economic intention and gain. The risks associated with substitution of ingredients, in whole or part, for economic gain are often overlooked in the Agency's prioritization of activity by risk stratification. It is possible that ingredients substituted as alternatives in place of the more costly ingredients for economic purposes were manufactured in less sanitary conditions to further reduce overhead. This means that the Certificates of Analysis (COAs)[3] and other appropriate specifications for these ingredients will not be accurate. If firms are willing to ignore some of the tenets of current Good Manufacturing Practices (cGMP) then it is not hard to imagine a scenario where they would neglect other aspects of the cGMP regulations, particularly those related to sanitary conditions of the facility. Another aspect of economic adulteration we would like to consider is the intentional substitution of substances to or mixed in to a product so as to increase the product's bulk, weight or reduce its quality or strength, or to make it appear better or of greater value than it is. The ingredients utilized as substitutes for those on the label could pose allergen risks to consumers. Less expensive fillers often have undisclosed wheat, which could cause serious health issues in any gluten-intolerant consumer.

Economic Adulteration of Imported Ingredients

The Federal Food, Drug, and Cosmetic Act (the FD&C Act) requires that manufacturers and distributors who wish to market dietary supplements that contain "new dietary ingredients" notify the FDA about these ingredients 75 days before they intend to go to market. The notification

[1] Z. Gizaw. *Environ Health Prev Med* 2019: 24(1):68.
[2] https://www.fda.gov/regulatory-information/federal-food-drug-and-cosmetic-act-fdc-act/fdc-act-chapter-iv-food
[3] https://www.fda.gov/regulatory-information/search-fda-guidance-documents/small-entity-compliance-guide-current-good-manufacturing-practice-manufacturing-packaging-labeling#X

must include information that forms the basis for which the manufacturer or distributor has concluded that a dietary supplement containing a new dietary ingredient (NDI) will reasonably be expected to be safe under the conditions of use recommended or suggested. In fiscal year 2019, there were less than 50 notifications submitted to the FDA to establish the safety of new dietary ingredients in supplements. This is the Agency’s only opportunity for the pre-market review of dietary ingredients.

NPA is concerned about the lack of participation in this program, a concern that is based upon the seemingly low number of notifications submitted on an annual basis. As a responsible industry, we invest in research, development, and time to maintain compliance and appropriately introduce these new dietary ingredients to market. Knockoff ingredients erode the integrity of the NDIN process and pose safety concerns to consumers. These safety concerns are significant because the knockoff ingredients are being sold to consumers without providing the Agency with the to opportunity to review the manufacturing processes or specifications for safety and compliance with the appropriate regulations. The knockoff ingredients in this scenario are marketed to consumers as if they were the ingredients that have undergone the rigorous scientific review by the Agency, although they have in fact bypassed this process. These ingredients could contain contaminants, as described above in the definition of economic adulteration.

Proposed Solution for Economic Adulteration at the Borders

The Agency does not have an opportunity to review the safety profile of most new ingredients that are imported into the United States before they reach consumers and misses the opportunity to do so by not considering how to issue an import alert for new dietary ingredients that fail to comply with the requirement to submit a NDIN. The Agency has not published a new import alert for a dietary supplement in several years. Creating an import alert for new dietary ingredients that have failed to comply with the NDIN regulations would provide the Agency with the ability to police the market in a way that is resource efficient and consistent with the goals of protecting the public’s health. In order to restore integrity to the NDIN process and provide the necessary safety net that American consumers rely on, it is imperative that the FDA stay “ahead of the curve” by protecting our nation’s borders and ports through issuing import alerts for ingredients that are failing to comply with the NDIN requirements.

Several of NPA’s members that are industry leading formulators and manufacturers who abide by all regulations that are applicable to dietary supplements have presented provided FDA with detailed information pertaining to the disreputable companies that were marketing products to American consumers without having submitted manufacturing or safety data for the ingredients in their products to the Agency for review. The lack of action by the FDA puts consumers at risk and disincentives legitimate companies from supporting the notification process because to the system currently only rewards those that piggyback on other’s notifications.

The issues described above are not confirmed health hazards, which the Agency typically prioritizes first and NPA understands the Agency’s resource limitations. That said, the Agency should not downplay issues that present a risk for illness or injury to consumers. The examples and issues that we have presented are without a doubt potential risks to consumers and should be addressed as such. The Agency has not taken action against a dietary supplement manufacturer for economic adulteration in the last five years. The industry looks to the Agency for guidance and lack of action on the Agency’s part indicates that economic adulteration is not a priority for the Agency.

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Promoting Innovation through Expansion of Authorized Claims

Beyond the issue of economic adulteration, the Agency also indicated that they would be working to promote innovation. The Nutrition Innovation Strategy (NIS) was recently announced by FDA and specifically referenced the Agency's willingness to consider means for encouraging industry innovation to improve the nutrition and healthfulness of food and by providing consumers with informative food labeling to make healthy food choices. The Agenda for the 2019 Meeting regarding the NIS specifically referenced the Agency's interest in hearing from industry about labeling statements and claims on packaging of products. Some of the questions addressed during the meeting included what types of claims facilitate product innovation and what additional factors FDA should consider when prioritizing its review of qualified health claims. There are less than 50 authorized health claims[4] or qualified health claims[5] for dietary supplements in the U.S. while other regulatory bodies, such as the European Commission and the Therapeutic Goods Association have allowed hundreds of such claims to be included on labels.

European Commission's Authorized Health Claims

The European Commission (EC, or Commission) has authorized over 250 nutrition and health claims for foods and dietary supplements. The EC considers health claims to be statements regarding a relationship between a specific food and improved health, or that a food can reduce the risk of a particular disease, and foods are specifically any food or drink product produced for human consumption and sold in the EU/Member States' market (i.e., excluding cosmetics, medicine or pet food products). The EC regulations pertaining to Health and Nutrition Claims were enacted to prevent consumers from being misled that there is an association between the use of a health or nutrition claim about a nutrient profile of food and certain conditions. For claims to be allowed on labels, producers must provide verification to the EC that there is a link between the claim and the product. Furthermore, for specific health claims about disease risk reduction or those referring to the health of children, a scientific dossier must be submitted to the European Food Safety Authority (EFSA) for a case-by-case review prior to authorization[6]. The EC proposed the rules that we have briefly outlined to support innovation. They stated in a memo on the topic that "manufacturers would be encouraged to develop food and drink products for which health and nutrition claims can genuinely be made[2]. The EC further commented that the regulatory framework for the review of health claims helped to regulate the market and "prevent unfair competition from unscrupulous manufacturers using false or misleading claims[2]."

Therapeutic Goods Administration's Authorized Health Claims

The Therapeutic Goods Administration (TGA) in Australia has authorized the use of a significantly larger number of health claims for complementary medicines[7]. TGA has established guidelines for levels and types of evidence required to support indications and claims for

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[4] https://www.fda.gov/food/food-labeling-nutrition/authorized-health-claims-meet-significant-scientific-agreement-ssa-standard

[5] https://www.fda.gov/food/food-labeling-nutrition/qualified-health-claims-letters-enforcement-discretion

[6] https://ec.europa.eu/commission/presscorner/detail/en/MEMO_06_200

[7] In Australia, medicinal products containing such ingredients as herbs, vitamins, minerals, nutritional supplements, homeopathic and certain aromatherapy preparations are referred to as complementary medicines. https://www.tga.gov.au/overview-regulation-complementary-medicines-australia

complimentary medicines[8]. TGA defines complementary medicines products containing such ingredients as herbs, vitamins, minerals, nutritional supplements, homeopathic and certain aromatherapy preparations that consist principally of one or more designated active ingredient each of which has a clearly established identity and traditional use. The active ingredients include: amino acids; charcoal; choline salt; essential oil; plant or herbal material (or a synthetically produced substitute for material of that kind) including plant fibers, enzymes, algae, fungi, cellulose and derivatives of cellulose and chloraphyll; a homeopathic preparation; a microorganism, whole or extracted, except a vaccine; a mineral including a mineral salt and a naturally occurring mineral; a mucopolysaccharide; non-human animal material (or a synthetically produced substitute for material of that kinds) including dried material, bone and cartilage, fats and oils and other extracts or concentrates; a lipid, including an essential fatty acid or phospholipid; a substance produced by or obtained from bees, including royal jelly, bee pollen and propolis; a sugar, polysaccharide or carbohydrate; or a vitamin or provitamin[9]. Most of these ingredients would be allowed (under the FD&C Act) to be included in food, and therefore, dietary supplements in the United States.

TGA allows for products to contain claims that have undergone pre-market efficacy assessment to use these claims on their label. Companies can make either general or medium-level indications and claims on their labels. The difference between the two level is determined by the amount of evidence held by the firm. General level indications and claims include health maintenance, including nutritional support; vitamin or mineral supplementation; and relief of symptoms (not related to a named disease, disorder or condition). Medium level indications and claims may include statements about health enhancement; reduction of risk of a disease, disorder, or condition; reduction in frequency of a discrete event; how it aids or assists in the management of a named symptom, disease, disorder, or condition; and relief of a symptom of a named disease, disorder, or condition. Sponsors for both levels of indications and/or claims must provide appropriately rigorous descriptive studies, case series, reports of relevant expert committees, TGA-approved Pharmacopoeias or monographs, or evidence obtained from well-designed controlled trials, analytical studies and/or evidence obtained from multiple time series with or without intervention. The level of the ingredient that is recommended in the product must match the level and route of administration tested in the scientific studies.

Expanding Authorized Health Claims in the U.S.

We have included detailed information pertaining to both the European Commission and the Therapeutic Goods Association's requirements for health claims to substantiate that the process for approving health claims in Europe and Australia are no less arduous than those required in the United States. It's long overdue for the labeling regulations in the United States to consider substantiation from other regulatory bodies and this request is directly in line with the Agency's efforts towards promoting innovation, particularly when these regulatory bodies reference the U.S. regulations in their own guidelines.

As we previously elaborated, there are approximately 20 authorized health claims for dietary supplements in the U.S. while the European Commission and the Therapeutic Goods Administration (TGA) in Australia have authorized the use of a significantly larger number of

[8] https://www.tga.gov.au/sites/default/files/evidence-guidelines.pdf
[9] https://www.tga.gov.au/overview-regulation-complementary-medicines-australia

health claims for complementary medicines, food, and dietary supplements[10]. The requirements for substantiating the health claims in Europe and Australia are no less stringent or less likely to protect consumers than those required in the United States. It's long overdue for the labeling regulations in the United States to consider substantiation from other regulatory bodies and truly promote industry innovation by incentivizing firms to do the science to support the efficacy of their products and ingredients.

Conclusion

We have described two revisions that are in line with FDA's questions presented in this federal register notice. We appreciate the Agency's consideration of our comments pertaining to steps that should be taken to protect consumers against economic adulteration and to promote industry innovation. Thanks for your consideration of this matter.

Respectfully submitted,

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[10] In Australia, medicinal products containing such ingredients as herbs, vitamins, minerals, nutritional supplements, homeopathic and certain aromatherapy preparations are referred to as complementary medicines. https://www.tga.gov.au/overview-regulation-complementary-medicines-australia