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BY HAND DELIVERY

Dockets Management Branch
Food and Drug Administration (HFA-305)
5630 Fishers Lane, Room 1061
Rockville, Maryland 20852

Re: Skin Protectant Drug Products for Over-the-Counter Human Use; Final Monograph. 68 Fed. Reg. 33362 (June 4, 2003). [Docket Nos. 78N-0021 and 78N-021P].

Dear Sir or Madam:

Hyman, Phelps & McNamara, P.C. (HPM) hereby submits these comments on the final monograph for Skin Protectant Drug Products for Over-the-Counter Human Use, 68 Fed. Reg. 33362 (June 4, 2003). HPM is a law firm that represents a number of manufacturers of OTC products that are affected by this final monograph. In the final rule promulgating this monograph, FDA requested comments on several reduced labeling requirements for skin protectant drug products. 68 Fed. Reg. at 33374. These comments address labeling requirements for skin protectant drug products, which may be improperly interpreted to require the duplicative listing of the established name of the active ingredient on the principal display panel of an OTC drug product and in the Drug Facts box. HPM requests that FDA state clearly and formally that the statement of identity for an OTC skin protectant drug product must include any established name for the drug itself but does not require inclusion of the established name of the active ingredient.[1]

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[1] Inasmuch as similar language appears in other OTC monographs, these comments are intended to apply to all such stated requirements.

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Specifically, the required labeling for skin protectant drug products in the final monograph includes a statement of identity which "contains the established name of the drug, if any, and identifies the product with one or more of the following [descriptors]." 21 C.F.R. § 347.50(a) (emphasis added).[2] Under FDA's general OTC drug labeling regulations, the statement of identity must appear on the principal display panel of the drug, 21 C.F.R. § 201.61(c).

Although the statement of identity requirement in 21 C.F.R. § 347.50(a) expressly applies only to "the established name of the drug" and only "if any" such established name exists, there is reason to believe that FDA incorrectly interprets that requirement to apply to the established name of the active ingredient for an OTC drug that contains only one such ingredient. This apparently has arisen from the language of the general OTC drug labeling requirement, 21 C.F.R. § 201.61(b), which provides, in pertinent part:

> Such statement of identity shall be in terms of the established name of the drug, if any there be, followed by an accurate statement of the general pharmacological category(ies) of the drug or the principal intended action(s) of the drug. In the case of an [OTC] drug that is a mixture and that has no established name, this requirement shall be deemed satisfied by a prominent and conspicuous statement of the general pharmacological action(s) of the mixture or of its principal intended action(s) in terms that are meaningful to the layman.

That provision has reportedly been interpreted to mean that the statement of identity for a single entity OTC drug must include the established name of its active ingredient, while the statement of identity for a combination OTC drug need not do so. That interpretation is wrong as a matter of law and of the plain reading of the current and proposed regulations. However, to avoid any misunderstanding, FDA should state the proper interpretation on the record here.

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[2] Similar requirements exist in virtually all of the current final monographs (see, e.g., id. at § 333.250(a), labeling for antifungal drug products).

The FDC Act clearly recognizes separate requirements for the established name of a drug and an active ingredient. Section 502(e)(1)(A)(i) requires the label of a drug to bear "the established name . . . of the drug, if there is such a name." 21 U.S.C. § 352(e)(1)(A)(i). Section 502(e)(1)(A)(ii) requires the label also to bear "the established name and quantity . . . of each active ingredient." 21 U.S.C. § 352(e)(1)(A)(ii). Thus, the established name of a drug – if any – is distinct from the established name of an active ingredient under the law. The established name of the drug refers to the entire drug product, including the active and inactive ingredients.

The requirement for a "statement of identity," as well as its placement on the principal display panel, actually arises under the Fair Packaging and Labeling Act, 15 U.S.C. § 1453(a)(1). That provision authorized FDA to promulgate regulations for OTC drugs which "specify the identity of the commodity." Id. (emphasis added). And see 15 U.S.C. § 1459(a)(3) (excluding prescription drugs). FDA merged that requirement with the FDC Act requirement for declaring the established name of the drug.

FDA's regulations respecting OTC drug labeling in general and in specific monographs correctly follow the statute in requiring the statement of identity to include the established name of the drug, if one exists. Those regulations literally do not require the statement of identity to include the established name of the active ingredient, even though one must exist. The latter is correctly identified in the Drug Facts box, as required by the law and FDA regulations. FDC Act § 502(e)(1)(A)(ii), 21 U.S.C. § 352(e)(1)(A)(ii); 21 C.F.R. § 201.66(e)(2).

Despite the clear language of both the law and regulations, FDA has published statements that appear to confuse the requirements for established names of drugs and ingredients. For example, the preamble to the tentative final monograph for Over-the-Counter Health Care Antiseptic Drug products asserts that the "[e]stablished name" of a drug that contains povidone-iodine is "povidone-iodine." 59 Fed. Reg. 31402, 31405 (June 17, 1994).[3]

The confusion may be due, in part, to the general labeling regulation's reference to "a mixture . . . that has no established name." 21 C.F.R. § 201.61(b). Although, to our knowledge, FDA has never formally defined the word, "mixture," neither FDA nor other

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[3] We have submitted similar comments to the record in that proceeding.

medical or pharmaceutical references restrict that term to combinations of active ingredients. Indeed, the agency has used the term to refer to OTC drug products that contain both active and inactive drug components in the instant proceeding, identifying a combination of sodium bicarbonate and water as a "mixture." 68 Fed. Reg. at 33378.

The distinction between "established name" and "mixture" is especially important for OTC drugs. Unlike prescription drugs, OTC drugs do not usually have established names and are more likely to be mixtures. Prescription drugs are virtually always marketed under approved new drug applications, which specify the established name of those drugs. 21 U.S.C. § 355; 21 C.F.R. § 314.50(a)(1).

In contrast, most OTC drugs – especially topical products – contain one or more active ingredients which may be mixed (or combined) with various inactive ingredients. The OTC Drug Review regulations make clear that the OTC drug monograph describes only active ingredients which may contain unidentified "suitable inactive ingredients which are safe in the amounts administered." 21 C.F.R. § 330.1(e). Thus, OTC monograph drugs can be differing mixtures that have no established names, even if their active ingredients do have such names. In fact, very few OTC drugs have established names. Therefore, the law and FDA's regulations require only that the label of most OTC drugs list their pharmacological categories or principal actions on the principal display panel.

In that regard, an interpretation that would require a single active ingredient to be named in the statement of identity, while no ingredients would be named in a combination drug could confuse consumers, who might interpret these differences as implying some special strength or benefit from the specific identification.

The proper application of the law does not adversely affect consumers, who will receive all pertinent information in the new OTC Drug labeling format. 21 C.F.R. § 201.66. The consumer is (or will become) familiar with the uniform location of the active ingredients and other information in the Drug Facts box. The consumer is fully informed as to the purpose of the OTC drug by the statement of identity on the principal display panel (e.g., "skin protectant cream," "poison ivy protectant") and by the identification of the active ingredient[s] in the Drug Facts box.

In conclusion, HPM requests that FDA formally state that the appropriate statement of identity for skin protectant drug products (and, indeed, most OTC drugs) is a statement of the pharmacological category (e.g., "skin protectant") or principal intended action, "in terms that are meaningful to the layman," 21 C.F.R. § 201.61(b), unless there is an established name for the drug itself and not simply its active ingredient(s).

Respectfully Submitted,

Paul M. Hyman

PMH/eam