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December 19, 2003

Division of Dockets Management (HFA-305)
Food and Drug Administration
5630 Fishers Lane
Room 1061
Rockville, MD 20852

Via Fax (301-827-6870) and Fed Ex

RE: Docket No. 2003D-0478
Comments in Response to Federal Register Notice, October 23, 2003, page 60702
Draft Guidance on Marketed Unapproved Drugs; Compliance Policy Guide

Dear Sir/Madam:

Pursuant to the above referenced Federal Register Notice, Healthpoint, Ltd. submits the following comments concerning the Draft Guidance on Marketed Unapproved Drugs; Compliance Policy Guide ("CPG"). Healthpoint's comments for your consideration are as follows:

1. The CPG should be clarified to provide a realistic mechanism by which an unapproved marketed drug that has been marketed for several decades can obtain approval by including a revised standard for approval for such products. As stated in the CPG, "a company may obtain approval of an NDA for a product that other companies are marketing without approval" and the FDA wants to "encourage this type of voluntary compliance with the new drug requirements...." Further, the FDA News release dated October 17, 2003 concerning this CPG draft guidance stated that the "FDA is emphasizing to the sponsors that many of the potentially beneficial drugs in this category could be approved based on straightforward scientific data that would not involve conducting new clinical

studies of safety and effectiveness. By providing adequate scientific evidence of safety and efficacy through other means (e.g., peer-reviewed medical literature, or other existing data) these drugs could be approved with relatively little time and expense". Currently, requirements for a new drug approval do not provide for approval based solely on limited scientific, nonclinical, and clinical data and literature citations to establish safety and effectiveness. Thus, modified approval requirements for drugs of this type should be established to encourage submission of such documentation for FDA review for these products and make it possible for these products to be marketed within FDA regulations. An application describing the length of time the product has been marketed, the marketed labeling and indication, the documented complaints/adverse events during the time period that it has been marketed, the efficacy presented in medical literature or scientific data, a commitment that the product be made under GMP, appropriate chemistry, manufacturing, and controls information for the drug substance and drug product, and a post-approval commitment to provide prospective, open label clinical data should be permitted to provide an economical, practical, and achievable scientific safety and efficacy basis for such drugs to be marketed under FDA approval. This would also provide a means for the FDA to review the products for potential safety risks, for potential lack of any efficacy, and for clearly fraudulent marketing.

2. The CPG should be clarified to state that when a company obtains approval to market a product that is *identical, related or similar* to a product that other companies are marketing without approval, FDA intends to allow a grace period before it will initiate enforcement action against marketed unapproved products that are *identical, related, or similar.* This would make it clear that the grace period and enforcement period would apply even if the product that is approved has different inactive ingredients or different labeling than the marketed products.

3. The CPG should be clarified to provide the criteria by which the FDA will determine if a product is a potential safety risk, whether the product lacks

evidence of effectiveness, whether the product is medically necessary, and the ability of legally marketed products to meet patient needs.

4. The CPG should be clarified to state once a product is approved, the identical, related, or similar products must be removed from the market after the grace period and must be approved under a NDA or ANDA as required by the Food, Drug, and Cosmetic Act before such products can again be marketed. In addition, the CPG should clarify that upon approval of any of these identical, related, or similar products, a showing of bioequivalence will still be required for the Orange Book Therapeutic Equivalence Evaluation Code designation (e.g., all topical products will not be considered therapeutically equivalent for purposes of generic substitution, unless a waiver of *in vivo* bioequivalence has been granted or the product is actually supported by adequate bioequivalence data.)

Thank you for your consideration of these comments. If the comment period is extended, Healthpoint may provide additional or amended comments.

Very truly yours,

Mark A. Mitchell by Kay Mary Harrell

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Facsimile Cover Sheet

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