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Food and Drug Administration
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Comments on the Food and Drug Administration's Proposed Rule, "Regulations Regarding 'Intended Uses'," Under 21 C.F.R. Parts 201 and 801
Docket No. FDA-2015-N-2002

Public Citizen, a consumer advocacy organization with more than 500,000 members and supporters nationwide, submits these comments regarding the proposed rule "Regulations Regarding 'Intended Uses'," which was published in the *Federal Register* on September 23, 2020 (Docket No. FDA-2015-N-2002).[1]

Public Citizen strongly supports the Food and Drug Administration's (FDA's) proposal to amend 21 C.F.R. §§ 201.128 and 801.4, which describe the types of evidence relevant to determining the intended uses of a marketed drug or medical device, respectively, under the Food, Drug, and Cosmetic Act (FDCA). The FDA's authority to make such determinations — including whether a product meets the definition of a drug or medical device and whether an approved or cleared medical product is intended for a new use — is critically important to the agency's core public health mission to protect public health by ensuring that all marketed drugs and medical devices are safe and effective for their intended uses.

The proposed changes to 21 C.F.R. §§ 201.128 and 801.4 appropriately clarify that a firm's[2] knowledge that health care providers are prescribing or using its approved or cleared medical product for an unapproved use would not, *by itself*, automatically trigger obligations for the firm to provide labeling for that unapproved use. Furthermore, the changes, along with the discussion in the proposed rule's preamble, provide helpful clarification regarding the types of evidence that the agency relies upon to determine a product's intended uses.

Detailed Discussion

In the preamble of the notice for the proposed rule, the FDA explained that it is the agency's "longstanding position…that, in evaluating a product's intended use, any relevant source of

[1] 85 FR 59718-59729.
[2] The term "firms" refers to manufacturers, packers, and distributors of FDA-regulated products and all their representatives, including both individuals and corporate entities.

evidence may be considered."[3] The proposed revisions to FDA regulations at 21 C.F.R. §§ 201.128 and 801.4 are fully consistent with the agency's long-standing position regarding the types of evidence that can be used to evaluate a product's intended use, which has a well-established legal basis that is detailed in the preamble.

We agree with the FDA's commonsense stance that a firm's knowledge that health care providers are prescribing or using its approved or cleared medical product for an unapproved use should not, *by itself*, automatically trigger obligations for the firm to provide labeling for that unapproved use. We also concur with the agency's position that such knowledge, in combination with certain other evidence, could be used to establish that an unapproved use is intended by the firm and thus could trigger obligations for the firm to provide labeling for that unapproved use.

The FDA's authority to establish the intended uses of marketed products based on an examination of all relevant direct and circumstantial evidence — including a product's labeling, promotional claims, advertising, and statements and circumstances surrounding the manufacture and distribution of a product, as well as a firm's knowledge that health care providers are prescribing or using its approved or cleared medical product for an unapproved use — is critically important to the agency's core public health mission to protect public health by ensuring that all marketed drugs and medical devices are safe and effective for their intended uses. As the FDA explained in the preamble of the notice for the proposed rule, "[c]onsidering evidence other than express claims often ensures that [the] FDA is able to pursue firms that attempt to evade FDA medical product regulation by avoiding making express claims about their products."[4] In response to some comments submitted in earlier rulemaking suggesting that the agency should rely exclusively on firms' claims to establish intended use, the agency appropriately and forcefully rejected such notions with the following well-reasoned justification:

> This narrow view of intended use would not only create a loophole for firms that would enable them to evade FDA oversight of the marketing of approved or cleared medical products for unapproved uses, but would also open the door to the marketing of products that are unapproved for any medical use--all to the detriment of the public health. As courts have recognized, "[s]elf-serving labels cannot be allowed to mask the vendor's true intent as indicated by the overall circumstances" (*United States* v. *Storage Spaces Designated Nos. 8 and 49*, 777 F.2d 1363, 1366 n.5 (9th Cir. 1985)). As one court explained, "[a] disease claim made with a wink and a nudge is still a disease claim. To hold otherwise would create an 'obviously wide loophole' that would defeat the 'high purpose of the [FDCA] to protect consumers'" (*United States* v. *Cole*, 84 F. Supp. 3d 1159, 1166 (D. Or. 2015) (citation omitted)). Examples where the government has relied on evidence other than express claims to establish intended use include situations where products contained a pharmacological ingredient such as the active ingredient from approved erectile dysfunction and hair-loss products, albuterol, or steroids, but were labeled as herbal supplements, leather cleaner, incense, potpourri, bath salts, or "for research purposes only." Similar examples for devices include: (1) products that are labeled as laser pointers or hyperbaric chambers but, based on other objective evidence, are actually intended by the manufacturer or the distributor to treat serious conditions

[3] 85 FR at 59721.
[4] 85 FR at 59723.

> such as cancer, diabetes, multiple sclerosis, human immunodeficiency virus (HIV), and autism; and (2) a product with a reservoir that is cleared for use with a saline solution to moisten tissue but, based on other objective evidence, is actually intended to deliver a drug (*e.g.*, steroids) to the tissue. The government has also considered firms' directions to their sales forces in determining intended use. Thus, in addition to claims, FDA may also take into account any circumstances surrounding the distribution of the product or the context in which it is sold (see *An Article of Device Toftness Radiation Detector*, 731 F.2d at 1257; see also *United States* v. *Travia*, 180 F. Supp. 2d 115, 119 (D.D.C. 2001)). Considering evidence other than express claims often ensures that FDA is able to pursue firms that attempt to evade FDA medical product regulation by avoiding making express claims about their products.[5]

Finally, we found the numerous examples of the types of evidence relevant to establishing a product's intended use and the examples of evidence that, standing alone, are not determinative of intended use to be clear and informative.

In closing, Public Citizen urges the FDA to expeditiously issue a final rule amending FDA regulations at 21 C.F.R. §§ 201.128 and 801.4 as proposed.

Thank you for the opportunity to comment on this important public health issue.

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[5] 85 FR at 59723.