FDA'S Implementation of FDAAA'S Food-Related Provisions:

A Work in Progress

by Ricardo Carvajal and Diane McColl

When the FDA Amendments Act ("FDAAA")[1] was enacted, its potential impact on FDA and industry responses to food contamination events was readily apparent. Title X of the FDAAA (captioned "Food Safety") requires FDA and industry to take several actions to improve transmission of information relating to adulteration of human and pet food. Most significantly, FDAAA section 1005 added section 417 to the Federal Food, Drug, and Cosmetic Act ("FDCA"). FDCA section 417 requires FDA to establish an electronic portal to which industry must submit reports about a "reportable food" (and to which federal, state, or local public health officials may also submit such reports). Section 417 also requires FDA to establish a Reportable Food Registry to which FDA may submit "instances of reportable food" that FDA learns of through the electronic portal.[2] When implemented, the Reportable Food Registry requirements are likely to significantly affect the way that FDA and industry handle Class I recalls.

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Less readily apparent to all but a few practitioners[3] was FDAAA's potential impact on innovation in the functional food and dietary supplement sectors. Title IX of FDAAA (captioned "Enhanced Authorities Regarding Postmarket Safety of Drugs") contains section 912, which added section 301(ll) to the FDCA. With certain limited exceptions, FDCA section 301(ll) prohibits the marketing of food to which has been added an approved drug, a licensed biological product, or a "drug" or "biological product" for which substantial clinical investigations have been instituted and their existence made public. Depending on how it is implemented, section 301(ll) could adversely affect development of novel food and dietary ingredients.

A year after FDAAA's enactment, FDA has yet to implement either section 417 or section 301(ll). However, FDA's progress toward implementation of both provisions has begun to capture industry's attention.

The Reportable Food Registry

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FDCA section 417(b)(1) directs FDA to establish a Reportable Food Registry ("Registry") to which FDA can submit "instances of reportable food" based on reports received through an electronic portal. A reportable food is an article of food (other than infant formula and dietary supplements) "for which there is

a reasonable probability that the use of, or exposure to, such article of food will cause serious adverse health consequences or death to humans or animals." The obligation to submit a report to FDA through the electronic portal falls on the "responsible party," which is defined as the person who submits the registration under section 415(a) for the facility at which the reportable food is manufactured, processed, packed, or held.

Within 24 hours of determining that an article of food is a reportable food, the responsible party must submit a report to FDA that includes a number of specified data elements and must investigate the cause of the adulteration if the adulteration may have originated with the responsible party. The submission of a report is not required if (1) the adulteration originated with the responsible party, (2) the responsible party detected the adulteration prior to the transfer of the food to another person, and (3) the responsible party either corrected the adulteration or destroyed the food (or caused its destruction.) Public health officials are permitted, but not required, to submit reports through the electronic portal.

The submission of a report triggers a review by FDA to identify reportable food, submit entries to the Registry, issue public alerts, and take enforcement action, as FDA deems necessary. The submission of a report also triggers a consultation between FDA and the responsible party, after which FDA has discretion to require that the responsible party submit supply chain information and/or provide notification to suppliers and purchasers. This can trigger a wave of reports and notifications up and down the supply chain. Evidently, the purpose of the Registry requirements is to speed up the tracking of adulterated food by both industry and FDA. A responsible party's failure to submit a report, or the falsification of a report, is a prohibited act under FDCA section 301(nn).

FDA was to issue guidance concerning the Registry by June 27, 2008, and the Registry was to be in operation by September 27, 2008. On May 27, FDA gave notice in the Federal Register that the agency would not meet those deadlines because it is still developing the IT infrastructure needed to implement the Registry.[4] FDA expects to have the Registry in operation in Spring 2009. FDA also requested comments with respect to (1) what obstacles to compliance were anticipated by responsible parties, (2) ways that FDA can enhance the quality, utility, and clarity of information submitted to the Registry, (3) what methods of notification to suppliers and purchasers would be efficient and effective, and (4) what additional information would be important to provide to suppliers and purchasers.

Very few comments have been submitted to the corresponding docket, but those comments raise some interesting issues:

- Given that FDA has missed the statutory deadline for implementation of the Registry, how much advance notice of the new implementation date should FDA provide? Notably, the statute required the issuance of guidance three months prior to the date on which the Registry was to become operative.
- What is the distinction between the submission of a report to the electronic portal by a responsible party or public health official and FDA's submission of an instance of reportable food to the Registry? The comments suggest that there is some confusion on this point.
- Can anyone (e.g., consumers) report to the electronic portal? The determination of whether a food is a reportable food is not a simple determination, and could well require consultation with experts.
- In providing guidance on how to determine if a food is a reportable food, does FDA intend to piggyback onto the similar existing Class I recall standard? Under FDA regulations, a recall is classified as Class I if it is "a situation in which there is a reasonable probability that the use of, or exposure, to, a violative product will cause serious adverse health consequences or death."[5]
- How will FDA ensure the timely evaluation and transmission of information submitted to the electronic portal given the well known constraints on its resources? This is an especially important issue given that FDA may be required to quickly consolidate information received from multiple sources.
- How will issues regarding coordination between FDA and USDA be addressed and resolved?

The Section 301(Ll) Prohibition

FDCA section 301(ll) makes it a prohibited act to introduce or deliver for introduction into interstate commerce any food to which has been added a drug approved under section 505, a biological product licensed under section 351 of the Public Health Service Act, or "a drug or biological product for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public." There are four limited exceptions, of which the most potentially useful is a first-to-market exception that allows the addition of a drug or biological product to food if that drug or biological product was first "marketed in food."[6]

It looks as if FDAAA's food-related provisions could impose a greater burden on FDA's food program than was apparent at the time of FDAAA's enactment.

Section 301(ll) is patterned after the dietary supplement exclusionary clause in section 201(ff)(3)(B), which excludes from the definition of a dietary supplement "an article" that is approved as a new drug or licensed as a biologic, or "an article authorized for investigation" as a new drug or biological "for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public," unless the article was first "marketed as a dietary supplement or as a food." However, sections 301(ll) and 201(ff)(3)(B) differ in some respects, and those differences have aroused consternation both within FDA and within industry.

First, section 301(ll) eschews the term "article" in favor of the terms "drug" and "biological product." This raises the question of how the statutory definitions of "drug" and "biological product" (and regulations and case law interpreting those definitions) should be factored into the interpretation of section 301(ll). Second, in addressing the institution and publicity of clinical trials as a triggering event, section 301(ll) makes no reference to a corresponding authorization for investigation as a new drug. This raises the question of what types of clinical investigations are cognizable under section 301(ll), a question of critical importance given the food industry's increasing reliance on the conduct of human studies to substantiate the health benefits of components of food. Third, the first-to-market exception in section 301(ll) applies when a drug or biological product is first "marketed in food," whereas the similar exception in section 201(ff)(3)(B) applies when one of the articles referenced in that section is first "marketed as a dietary supplement or as a food." This raises the question of whether the two marketing standards are intended to be different, and contributes to confusion over whether section 301(ll) was intended to apply to dietary supplements.

Faced with these questions (among many others), FDA took the somewhat unusual step of publishing a Federal Register notice asking for submission of "data, information, and comments that will help provide a context for the agency's decisions on implementation" of section 301(ll).[7] In its notice, FDA indicated that it views section 301(ll) as ambiguous in certain respects, and the agency set out a number of specific questions intended to gauge the impact of alternative interpretations of section 301(ll). Initially, comments were slow to come into the corresponding docket, perhaps because the potential impact of section 301(ll) on the food industry was not immediately obvious. But as word of FDA's request for comments spread, FDA was asked to extend its deadline for submission of comments, and several trade associations and firms filed extensive and thoughtful submissions. Some of the principal issues raised by those submissions:

- Which (if any) parts of section 301(ll) are ambiguous within the meaning of Chevron U.S.A., Inc. v. Natural Resources Defense Council?[8] Under that case, if a statute is silent or ambiguous on an issue, FDA can reasonably construe the statute, and FDA's construction is entitled to deference.
- Does the "food" to which section 301(ll) applies encompass all food, including dietary supplements and animal feed, or only human conventional food? If section 301(ll) applies to dietary supplements, what effect (if any) does section 301(ll) have on the operation of the dietary supplement exclusionary clause in section 201(ff)(3)(B)? Many comments expressed the view that section 301(ll) ought not to affect the regulation of dietary supplements under section 201(ff)(3)(B).
- How should concepts of chemical identity, biological identity, and intended use factor into the interpretation of the terms "drug" and "biological product?" Several comments noted that, if the term "drug" is interpreted solely by reference to chemical identity, then any use of that substance in food could be prohibited, even if the food use is entirely different from the drug use. A number of comments advocated that use of a substance in food should be prohibited only when there is a manifestation of intended drug use on the part of the person marketing the food.
- Which clinical investigations are cognizable under section 301(ll)? There appears to be unanimous agreement that section 301(ll) should not be interpreted to discourage clinical research on the health benefits of

food components, and that only substantial clinical investigations related to the development of a substance as a drug are potentially relevant.

- What does it mean to market a substance in food? There is little love lost for the interpretation of the concept of marketing put forth by FDA in Pharmanex, Inc. v. Shalala, in which FDA argued that a component of a product should be deemed "marketed" only if the component itself was somehow highlighted to purchasers (e.g., in labeling and advertising.)[9] A number of comments advocate a broader interpretation of the concept of marketing so as to encompass presence in a product offered for sale.

A Difficult 2009?

Based on the difficult issues raised by FDA's implementation of the Reportable Food Registry and the section 301(ll) prohibition, it looks as if FDAAA's food-related provisions could impose a greater burden on FDA's food program than was apparent at the time of FDAAA's enactment. Implementation of the Registry requires the issuance of guidance, and likely will necessitate internal training, external outreach, and an ongoing commitment to its maintenance and effective operation. Implementation of section 301(ll) also would seem to necessitate the issuance of guidance, given the nature of the issues highlighted by FDA and commented on by industry. In light of FDA's existing load, and given the strong potential for the imposition of new food safety mandates and authorities by the incoming Congress, FDA's food program appears to have its work cut out for it.

1 Pub. L. No. 110-85, 121 Stat. 823 (2007)
2 Title X contains other human and pet food safety provisions that we do not address here. For a discussion of those provisions, see our detailed summary and analysis of FDAAA, available at http://www.fdalawblog.net/fda_law_blog_hyman_phelps/2007/10/hpm-issues-deta.html.
3 See, e.g., id. at 37.
4 73 Fed. Reg. 30405 (May 27, 2008).
5 21 C.F.R. § 7.3(m)(1).
6 Addition of a drug or biological product to food also is permitted if (1) FDA has issued a regulation allowing it, (2) the drug or biological product is added to food to enhance the safety of the food and not to have independent biological or therapeutic effects on humans, or (3) the drug is an approved animal drug. The four exceptions are listed in FDCA § 301(ll)(1)-(4).
7 73 Fed. Reg. 43937 (July 29, 2008).
8 467 U.S. 837 (1984).
9 No. 2:97CV262K, 2001 WL 741419 (D. Utah Mar. 30, 2001).