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Managing Regulation of Mental Health-Related Claims in the COVID-19

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Introduction

The COVID-19 pandemic has had a significant impact on mental health in the US and abroad. According to a recent scientific brief published by the World Health Organization, the global prevalence of anxiety and depression increased by 25% in 2020,[1] while a January 2021 survey from the American Psychological Association found that 84% of US adults reported feeling at least one emotion associated with prolonged stress.[2] Given this environment, many consumers are turning to dietary supplements to help them manage the daily stress and anxiety of this unprecedented era, with sales of mood support dietary supplements growing by over 75% year-on-year between February 2021 and February 2022.[3]

The increased focus on mental health-related products has also garnered regulatory scrutiny. For example, on 19 February 2021, the FDA issued warning letters to 10 companies, which the agency alleged had unlawfully sold dietary supplements intended to treat or prevent depression and other mental health disorders.[4] In the agency's press release announcing issuance of the letters, it communicated concern regarding such claims, stating that "[d]ietary supplements that claim to cure, treat, mitigate or prevent depression and other mental health disorders are unapproved new drugs that could potentially harm consumers who use these products instead of seeking proven treatments from qualified health care providers."[4] It noted that consumers are particularly vulnerable in the midst of the ongoing pandemic and emphasized its commitment "to taking action to protect the public from unlawful dietary supplements."[4] The agency has since continued to issue warning letters to companies for making mental health-related claims deemed to be unlawful by the agency.

This chapter provides guidance for companies contemplating the sale of dietary supplements with mental health-related claims. The focus is largely on FDA's guidance and enforcement, but we also briefly discuss the FTC regulation of mental health-related advertising claims for dietary supplements, focusing on its recent enforcement activities against cannabidiol (CBD) product sellers. We then outline general recommendations on crafting mental health-related claims for dietary supplements, while mitigating risk of regulatory enforcement.

Dietary Supplement Claims

Regulatory Framework Overview

Pursuant to a long-standing liaison agreement, the FDA and FTC share responsibility for overseeing the promotion and marketing of dietary supplements within the US.[5] While the FDA exercises primary jurisdiction over all labeling claims including packaging, inserts, and other promotional materials distributed at the point of sale, the FTC holds primary responsibility over all advertising, including print and broadcast ads, infomercials, catalogs, and similar marketing materials.[5] Notwithstanding this division of labor, the agencies have at times coordinated their efforts in their enforcement activities. For instance, both agencies have expressed their continued intent to prioritize health-related claims for dietary supplement manufacturers and have issued joint warning letters to address various health related claims made by sellers of dietary supplements, including claims relating to mental health benefits.[4,6-8]

FDA's Regulation of Structure/Function Claims

Before discussing FDA's recent enforcement activities regarding mental health claims, it is important to first understand the agency's general approach with respect to distinguishing structure/function claims from disease claims requiring FDA approval.

Under current federal law, dietary supplements may not bear unapproved claims that indicate the product is "intended for use in the diagnosis, cure, mitigation, treatment, or prevention of a disease."[9] FDA regulations broadly define the "intended use" of a product as "refer[ing] to the objective intent of the persons legally responsible for the labeling of an article (or their representatives)." Per the regulation, "objective intent" may be shown in a variety of ways, including but not limited to "labeling claims, advertising matter, or oral or written statements" by the persons responsible for the labeling of a product; thus, dietary supplement companies must keep in mind that all marketing materials used for their products are prohibited from including disease claims.[10] However, pursuant to the Dietary Supplement Health and Education Act (DSHEA) of 1994, dietary supplements may be promoted with statements that "[describe] the role of a nutrient or dietary ingredient intended to affect the structure or function in humans" or "characterize[] the documented mechanism by which a nutrient or dietary ingredient acts to maintain such structure or function" – otherwise known as structure/function claims.[9]

On 6 January 2000, the agency published its Final Rule in the Federal Register, setting forth requirements for marketing dietary supplements, including defining the types of statements that would qualify as structure/function claims.[10] Codified under 21 CFR §101.93, the regulation requires dietary supplement companies to meet three key requirements prior to making any structure/function claims on their products:

- They must maintain substantiation showing the claims are truthful and not misleading
- They must notify FDA regarding their use of any structure/function claims within 30 days of first marketing the product bearing such claims
- With each structure/function claim they must include FDA's mandatory disclaimer stating, "This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease:[12,13]

It is important to note that the regulation also includes FDA's explanation of which type of claims may be deemed structure/function claims appropriate for use on dietary supplement labeling without previous approval and which claims are disease claims requiring FDA's approval.[12]

FDA defines permitted structure/function statements as "statements that describe the role of a nutrient or dietary ingredient intended to affect the structure or function in humans or that characterize the documented mechanism by which a nutrient or dietary ingredient acts to maintain such structure of function, provided that such statements are not disease claims."[13] The

agency emphasizes that any dietary supplement bearing a disease claim will be subject to regulation as a drug, unless the claim is an authorized health claim for which the product qualifies.[13]

To further assist dietary supplement companies in assessing whether their claims fall within the category of structure/function statements or disease claims, the regulation includes a definition for "disease" and sets forth 10 criteria that help clarify whether a statement is a disease claim. In particular, "disease" is defined as "damage to an organ, part, structure, or system of the body such that it does not function properly (e.g., cardiovascular disease), or a state of health leading to such dysfunction (e.g., hypertension); except that diseases resulting from essential nutrient deficiencies (e.g., scurvy, pellagra) are not included in this definition."[13] Further, the regulation notes that FDA will find a statement to be a disease claim if it explicitly or implicitly claims that the product:

- Has an effect on a specific disease or class of diseases
- Has an effect on the characteristic signs or symptoms of a specific disease or class of diseases, using scientific or lay terminology
- Has an effect on an abnormal condition associated with a natural state or process, if the abnormal condition is uncommon or can cause significant or permanent harm
- Has an effect on a disease or diseases through one or more of the following factors:
    - The name of the product
    - A statement about the formulation of the product, including a claim that the product contains an ingredient (other than an ingredient that is an article included in the definition of "dietary supplement" under 21 USC. 321(ff)(3)) that has been regulated by the FDA as a drug and is well known to consumers for its use or claimed use in preventing or treating a disease
    - Citation of a publication or reference, if the citation refers to a disease use, and if, in the context of the labeling as a whole, the citation implies treatment or prevention of a disease, for example, through placement on the immediate product label or packaging, inappropriate prominence, or lack of relationship to the product's express claims
    - Use of the term "disease" or "diseased," except in general statements about disease prevention that do not refer explicitly or implicitly to a specific disease or class of diseases or to a specific product or ingredient
    - Use of pictures, vignettes, symbols, or other means
- Belongs to a class of products that is intended to diagnose, mitigate, treat, cure, or prevent a disease
- Is a substitute for a product that is a therapy for a disease
- Augments a particular therapy or drug action that is intended to diagnose, mitigate, treat, cure, or prevent a disease or class of diseases
- Has a role in the body's response to a disease or to a vector of disease
- Treats, prevents, or mitigates adverse events associated with a therapy for a disease, if the adverse events constitute diseases
- Otherwise suggests an effect on a disease or diseases[13]

With regard to distinguishing structure/function claims from disease claims, the FDA has acknowledged that drawing a bright line may not always be possible.[12] Nevertheless, the FDA expects companies to carefully review their product claims and ensure they comply with the regulations. Notably, the agency advises companies to keep in mind the context in which a statement or claim is being made when assessing whether it is a structure/function claim or disease claim.[12] As discussed in the next section of this article, this is particularly important for mental health-related claims, where certain statements, such as "relieves stress and frustration," could be considered permissible structure/function claims in some contexts and disease claims in other contexts.

FDA Regulation of Mental Health Claims

As already noted, the FDA indicated in February 2021 that unlawful mental health-related claims for dietary supplements would be an enforcement priority. At the time, the agency issued warning letters to 10 dietary supplement companies, which it contended had illegally sold dietary supplements marketed with drug claims.[4] Since that initial sweep, FDA has issued more than 50 warning letters in which it took the position that certain mental health-related claims were unapproved drug claims. In most of the letters, mental health-related claims were a small subset of the disease claims identified by FDA. Nevertheless, their inclusion demonstrates the agency's ongoing close scrutiny of this category of claims.

Though FDA has yet to publish specific guidance materials on mental health-related claims, the agency's general guidance on FDA has also unequivocally held that claims that state or imply that a dietary supplement can treat or prevent a specific mental health disorder, such as depression or severe anxiety, are disease claims that would subject the supplement to regulation as a drug product. The agency's 19 February 2021 warning letters to 10 dietary supplement companies make the agency's position on these types of claims particularly clear. Notably, each target of the FDA warning letters had expressly touted its dietary supplements' ability to prevent or address depression, with some even including this claim in the product name (e.g., "natural anxiety depression relief").[4,14] Many of the claims identified in the warning letters also compared product or ingredient effects with prescription antidepressants (e.g., "has equal effectiveness compared to drugs like Prozac, Paxil, and Zoloft"[14]) or indicated the supplement or ingredient was a "natural antidepressant."[14,16,17] FDA's concern regarding these claims is unsurprising given its clear guidance that a claim that a product "[b]elongs to a class of products that is intended to diagnose, mitigate, treat, cure, or prevent a disease" is considered to be a disease claim.[12,13] FDA even specifically cites antidepressants as an example of a class of products "that are so strongly associated with treating and preventing diseases that claiming membership in the product class constitutes a disease claim."[12]

FDA's position on mental health-related claims that expressly or implicitly indicate a dietary supplement can treat or prevent specific mental health disorders has remained consistent since it issued the warning letters in February 2021. For instance, on 4 February 2022, the agency issued a warning letter to a dietary supplement company relating to claims that the company's products could be used to treat or alleviate various mental health-related conditions.[18] Among the claims identified by the FDA as unapproved drug claims included: "Tianeptine … is an antidepressant agent that works by increasing serotonin uptake in the brain …"[18] and "Tianeptine's success in treating depression is comparable to prescription medications but with less side effects and minimal risk of abuse,"[18] and "Medical research demonstrates the ability of phenibut to reduce anxiety as well as enhance cognitive performance."18 As recently as 4 May 2022, the FDA similarly flagged claims relating to depression and anxiety in a series of warning letters to companies marketing dietary supplements and other products that contain CBD and delta-8 tetrahydrocannabinol (delta-8 THC).[19]

While most claims identified in the FDA's warning letters fit squarely within one or more of the agency's 10 enumerated criteria for disease claims, it is worth noting that, in some instances, the agency also listed claims that in isolation would likely qualify as acceptable structure/function claims, including claims such as "helps to manage stress,"[17] "stress reducing mood boosting,"[18] and "supporting emotional health."[20] The agency's inclusion of these claims highlights the importance of considering the overall context in which claims are made when assessing whether a mental health-related claim is likely to be treated as a permitted structure/function claim or an unapproved drug claim.

FTC Regulation of Mental Health Claims

Similar to the FDA, the FTC also brought has enforcement activities against dietary supplement companies touting mental health-related benefits in their advertising and, in several instances, has partnered with the FDA to issue joint warning letters. An example of the FTC's priorities with respects to mental health-related claims is best seen in FTC enforcement related to CBD products. For example, in a series of joint warning letters issued with FDA,[7,8] the agencies flagged several mental health-related claims, which they alleged were unsupported including: "Lavender … Antidepressant properties,"[7] "Increasing evidence suggests that CBD oil is a powerful option for … anxiety,"[7] "CBD oil may improve depression, anxiety, and PTSD,"[7] "For many, CBD holds the answers to treating depression,"[8] "cannabidiol may treat depression,"[8] and "Researchers suggest that it may be effective for panic disorder, obsessive compulsive disorder, and posttraumatic stress disorder."[8]

In December 2020, the FTC separately announced a crackdown—dubbed Operation CBDeceit—against deceptively marketed CBD products and filed enforcement activities against six sellers of CBD-containing products.[21] Among the allegedly false and unsubstantiated health claims identified in FTC's complaints were claims that the CBD products could treat or prevent mental health disorders like anxiety, depression, bipolar disorders, schizophrenia, and posttraumatic stress disorder.[22,23] For instance, one of the companies targeted for enforcement had touted various psychological benefits of CBD, stating among other things that CBD "is commonly used to address anxiety," [h]elps positively regulate mood patterns which help reduce anxiety and stress," and "promotes better sleep cycles and in some cases may offer a remedy for depression and bipolar disorders."[22] In the complaint, the FTC concluded these claims were unsubstantiated and therefore false or misleading.[22]

In March 2021, the FTC announced it had approved settlement agreements with each of the six sellers of CBD products against which it had taken action.[24] The agreements prohibited each seller from making any representations about their products' health benefits, unless the representations are nonmisleading and, at the time of making the representations, the seller possesses and relies upon competent and reliable scientific evidence substantiating that the representation is true.22-24 Notably, the agreements also reiterate the agency's position with respect to what constitutes "competent and reliable scientific evidence," stating specifically that it means: "tests, analyses, research, or studies 1) that have been conducted and evaluated in an objective manner by experts in the relevant disease, condition, or function to which the representation relates; 2) that are generally accepted by such experts to yield accurate and reliable results; and 3) that are randomized, double-blind, and placebo-controlled human clinical testing of the [relevant CBD product or an essentially equivalent product], when such experts would generally require such human clinical testing to substantiate that the representation is true."[22-24]

Since the settlement agreements, the FTC has continued to take action against CBD product sellers[25] and also set its sights on other health-related claims by dietary supplement companies.[5] According to the FTC's website, the agency has already filed 120 cases challenging health claims made for supplements over the last decade.[6] Most recently, the FTC has focused on companies that falsely tout cures or treatments for COVID-19.[5] However, given FTC's close scrutiny of the dietary supplement industry in general, companies touting the mental health benefits of their dietary supplements should be careful to ensure they meet the FTC's robust substantiation requirements in order to avoid potential enforcement activities.

Key Takeaways and Recommendations

This review of FDA and FTC enforcement activity highlights some key takeaways for companies interested in promoting dietary supplements with mental health-related claims. FDA is monitoring mental health-related claims for dietary supplements and will pursue enforcement where it considers

a company's statements to move beyond acceptable structure/function claims to unapproved disease claims. In addition, any promotional strategies perceived to convey that a product can treat or prevent mental health disorders will likely attract regulatory enforcement from both FDA and FTC. The following include some steps taken to mitigate risk of enforcement:

- Avoid claims expressly or implicitly tying a product's benefits or efficacy to specific mental health disorders, such as depression or severe anxiety.
- Avoid claims stating or implying a product is an "antidepressant" or otherwise imply equivalence to medical therapies used to treat mental health disorders.
- Keep in mind the context in which claims are made. Claims that may be acceptable structure/function claims in isolation will likely be considered disease claims if placed with other claims or imagery implying the product or ingredients in a product can treat or prevent a disease.
- Avoid claims implying a product can address long-term or chronic conditions. Claims clearly stating a product is only addressing occasional mood changes or stress are likely to be viewed as structure/function claims by FDA.
- Focus on claims highlighting symptoms which may often be associated with nondisease states, such as stress and frustration.
- Ensure each claim is adequately substantiated with competent and reliable scientific evidence.

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References

All URLs were accessed on 20 June 2022.

1. World Health Organization. Mental health and COVID-19: Early evidence of the pandemic's impact: Scientific brief, 2 March 2022. https://www.who.int/publications/i/item/WHO-2019-nCoV-Sci_Brief-Mental_health-2022.1.
2. American Psychological Association. US adults report highest stress level since early days of the COVID-19 pandemic [press release]. Released 2 February 2021. https://www.apa.org/news/press/releases/2021/02/adults-stress-pandemic.
3. Daniells S. Mood support supplements sales surge with novel microbiome opportunities. Published 17 March 2022. https://www.nutraingredients-usa.com/Article/2022/03/17/Mood-support-supplements-sales-surge-with-novel-microbiome-opportunities#:~:text=Sales%20of%20these%20supplements%20in,to%20data%20provided%20by%20SPINS.
4. Food and Drug Administration. FDA warns 10 companies for illegally selling dietary supplements claiming to treat depression and other mental health disorders. Current as of 19 February 2021. https://www.fda.gov/news-events/press-announcements/fda-warns-10-companies-illegally-selling-dietary-supplements-claiming-treat-depression-and-other.
5. Federal Trade Commission. FTC coronavirus warning letters to companies. https://www.ftc.gov/news-events/features/coronavirus/enforcement/warning-letters.
6. Federal Trade Commission. Health and fitness claims. https://www.ftc.gov/news-events/topics/truth-advertising/health-claims.
7. Federal Trade Commission. FTC and FDA warn Florida company marketing CBD products about claims related to treating autism, ADHD, Parkinson's, Alzheimer's, and other medical conditions. Dated 22 October 2019. https://www.ftc.gov/news-events/news/press-releases/2019/10/ftc-fda-warn-florida-company-marketing-cbd-products-about-claims-related-treating-autism-adhd.
8. Federal Trade Commission. FTC joins FDA in sending warning letters to companies advertising and selling products containing cannabidiol (CBD) claiming to treat Alzheimer's, cancer, and other diseases. Dated 2 April 2019. https://www.ftc.gov/news-events/news/press-releases/2019/04/ftc-joins-fda-sending-warning-letters-companies-advertising-selling-products-containing-cannabidiol.

9. 21 USCA §343(r)(6). https://www.govinfo.gov/app/details/USCODE-2011-title21/USCODE-2011-title21-chap9-subchapIV-sec343.
10. Federal Register. Regulations on statements made for dietary supplements concerning the effect of the product on the structure or function of the body, 65 FR 1000-01. Dated 6 January 2000. https://www.federalregister.gov/documents/2000/01/06/00-53/regulations-on-statements-made-for-dietary-supplements-concerning-the-effect-of-the-product-on-the.
11. 21 CFR §201.128.
12. Food and Drug Administration. Small entity compliance guide on structure/function claims. Current as of 10 November 2017. https://www.fda.gov/regulatory-information/search-fda-guidance-documents/small-entity-compliance-guide-structurefunction-claims.
13. 21 CFR §101.93.
14. Food and Drug Administration. Wholesome Wellness warning letter. Current as od 19 February 2021. https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/wholesome-wellness-612257-02182021.
15. Food and Drug Administration. Mountain Peak Nutritionals warning letter. Current as of 19 February 2021. https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/mountain-peak-nutritionals-612219-02182021.
16. Food and Drug Administration. Blossom Nature, LLC warning letter. Current as of 19 February 2021. https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/blossom-nature-llc-612263-02182021.
17. Food and Drug Administration. Enlifta, LLC warning letter. Current as of 19 February 2021. https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/enlifta-llc-612253-02182021.
18. Food and Drug Administration. Crystal Clear supplements. Current as of 4 February 2022. https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/crystal-clear-supplements-620285-02042022.
19. Food and Drug Administration. FDA issues warning letters to companies illegally selling CBD and delta-8 THC products. Current as of 4 May 2022. https://www.fda.gov/news-events/press-announcements/fda-issues-warning-letters-companies-illegally-selling-cbd-and-delta-8-thc-products.
20. Food and Drug Administration. Native Remedies dba Silver Star Brands warning letter. Current as of 19 February 2021. https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/native-remedies-dba-silver-star-brands-612268-02182021.
21. Federal Trade Commission. FTC Announces Crackdown on Deceptively Marketed CBD Products. Released 17 December 2021. https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-announces-crackdown-deceptively-marketed-cbd-products.
22. Federal Trade Commission. Epichouse LLC, (First Class Herbalist CBD), In the matter of. Last updated 5 March 2021. https://www.ftc.gov/legal-library/browse/cases-proceedings/202-3094-epichouse-llc-first-class-herbalist-cbd-matter.
23. Federal Trade Commission. CBD Meds Inc., In the matter of. Last updated 5 March 2021. https://www.ftc.gov/legal-library/browse/cases-proceedings/202-3080-cbd-meds-inc-matter
24. Federal Trade Commission. FTC approves final administrative consent orders against sellers of deceptively marketed CBD products. Dated 5 March 2021. https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-approves-final-administrative-consent-orders-against-sellers-deceptively-marketed-cbd-products
25. Federal Trade Commission. FTC announces latest enforcement action halting deceptive CBD product marketing. Released 17 May 2021. https://www.ftc.gov/news-events/news/press-releases/2021/05/ftc-announces-latest-enforcement-action-halting-deceptive-cbd-product-marketing