

Comment #14 from Notice of Final Rule 21 CFR Parts 16 and 99 Dissemination of Information on Unapproved/New Uses for Marketed Drugs, Biologics, and Devices

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14. Proposed § 99.3(g) defined “new use” to mean a use that is not included in the approved labeling of an approved drug or device, or a use that is not included in the statement of intended use for a cleared device. The preamble to the proposed rule explained that a new use is one that would require approval or clearance of a supplemental application in order for it to be included in the product labeling.

The preamble to the proposed rule explained that “new uses,” include, but are not limited to: A completely different indication; modification of an existing indication to include a new dose, a new dosing schedule, a new route of administration, a different duration of usage, a new age group (e.g., unique safety or effectiveness in the elderly), another patient subgroup not explicitly identified in the current labeling, a different stage of the disease, a different intended outcome (e.g., longterm survival benefit, improved quality of life, disease amelioration), effectiveness for a sign or symptom of the disease not in the current labeling; and comparative claims to other agents for treatment of the same condition (see 63 FR 31143 at 31145).

A number of comments supported FDA’s definition of new use. However, others disagreed with the specific examples set forth in the preamble as too broad. Most of the latter comments objected to the inclusion of patient subgroups and comparative claims for approved indications. They argued that their inclusion in the definition is inconsistent with the agency’s prescription drug advertising regulations, which permit companies to promote patient subgroups and comparative claims if certain conditions are met. Several comments disagreed with the inclusion of a new age group—specifically children—in the definition of new use. One comment argued that children should not be considered a “use,” but a “user.” One comment stated that the definition should focus only on information that differs from the current labeling; it should not include information that is consistent with, but more detailed than what is described in the approved labeling. Finally, one comment disagreed with the agency’s characterization of a different intended outcome as an off-label use.

FDA agrees with the comments discussed previously, which note that FDA’s prescription drug advertising regulations permit companies to make comparative claims about two approved uses, without getting the claims on the approved label if the companies have on file, substantial evidence or substantial clinical experience to support such claims. (See § 202.1(e) (21 CFR 202.1(e)).) FDA did not intend to change the provision found in its prescription drug advertising regulations. In addition, FDA agrees that as long as the comparison is between two approved claims, there technically is not a new “use” involved. Therefore, FDA is deleting comparative claims about approved uses from its interpretation of “new use.” Manufacturers who want to make such claims for a drug, must submit a labeling

supplement or must meet the requirements set forth in FDA's drug advertising regulations. (See § 202.1(e).) Manufacturers who want to make such claims for a medical device must meet the requirements set forth in §§ 807.81(a)(3)(ii) or 814.39 (21 CFR 807.81(a)(3)(ii) or 814.39).

With respect to claims of efficacy in a new patient subgroup, including a new age group, claims that are more detailed than the approved labeling, and claims that relate to different intended outcomes (as well as with respect to some of the other types of new use claims listed in the preamble to the proposed rule), FDA's prescription drug advertising regulations may permit companies to make such claims about prescription drugs in certain circumstances, without submitting a supplement, provided they have on file the required evidence to support the claim. (See § 202.1(e).) However, FDA does consider such claims, including claims regarding children, to be new uses in some cases. In cases where such claims constitute new uses, manufacturers also can use the procedures set forth in this part to disseminate journal articles and reference publications about those claims. For medical devices, manufacturers can use the procedures set forth in this part to disseminate journal articles and reference publications about these types of claims. Otherwise, they must comply with the requirements set forth in §§ 807.81(a)(3)(ii) or 814.39.