PhRMA
RESEARCH • PROGRESS • HOPE
950 F STREET, NW, SUITE 300 • WASHINGTON, DC 20004 • 202-835-3400 • PhRMA.org

December 15, 2014

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

Re: Comments on Notice—Survey of Pharmacists and Patients: Variations in the Physical Characteristics of Generic Drug Pills and Patients' Perceptions (Docket No. FDA-2014-N-1491)

Dear Sir or Madam:

The Pharmaceutical Research and Manufacturers of America (PhRMA) is pleased to provide comments on the Food and Drug Administration's (FDA's) information collection notice entitled "Survey of Pharmacists and Patients: Variations in the Physical Characteristics of Generic Drug Pills and Patients' Perceptions."[1] PhRMA represents the country's leading pharmaceutical research and biotechnology companies, which are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives. PhRMA companies are leading the way in the search for new cures, with members investing an estimated $51.1 billion in 2013 in the discovery and development of new medicines.

PhRMA members share FDA's goals to minimize patient confusion about dispensed drugs and to better understand patient compliance with prescribed therapeutic regimens. The *Federal Register* notice states that the survey results "may help guide regulatory policy" and invites comments on four topics.[2] The first is "[w]hether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility."[3] PhRMA offers comments on this question and highlights public health concerns implicated by the proposed survey that are not mentioned in the notice. PhRMA urges FDA to consider these comments as it assesses the utility of the data proposed for collection and whether to perform the survey. PhRMA believes that the following concerns support a decision not to conduct the proposed survey. If the agency decides to proceed with the survey, however, we respectfully request that it reflect the considerations outlined in these comments.

[1] 79 Fed. Reg. 61872 (Oct. 15, 2014).

[2] *Id.* ("To provide additional information that may help guide regulatory policy or pharmacy business practices, we intend to conduct surveys of pharmacists and patients about their perceptions about and experiences with generic drug product pill appearance change.").

[3] *Id.*

The "variations" in the physical appearance of a drug product—such as a pill's color, size, and shape—form the drug product's overall image, which conveys important information about the source of a specific product to pharmacists and patients.[4] In other words, a pill's physical appearance can, if sufficiently distinctive, qualify as trade dress that functions in the same way that a traditional trademark does: to distinguish between that particular product and a product from a different manufacturer. A pill's distinctive physical appearance can thus help pharmacists and patients to avoid the confusion about the source of a specific product that may contribute to medication errors, a possibility that the *Federal Register* notice does not mention. Moreover, trade dress as a source identifier is protected under the Lanham Act,[5] and PhRMA believes that FDA's regulatory policy must take account of these intellectual property rights. Additionally, differentiation among generic drug pills facilitates the detection and deterrence of counterfeit drug products. For example, in some instances, a drug product may be transported without exterior packaging, so that only the pills themselves—including their physical appearance—can be relied upon in detection and confirmation of counterfeiting. Instead of recognizing these key functions, however, the notice states that a change in the physical appearance of the dispensed generic drugs, *e.g.*, due to a change in generic drug suppliers, "may result in patient confusion and concerns about the safety and effectiveness of the generic drug products."[6] We recommend that the agency acknowledge the ways in which these differences are beneficial and can instead mitigate confusion about generic drugs when determining whether and how to conduct the survey.

A pill's distinct physical appearance may also serve pharmacovigilance purposes. A patient who experiences an adverse event might be more familiar with a pill's physical attributes than with the drug product's other identifiers, such as the manufacturer's name or National Drug Code. As such, a drug product's distinct physical appearance could facilitate the accurate reporting of adverse drug experiences, which in turn helps manufacturers and FDA to detect potential safety or quality issues. In contrast, an identical physical appearance for all generic products referencing the same listed drug would eliminate these distinguishing physical features that could help pinpoint adverse events associated with a particular manufacturer's product. Having this capability is particularly important in the generic drug context to detect,

---

[4] Although not referenced in the *Federal Register* notice, FDA's draft guidance on the physical attributes of generic tablets and capsules already offers recommendations based on scientific literature for determining a generic drug product's physical appearance, as compared to the reference listed drug, to allow for a comparable patient experience in swallowing tablets and capsules. *See* FDA, Draft Guidance for Industry – Size, Shape, and Other Physical Attributes of Generic Tablets and Capsules (Dec. 2013). These recommendations help establish a baseline for the appearance of generic pills.

[5] *See* 15 U.S.C. § 1051 *et seq.* For example, the Lanham Act provides a cause of action against "[a]ny person who . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof . . . which is likely to cause confusion, or to cause mistake, or to deceive . . . as to the origin . . . of his or her goods, services, or commercial activities." *Id.* at § 1125(a).

[6] 79 Fed. Reg. at 61872. Indeed, in denying a citizen petition requesting that the agency refrain from approving any abbreviated new drug application (ANDA) for a generic drug without the reference listed drug's dual-scored configuration, FDA concluded that a difference in the physical appearance of pills manufactured by different sponsors in scoring was unlikely to present a safety issue. FDA, Response to Citizen Petition, Docket No. FDA-2011-P-0702 (Feb. 8, 2012), at 5 ("there is very little chance that this marketing of two doxycycline products with different scoring patterns would lead to a safety issue").

based on postmarketing experience, bioinequivalence problems with specific generic drug products. In two recent cases, FDA found that generic formulations were not bioequivalent to their respective listed drugs based on postmarketing data, showing that this possibility is not hypothetical.[7] In such cases, a pill's distinct physical appearance could help both the manufacturer and FDA identify the specific drug product in a more efficient manner.

PhRMA is also concerned that the survey does not appear take into account the ability of pill appearance variation to notify patients of any changes in the source of their medications. The *Federal Register* notice seems to assume that all generic drug products referencing a particular listed drug should be identical in physical appearance so that patients will not observe a difference if they receive pills made by a different manufacturer. This premise is inconsistent with those state pharmacy practice laws requiring a patient to be notified if a switch occurs.[8] Indeed, if the generic drug pills for a particular formulation shared the same physical appearance, a patient might be misled about the source of her medication and believe that it continues to be made by the same manufacturer, even when the pharmacist has switched from one manufacturer to another. This situation would run counter to the intent of these state laws, as well as the long-held positions of many drug safety organizations.

Finally, restrictions on distinctive physical appearances for drug pills raise First Amendment concerns. Such requirements would limit the ability of manufacturers to develop trade dress to serve as a source identifier of their respective products. A drug pill's physical appearance, like other forms of trade dress, can be considered a protected form of non-verbal expression.[9]

* * *

PhRMA appreciates FDA's consideration of these comments, and we hope the agency will keep in mind the considerations highlighted in this letter as it decides whether to collect the described data from pharmacists and patients. We would welcome the opportunity to discuss them further.

---

[7] *See* FDA, Press Release, Methylphenidate Hydrochloride Extended Release Tablets (Nov. 13, 2014); FDA, Press Release, FDA Update: Budeprion ®XL 300 mg Not Therapeutically Equivalent to Wellbutrin® XL 300 mg (Oct. 3, 2012).

[8] *See, e.g.*, Tenn. Code Ann. § 53-10-210(b); Utah Code Ann. § 58-17b-605(1).

[9] *See Gold Coast Publ'n, Inc. v. Corrigan*, 42 F.3d 1336, 1355 (11th Cir. 1994) (applying a First Amendment analysis to government restrictions on trade dress, specifically restrictions on the "color and size of lettering on newsracks"); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression."); *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.").

Respectfully submitted,

David E. Korn
Vice President,
Intellectual Property and Law

Sarah A. Spurgeon
Assistant General Counsel