



August 15, 2019

Steven Tave
Director, Office of Dietary Supplement Programs
Center for Food Safety and Applied Nutrition
Food and Drug Administration
Via e-mail: steven.tave@fda.hhs.gov

Subject: Request for Immediate Enforcement Discretion on the Labeling of Probiotic Quantity in Colony Forming Units Only

Dear Mr. Tave,

In support of efforts to modernize the Food and Drug Administration's (FDA) approach to regulating dietary supplements, the Council for Responsible Nutrition (CRN)¹ reiterates our request that the agency permit the declaration ingredient quantity for probiotic dietary supplements by identifying the amount of live microbial organisms (e.g., in colony forming units (CFUs) on dietary supplement labels *in lieu of* (and not in addition to) general requirements that ingredient quantity be declared by metric weight. Our previous correspondence with FDA on this issue is summarized below.

- In August 2014, CRN requested that FDA provide flexibility regarding units of measure for dietary ingredients that are more accurately labeled with units of measure specific to the ingredient, such as CFUs for probiotics, in comments responding to the agency's proposed rule titled, "Food Labeling: Revision of the Nutrition and Supplement Facts Labels."²

¹ The Council for Responsible Nutrition (CRN), founded in 1973 and based in Washington, D.C., is the leading trade association representing dietary supplement and functional food manufacturers, marketers, and ingredient suppliers. CRN companies produce a large portion of the functional food ingredients and dietary supplements marketed in the United States and globally. Our member companies manufacture popular national brands as well as the store brands marketed by major supermarkets, drug stores, and discount chains. These products also include those marketed through natural food stores and mainstream direct selling companies. CRN represents more than 150 companies that manufacture dietary ingredients, dietary supplements and/or functional foods, or supply services to those suppliers and manufacturers. Our member companies are expected to comply with a host of federal and state regulations governing dietary supplements and food in the areas of manufacturing, marketing, quality control and safety. Our supplier and manufacturer member companies also agree to adhere to additional voluntary guidelines as well as to CRN's Code of Ethics. Learn more about us at www.crnusa.org.

² Docket No. FDA-2012-N-1210; Food Labeling: Revision of the Nutrition and Supplement Facts Labels. CRN comments submitted August 1, 2014. Available at: http://crnusa.org/sites/default/files/pdfs/comments-pdfs/CRN_Comments_FDA_ProposedRule-RevisionNutritionSupplementFactsLabels080114.pdf

- In March 2017, CRN supported a petition to request that FDA amend 21 CFR §101.36 to require declaration of the quantitative amount of probiotic ingredients in a dietary supplement in CFUs instead of by weight on the product label.³
- In October 2017, CRN submitted a letter to you requesting that FDA exercise immediate enforcement discretion on dietary supplements containing probiotics that declare probiotic quantity in CFUs instead of by weight on the product label. In June 2018, we reiterated the request in a letter to Dr. Stephen Ostroff, former FDA Deputy Commissioner for Foods and Veterinary Medicine.
- In February 2018, CRN again requested that FDA amend 21 CFR §101.36 to require that the quantitative amount of probiotic dietary ingredients be declared in CFUs instead of by weight, in comments responding to the agency's request for input on the review of existing regulatory and information collection requirements.⁴
- In September 2018, FDA denied the request in the aforementioned petition and issued a draft guidance titled, "Policy Regarding Quantitative Labeling of Dietary Supplements Containing Live Microbials: Guidance for Industry" (Draft Guidance). In response, CRN commended the agency's intent to exercise enforcement discretion when supplement marketers use CFUs when declaring the quantity of live microbials on a Supplement Facts label, but raised concern with FDA's position that supplement labels should also list the quantitative amount of live microbial dietary ingredients by metric weight.⁵ CRN recommended that FDA revise its policy to exercise enforcement discretion when marketers declare quantitative amounts of live microbial ingredients in CFUs in the Supplement Facts label only, without any declaration of the quantitative amount by metric weight.

CRN understands that FDA has not determined whether to engage in rulemaking to amend 21 CFR §101.36. In the interim, FDA should revise the Draft Guidance immediately. The agency's inaction has resulted in uncertainty for the dietary supplement industry and confusion among consumers.

Weight is not an appropriate unit of measure for live microbial ingredients because it represents the total cellular mass of an ingredient, including live and dead microorganisms. Declaration of dietary ingredients on a Supplement Facts label should provide the most meaningful information to consumers, and in the case of probiotics, live microorganisms are the beneficial and relevant portion of the ingredient. As such, only live microorganism quantity

³ Docket No. FDA-2016-P-3968; Citizen Petition from International Probiotics Association. CRN comments submitted on March 7, 2017.

⁴ Docket No. FDA-2017-N-5093; Review of Existing General Regulatory and Information Collection Requirements of the Food and Drug Administration. CRN comments submitted on February 5, 2018. Available at: <http://crnusa.org/comments/FDA/Info-Collection-Requirements-Feb-2018>

⁵ Docket No. FDA-2018-D-3464; Policy Regarding Quantitative Labeling of Dietary Supplements Containing Live Microbials: Draft Guidance for Industry. CRN comments submitted November 6, 2018. Available at: <http://crnusa.org/policy-regarding-quantitative-labeling-dietary-supplements-containing-live-microbials-draft>

should be declared on a Supplement Facts label.

As acknowledged in the Draft Guidance, CFU is currently the scientifically accepted unit of measure for live microbials, used by scientific researchers, FDA, and other governmental organizations. CFUs are widely used by dietary supplement manufacturers to measure live microbial quantity, and are considered industry best practice for quantification.⁶ While alternate analytical methods and units of measure are being developed, they do not currently have the same level of recognition and adoption, and cannot be correlated to CFU measurements in existing scientific research. At present, CFU is the best means of communicating the quantity of live microbials in a product to consumers.

CRN appreciates that the Draft Guidance recognizes the appropriateness of CFUs for describing live microbial ingredient quantity; however, listing quantity in CFUs in addition to metric weight, which is the unit of measure currently required for dietary ingredients, is impractical. It is not possible to accurately correlate probiotic quantity in both weight and CFUs on a consistent basis. As written, the Draft Guidance presents a challenge to industry because its recommendations cannot be implemented in a manner that is not potentially misleading to consumers. Supplement marketers still face a regulatory risk when they use CFUs to declare the amount of live microbials in dietary supplements instead of weight, yet their goal is to provide a scientifically accepted measure of quantity for probiotic dietary supplements that is relevant and useful for consumers.

While FDA delays revising its policy and the pertinent regulation, others are seeking to impose requirements on live microbial containing dietary supplements. In February 2019, state legislators in California introduced a bill to require labels of dietary supplements containing live microorganisms to include the genus, species, and strain of each live microorganism in the dietary supplement, as well as the total estimated quantity of all live microorganisms in the dietary supplement at the end of its shelf life, as measured by CFUs.⁷ While the proposed requirements are generally consistent with industry best practices, they are inconsistent with FDA's current policy and regulation. Individual state requirements that conflict with federal rules will put responsible industry members in an untenable position and will cause confusion among consumers.

⁶ Best Practices Guidelines for Probiotics. Available at: <http://crnusa.org/sites/default/files/pdfs/CRN-IPA-Best-Practices-Guidelines-for-Probiotics.pdf>

⁷ https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1178. As introduced, AB 1178 required probiotic dietary supplements to label ingredients by genus/species/strain and to identify quantity by CFU. During the California Senate's consideration of the legislation, CRN was successful in having the CFU requirement removed from the bill, leaving only the genus/species/strain requirement in the bill. That requirement, although creating a state-imposed labeling obligation that applies in addition to federal requirements, is not inconsistent or conflicting with federal ones. The legislation will be the subject of conference committee consideration this Fall. As the Assembly bill sponsor has not agreed to this revision, the CFU requirement could be reinstated in the legislation before final approval, setting up inconsistent obligations between state and federal law.

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At this time, FDA should eliminate from the Draft Guidance the condition that live microbial quantity must be listed in terms of weight in addition to quantity in CFUs and announce a formal exercise of enforcement discretion when quantitative amounts of live microbial ingredients are declared in CFUs on the Supplement Facts label only. Revising the Draft Guidance immediately is necessary to allow manufacturers and marketers of probiotic products to provide consumers with accurate and meaningful label information for making informed choices.

Yours truly,



Andrea Wong
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