

upon completion of such processing, labeling, or repacking. Such person and such operator shall each keep a copy of such agreement until 2 years after the final shipment or delivery of such drug from such establishment, and shall make such copies available for inspection at any reasonable hour to any officer or employee of the Department who requests them.

(b) An exemption of a shipment or other delivery of a drug under paragraph (a)(1) of this section shall, at the beginning of the act of removing such shipment or delivery, or any part thereof, from such establishment, become void ab initio if the drug comprising such shipment, delivery, or part is adulterated or misbranded within the meaning of the act when so removed.

(c) An exemption of a shipment or other delivery of a drug under paragraph (a)(2) of this section shall become void ab initio with respect to the person who introduced such shipment or delivery into interstate commerce upon refusal by such person to make available for inspection a copy of the agreement, as required by such paragraph (a)(2) of this section.

(d) An exemption of a shipment or other delivery of a drug under paragraph (a)(2) of this section shall expire:

(1) At the beginning of the act of removing such shipment or delivery, or any part thereof, from such establishment if the drug comprising such shipment, delivery, or part is adulterated or misbranded within the meaning of the act when so removed; or

(2) Upon refusal by the operator of the establishment where such drug is to be processed, labeled, or repacked, to make available for inspection a copy of the agreement, as required by such clause.

[41 FR 6911, Feb. 13, 1976, as amended at 64 FR 400, Jan. 5, 1999]

**§ 201.161 Carbon dioxide and certain other gases.**

(a) Carbon dioxide, cyclopropane, ethylene, helium, and nitrous oxide gases intended for drug use are exempted from the requirements of § 201.100(b) (2), (3), and (c)(1) provided the labeling bears, in addition to any other infor-

mation required by the Federal Food, Drug, and Cosmetic Act, the following:

(1) The warning statement “Warning—Administration of (name of gas) may be hazardous or contraindicated. For use only by or under the supervision of a licensed practitioner who is experienced in the use and administration of (name of gas) and is familiar with the indications, effects, dosages, methods, and frequency and duration of administration, and with the hazards, contraindications, and side effects and the precautions to be taken”; and

(2) Any needed directions concerning the conditions for storage and warnings against the inherent dangers in the handling of the specific compressed gas.

(b) This labeling exemption does not apply to mixtures of any one or more of these gases with oxygen or with each other.

(c) Regulatory action may be initiated with respect to any article shipped within the jurisdiction of the Act contrary to the provisions of this section after 60 days following publication of this section in the FEDERAL REGISTER.

**Subpart F—Labeling Claims for Drugs in Drug Efficacy Study**

**§ 201.200 Disclosure of drug efficacy study evaluations in labeling and advertising.**

(a)(1) The National Academy of Sciences—National Research Council, Drug Efficacy Study Group, has completed an exhaustive review of labeling claims made for drugs marketed under new-drug and antibiotic drug procedures between 1938 and 1962. The results are compiled in “Drug Efficacy Study, A Report to the Commissioner of Food and Drugs from the National Academy of Sciences (1969).” As the report notes, this review has made “an audit of the state of the art of drug usage that has been uniquely extensive in scope and uniquely intensive in time” and is applicable to more than 80 percent of the currently marketed drugs. The report further notes that the quality of the evidence of efficacy, as well as the quality of the labeling claims, is poor. Labeling and other promotional claims

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have been evaluated as “effective,” “probably effective,” “possibly effective,” “ineffective,” “ineffective as a fixed combination,” and “effective but,” and a report for each drug in the study has been submitted to the Commissioner.

(2) The Food and Drug Administration is processing the reports, seeking voluntary action on the part of the drug manufacturers and distributors in the elimination or modification of unsupported promotional claims, and initiating administrative actions as necessary to require product and labeling changes.

(3) Delays have been encountered in bringing to the attention of the prescribers of prescription items the conclusions of the expert panels that reviewed the promotional claims.

(b) The Commissioner of Food and Drugs concludes that:

(1) The failure to disclose in the labeling of a drug and in other promotional material the conclusions of the Academy experts that a claim is “ineffective,” “possibly effective,” “probably effective,” or “ineffective as a fixed combination,” while labeling and promotional material bearing any such claim are being used, is a failure to disclose facts that are material in light of the representations made and causes the drug to be misbranded.

(2) The Academy classification of a drug as other than “effective” for a claim for which such drug is recommended establishes that there is a material weight of opinion among qualified experts contrary to the representation made or suggested in the labeling, and failure to reveal this fact causes such labeling to be misleading.

(c) Therefore, after publication in the FEDERAL REGISTER of a Drug Efficacy Study Implementation notice on a prescription drug, unless exempted or otherwise provided for in the notice, all package labeling (other than the immediate container or carton label, unless such labeling contains information required by § 201.100(c)(1) in lieu of a package insert), promotional labeling, and advertisements shall include, as part of the information for practitioners under which the drug can be safely and effectively used, an appropriate qualification of all claims evalu-

ated as other than “effective” by a panel of the National Academy of Sciences—National Research Council, Drug Efficacy Study Group, if such claims continue to be included in either the labeling or advertisements. However, this qualifying information will be required in advertisements only if promotional material is included therein for claims evaluated as less than “effective” or if such claims are included in the indications section of the portion of the advertisement containing the information required in brief summary by § 202.1(e)(1) of this chapter. When, however, the Food and Drug Administration classification of such claim is “effective” (for example, on the basis of revision of the language of the claim or submission or existence of adequate data), such qualification is not necessary. When the Food and Drug Administration classification of the claim, as stated in the implementation notice, differs from that of the Academy but is other than “effective,” the qualifying statement shall refer to this classification in lieu of the Academy’s classification.

(d) For new drugs and antibiotics, supplements to provide for revised labeling in accord with paragraph (c) of this section shall be submitted under the provisions of § 314.70 and § 514.8 of this chapter within 90 days after publication of the implementation notice in the FEDERAL REGISTER or by May 15, 1972, for those drugs for which notices have been published and such labeling shall be put into use as soon as possible but not later than the end of the time period allowed for submitting supplements to provide for revised labeling.

(e) Qualifying information required in drug labeling by paragraph (c) of this section in order to advise prescribers of a drug of the findings made by a panel of the Academy in evaluating a claim as other than “effective” shall be at least of the same size and color and degree of prominence as other printing in the labeling and shall be presented in a prominent box using one of the following formats and procedures:

(1) In drug labeling the box statement may entirely replace the indications section and be in the following format:

## INDICATIONS

Based on a review of this drug by the National Academy of Sciences—National Research Council and/or other information, FDA has classified the indication(s) as follows:

Effective: (*list or state in paragraph form*).

“Probably” effective: (*list or state in paragraph form*).

“Possibly” effective: (*list or state in paragraph form*).

Final classification of the less-than-effective indications requires further investigation.

(2) Or the indication(s) for which the drug has been found effective may appear outside the boxed statement and be followed immediately by the following boxed statement:

Based on a review of this drug by the National Academy of Sciences—National Research Council and/or other information, FDA has classified the other indication(s) as follows:

“Probably” effective: (*list or state in paragraph form*).

“Possibly” effective: (*list or state in paragraph form*).

Final classification of the less-than-effective indications requires further investigation.

(3) In drug labeling (other than that which is required by §201.100(c)(1)) which may contain a promotional message, the promotional message shall be keyed to the boxed statement by the same means as those provided for advertisements in paragraph (f)(2) of this section.

(f) Qualifying information required in prescription drug advertising by paragraph (c) of this section shall contain a prominent boxed statement of the advertised indication(s) and of the limitations of effectiveness using the same format, language, and emphasis as that required in labeling by paragraph (e) of this section.

(1) The boxed statement shall appear in (or next to) the information required in brief summary by §202.1(e)(1) of this chapter and shall have prominence at least equal to that provided for other information presented in the brief summary and shall have type size, captions, color, and other physical characteristics comparable to the information required in the brief summary.

(2) Less-than-effective indication(s) in the promotional message of an ad-

vertisement which is a single page or less shall be keyed to the boxed statement by asterisk, by an appropriate statement, or by other suitable means providing adequate emphasis on the boxed statement. On each page where less-than-effective indication(s) appear in a multiple page advertisement, an asterisk shall be placed after the most prominent mention of the indication(s); if the degree of prominence does not vary, an asterisk shall be placed after the first mention of the indication. The asterisk shall refer to a notation at the bottom of the page which shall state “This drug has been evaluated as probably effective (or possibly effective whichever is appropriate) for this indication” and “See Brief Summary” or “See Prescribing Information,” the latter legend to be used only if the advertisement carries the required information for professional use as set forth in §201.100(c)(1).

(3) For less-than-effective indications which are included in the advertisement only as a part of the information required in brief summary, the disclosure information shall appear in this portion of the advertisement in the same manner as is specified for labeling in paragraph (e) of this section.

(g) The Commissioner may find circumstances are such that, while the elimination of claims evaluated as other than effective will generally eliminate the need for disclosure about such claims, there will be instances in which the change in the prescribing or promotional profile of the drug is so substantial as to require a disclosure of the reason for the change so that the purchaser or prescriber is not misled by being left unaware through the sponsor’s silence that a basic change has taken place. The Food and Drug Administration will identify these situations in direct correspondence with the drug promoters, after which the failure to make the disclosure will be regarded as misleading and appropriate action will be taken.

[40 FR 13998, Mar. 27, 1975, as amended at 55 FR 11576, Mar. 29, 1990]