A New Guide for the Journey to Drug Name Approval

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B. Brett Heavner
202.408.4073

Clearing U.S. pharmaceutical trademarks for use and registration is more complicated and unpredictable than clearing marks in other industries. Unlike trademarks in other fields, pharmaceutical marks must be approved by the U.S. Food and Drug Administration (FDA).

Until recently, the FDA's safety and promotional review of a proposed drug name has been conducted with little official guidance using vague statutory and regulatory standards. As a result, drug companies regularly spend thousands of dollars developing and clearing drug names, only to see roughly a third of them rejected by the FDA.[1] The rejection of a name can be particularly problematic if the drug company has already launched the product outside the United States under the rejected name.

To improve transparency, in February 2010 the FDA published "Guidance for Industry on the Contents of a Complete Submission for the Evaluation of Proprietary Names" (Guidance), which describes in detail the FDA's evaluation methodology for proposed proprietary drug names.[2] By carefully examining this methodology and incorporating it into their own name clearance strategies, drug companies can better select drug names that have a better chance of clearing the FDA review process.

The FDA's Review Process

The FDA's mandate under the Federal Food, Drug, and Cosmetic (FD&C) Act is to reject drug names that are misleading.[3] This includes names that include or suggest the name of one or more but not all of the drug's ingredients;[4] imply the drug or ingredient has some unique effectiveness or composition;[5] or may be confused with the proprietary name or the established name of a different drug or ingredient.[6]

In order to determine whether a drug name is misleading the FDA collects the proposed primary and alternate proposed proprietary name, including its intended pronunciation, derivation, modifier meaning (e.g., prefix suffix), and pharmacologic/therapeutic category; the proposed labeling, including any packaging insert if a prescription drug; the proposed container labels and labeling; and information about the product's dispensing and delivery, including its likely care environment(s) for dispensing and use, delivery system, and measuring device.[7]

Upon receipt of this information, the FDA will then use a variety of methods to determine if the name has a problematic meaning or connotation within the pharmaceutical field. It also generates and tests a list of existing drug names that could be confused with the proposed proprietary name, possibly contributing to a medication error. Specifically, the FDA will conduct preliminary screening of proposed names that incorporate or suggest, among other drug characteristics, dosing intervals, dosage forms/routes of administration, medical/product name abbreviations, and drug compositions; United States Adopted Names Council (USAN) stem screening of proposed names that incorporate generic drug stems; orthographic/phonographic computer searching of existing drug names in industry databases that are similar to the proposed drug name in spelling, pronunciation, and handwritten appearance; and

phonetic orthographic computer analysis (POCA) using a powerful computerized orthographic/phonological algorithm to generate objective numeric scores that rank the orthographic and phonological similarity between the proposed name and existing drug names above a specific threshold.

After identifying problematic and similar drug names, the FDA conducts a failure modes and effects analysis (FMEA), which examines the nomenclature, labeling, and packaging of the drug for possible ways in which an administration error could occur along a drug's route from manufacturer to patient. Part of the FMEA evaluates the name itself for its potential to inadvertently function as a source of error regarding its own ingredients or characteristics. Another part of the FMEA is a "sound-alike/look-alike" test, which compares the proposed proprietary name to all of the names gathered during the safety review in spelling, appearance, sound, connotation, and commercial impression. Because product name confusion can occur at any point in the medication-use system, the FDA considers the potential for confusion at each stage of the process, including product procurement, prescribing/ordering, dispensing, administration, and monitoring the effects of a medication.[8] If the FDA determines under these analyses that the proposed proprietary name could cause medication errors under any of these conditions, the name will be rejected.

In addition to the safety review, the FDA conducts a promotional review. This review evaluates a proposed proprietary name to determine if they are "overly fanciful" so as to misleadingly imply unique effectiveness or composition, as well as to assess whether the name contributes to overstatement of product efficacy, minimization of risk, broadening of product indications, or making of unsubstantiated superiority claims.[9]

Considering meaning

The Guidance illustrates the first difference between the FDA review and the traditional trademark analysis: how the meaning of the marks are analyzed. Under a standard trademark analysis, a mark's meaning is first considered in order to determine whether it is inherently distinctive (i.e., coined, suggestive, descriptive, or generic) with respect to its underlying goods. The FDA, on the other hand, considers whether a drug name has a particular meaning within the pharmaceutical industry likely to cause or contribute to medication errors, regardless if that meaning is relevant to the drug itself. If so, the name risks rejection and may not be used in U.S. commerce for that drug.

Accordingly, a pharmaceutical company would first be wise to make certain that its trademark searching and analysis includes a USAN stem search as referenced in the Guidelines. Then, counsel can consider whether the potential drug name incorporates or otherwise suggests an existing generic drug stem, in order to better evaluate whether the FDA may object.

The FDA also advises that applicants avoid drug names that suggest a drug's composition, dosing interval, dosage form, or route of administration, regardless if that meaning is accurate for the drug or not. Names that exaggerate the drug's effectiveness, superiority, or lack of risk should also be avoided.[10] For example, prefixes and suffixes that have pharmaceutical meanings, such as strength, method of administration, or duration should be avoided (e.g., "PM" suggests night-time administration or "-stat" suggests fast action). Also, be careful of prefixes and suffixes that may have multiple meanings depending upon the medical context in which they are used, such as numeric suffixes that may be used to signify both duration and suggested dosage regimens.

Considering similar marks

The trademark and FDA test also differ considerably in how they compare the proposed name or mark to similar existing names or marks. The traditional likelihood-of-confusion test balances numerous factors including, among others, the overall visual and phonetic similarity of marks, the similarity or dissimilarity of the products, the strength or weakness of the marks, the sophistication of the consumers, the overlap in the channels of trade, and the intent of the junior user.[11] The FDA test, on the other hand, only

considers lookalike/soundalike issues, comparing the proposed drug name to drug names in spelling, pronunciation, and handwritten appearance.[12]

Indeed, many of the factors used in the likelihood-of-confusion analysis may be of little importance to the FDA analysis. For example, the "weakness" factor in traditional trademark analysis is entirely absent from the FDA analysis. Thus, similar marks that could coexist under traditional trademark analysis (where the field is crowded with equally similar marks or where the two marks are descriptive), are likely to be rejected by the FDA due to the look-alike/sound alike problem. Similarly, factors relating to the sophistication of the consumer, the intent of the junior user, and the lack of relationship between the goods will play little or no role in the FDA review. Indeed, physician and pharmacist sophistication may be irrelevant if they simply miswrite, mishear, or misread the drug name.

Moreover, the likelihood-of-confusion analysis also requires comparison of the marks as a whole, and not to dissect them into parts. Given the FDA test, however, it may be more important to focus on similarities at the beginning of the words. For example, the FDA focuses on physician handwriting which, it assumes, is often difficult to read and may trail off at the end of words. Similarly, prescriptions are often presented over the telephone to pharmacists, who may only hear the beginning syllables of a trademark. The FDA accordingly presumes that pharmacists may rely more heavily on differences at the beginnings of marks to distinguish drugs than consumers in other fields.

Conducting a sound alike/look-alike analysis by hand would be daunting when faced with hundreds of drug names from such databases. That is why the FDA uses unique computational methods, including a POCA, to identify phonologically or orthographically similar names existing in industry databases. A POCA runs existing drug names through a computer algorithm and assigns each name a similarity percentage score between 1-100 based on how similar the name is to the proposed name. On this scale a ranking of 100 would suggest the names are identical. The FDA has yet to provide guidance as to what ranking threshold it considers problematic, although most POCA reports will typically only display names with a rank above a certain threshold such as 60. The FDA has allowed access to its POCA algorithm and professional search companies, such as Thomson Compumark[13] and CT Corsearch,[14] have developed their own POCA tools. Accordingly, the pharmaceutical trademark practitioner should consider employing a POCA as part of its own clearance strategy, as it efficiently highlights potentially problematic existing drug names that may not initially have been considered a problem under the traditional trademark "likelihood of confusion" test.

Conclusion

The Guidelines have considerably illuminated the FDA's drug review process. It is important for trademark practitioners to adjust their clearance process for drug names to include all the tools available to adequately predict both PTO and FDA analysis of the proposed name. More accurate FDA analysis in the clearance process may allow pharmaceutical companies both to reduce the number of alternative names developed for each of their new drugs, and to avoid having their worldwide branding strategy disrupted by an unexpected FDA decision.

Endnotes

[1] FDA 101: Medication Errors, FDA Consumer Health Information (Sept. 20, 2009), available at: http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM143038.pdf.

[2] Available at: http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm075068.pdf

[3] See 21 USC §§ 352(a), 355(d)(7); 21 CFR §§ 314.105(c), 314.125(b)(6), 314.125(b)(8).

[4] 21 CFR 201.6(b).

[5] 21 CFR 201.10(c)(3).

[6] 21 CFR 201.10(c)(5).

[7] Guidance, supra, at 9-15.

[8] DMEPA also conducts name simulation studies, which attempt to simulate the prescription ordering process with healthcare providers employed by the FDA to test the response of healthcare practitioners to proposed names and identify potential errors, and reviews medication error data of existing drugs with for the proposed drug's active ingredient(s) for potential errors. See PDUFA, supra, at 16-20.

[9] Guidance, supra, at 6.

[10] See FDA, PDUFA Pilot Project Proprietary Name Review Concept Paper ("PDUFA") at 12 (Sept. 2008), available at: http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm072229.

[11] In re E. I. Du Pont de Nemours & Co., 476 F.2d 1357, 1361 (CCPA 1973).

[12] PDUFA, supra, at 13-15.

[13] More information about Thomson's Pharmaceutical Search XC can be obtained at: http://compumark.thomson.com/do/pharmaceutical.

[14] More information about CT Corsearch's Pharmaceutical Search can be obtained at: https://www.ctcorsearch.com/CtcorsearchApps/ctcorsearch/MasterFrame.aspx.