DEPARTMENT OF HEALTH
...in pursuit of good health

(717) 783-2500

August 24, 2001

Bernard Schwetz
Dockets Management Branch
Food and Drug Administration
Department of Health and Human Services
Room 1061
Fishers Lane
Rockville, MD 20852

Request for Advisory Opinion

Dear Commissioner Schwetz:

The undersigned, on behalf of the Pennsylvania Department of Health (PaDOH), submits this request for an advisory opinion of the Commissioner of Food and Drugs with respect to whether Food and Drug Administration (FDA) regulations regulating medical devices do not preempt a Pennsylvania regulation that permits laboratories to accept human specimens for testing only upon request by a member of the healing arts or other person designated by statute, which does not include a health care consumer.

A. Issues involved:

Is a PaDOH regulation that prohibits laboratories in Pennsylvania from accepting human specimens for testing when the testing is requested by a health care consumer, rather than a health care practitioner or other person specified by statute, not preempted with respect to a device that has been approved by the FDA for over-the-counter sale through the Section 510(k) process?

B. Statement of facts and law:

The Osborn Group, Inc., received FDA approval to market the Appraise A1c Sample Collection Kit (Collection Kit) over-the-counter in interstate commerce. The approval was granted under the Section 510(k) process based upon the FDA concluding that the Collection Kit is substantially equivalent to a predicate device legally marketed in interstate commerce prior to May 26, 1976, the effective date of the Medical Device Amendments to the Federal Food, Drug and Cosmetic Act of 1938.

01A-0375 AP 1

The Collection Kit is a dried blood spot collection kit. It is designed to collect a blood spot via fingerstick, which is later tested to assess the glycosylated hemoglobin level in blood. The Collection Kit is be used to facilitate the assessment of blood glucose over a 10 to 12-week period.

In 1962 the PaDOH adopted a regulation, pursuant to Pennsylvania's Clinical Laboratory Act, that precludes laboratories from accepting human specimens for testing pursuant to requests for testing made by health care consumers. The PaDOH regulation reads:

> 28 Pa. Code §5.41. Acceptance and collection of specimens.
>
> (a) Specimens shall be accepted or collected from patients by a clinical laboratory only when tests are requested on the specimens by a member of the healing arts licensed to practice in this Commonwealth, or other person authorized by statute, or authorized agents of the forgoing. (Enclosure 1).

The Osborn Group, Inc., has asked the PaDOH to hold that the regulation does not apply to blood samples obtained through use of the Collection Kit. (Enclosure 2). It contends that the FDA approval to market the Collection Kit over-the-counter preempts the PaDOH regulation. It argues that application of the regulation to blood samples secured through use of the device would unlawfully circumvent the FDA approval of the Collection Kit by imposing burdens on the use of the device, in addition to the requirements imposed by the FDA regulations, that would prevent the Collection Kit from being used as an over-the-counter device in Pennsylvania. The claimed burden is that a health care consumer would be deterred from purchasing the Collection Kit because that person would require a health care provider's order or prescription to have the collected blood tested for glycosylated hemoglobin.

PaDOH regulation 28 Pa. Code §5.41(a) is promulgated under the authority of a Pennsylvania statute, section 11.1(5) of The Clinical Laboratory Act (CLA), act of September 26, 1951, P.L. 1539, *as amended*, added by section 2 of the act of August 4, 1961, P.L. 920, 35 P.S. §2161.1(5). (Enclosure 3). That provision authorizes PaDOH to promulgate regulations on "matters it may deem advisable for the protection of the public and for carrying out the provisions and purpose of the [CLA]."

PaDOH has concluded that its regulation does not prevent or regulate the over-the-counter sale of the Collection Kit (or any other device used to collect a specimen from a human body) to health care consumers in Pennsylvania, notwithstanding that health care consumers are not able to have the blood collected by the Collection Kit undergo testing by a Pennsylvania laboratory absent a request for testing by a health care practitioner.

Federal preemption of state law arises under the Supremacy Clause of the United States Constitution, Article VI, Clause 2. Whether a federal statute preempts state law is a question of legislative intent. Medtronic, Inc. v. Lohr, 518 U.S. 470, 484-486 (1996). Preemption may be either express, in which case there would be explicit language regarding legislative intent to preempt state law, or implied. Intent is implied where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for states to supplement it, or when state and federal law are in irreconcilable conflict. Rice v. Santa Fe Elevator Corp., 331 U.S. 246 (1994). "Irreconcilable conflict" occurs when compliance with both federal and state law is a physical impossibility (Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963)) or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

One of the Medical Device Amendments, 21 USC §360k(a) (relating to state and local requirements respecting devices), provides:

> (a) General rule
>
> Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—
>
> (1) which is different from, or in addition to, any requirement applicable under this chapter to a device, and
> (2) which relates to the safety or effectiveness of the device or any other matter included in a requirement applicable to the device under this chapter.

FDA regulation 21 CFR §808.1(d) interprets this statutory provision as follows:

> State or local requirements are preempted only when the Food and Drug Administration has established specific counterpart regulations or there are other specific requirements applicable to a particular device under the act, thereby making a different divergent State or local requirement applicable to the device different from, on in addition to, the specific Food and Drug Administration requirements.

Congress enacted the Medical Device Amendments to provide for the safety and effectiveness of medical devices for human use. 90 Stat. 539. The Medical Device Amendments do expressly exempt some state law. At issue here is whether the PaDOH regulation falls within the domain of state regulation expressly preempted. Because

states are independent sovereigns in the federal system and the states have traditionally regulated the public health and safety under their sovereign police power, a federal statute must be presumed not to preempt a state regulation that is the exercise of its police power to protect the public health or safety, unless that was the clear and manifest purpose of Congress. Lohr; Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 and 523 (1992).

Compliance with the PaDOH regulation does not render compliance with the federal regulatory scheme an impossibility. The PaDOH regulation also does not stand as an obstacle to the federal regulatory scheme to ensure the safety and effectiveness of medical devices.

The PaDOH regulation does not address the safety or effectiveness of medical devices; it does not address or regulate medical devices at all. The PaDOH regulation also does not prevent a health care consumer from purchasing the Collection Kit over-the-counter, or using it to collect a blood sample for testing. With respect to human blood, the PaDOH regulation requires that the blood, no matter how collected, is to be tested only upon order of a member of the healing arts or other statutorily designated person.

The purpose of the PaDOH regulation is clear. It is designed to ensure that the health care consumer is properly informed and counseled about the significance of laboratory test results of specimens collected from that consumer. It does this by ensuring that a health care provider orders the specimens to be tested and receives the test results so that the health care consumer will receive from the health care practitioner appropriate explanation and counseling when the test results are provided.

While the request of the Osborn Group, Inc., has prompted the PaDOH to request an advisory opinion, the request for advice is not with respect to the particular device that company has brought to the PaDOH's attention, but, rather, to whether the PaDOH regulation is preempted with respect to any medical device approved by the FDA for the collection of specimens from human bodies.

The PaDOH regulation is a state regulation of general applicability regulating the testing of human specimens, not the use of medical devices. It is the opinion of the PaDOH that pursuant to 21 CFR §808.1(d), because there is no specific counterpart FDA regulation to the PaDOH regulation, the PaDOH regulation is a regulation of general applicability pertaining to the testing of human specimens, and the PaDOH regulation does not relate to the safety or effectiveness of medical devices, it is not the type of regulation that is preempted under the Medical Device Amendments.

The undersigned certifies that, to the best of my knowledge and belief, this request includes all data, information, and views relevant to the matter, whether unfavorable to the position of the undersigned, which is the subject of the request.

Sincerely,

Kenneth E. Brody

Kenneth E. Brody
Senior Counsel

Individual submitting the request: Kenneth E. Brody, Esq.
Person making the request: Pennsylvania Department of Health
Mailing address: Room 825, Health and Welfare Building
Commonwealth Avenue and Forster Street
P.O. Box 90
Harrisburg, PA 17108
Telephone number: (717) 783-2500

Enclosures

§ 5.32. Library.

A current library of books and journals shall be available to the director and other personnel to enable them to keep informed of advances in laboratory medicine. Approved procedural manuals for the work performed shall be immediately available to technical personnel in the laboratory working area.

PROCEDURES

§ 5.41. Acceptance and collection of specimens.

(a) Specimens shall be accepted or collected from patients by a clinical laboratory only when tests are requested on the specimens by a member of the healing arts licensed to practice in this Commonwealth, or other persons authorized by statute, or authorized agents of the foregoing.

(b) No specimen shall be collected by an owner, an employe or other person associated with the clinical laboratory except under one of the following conditions:

(1) The person is a member of the healing arts licensed in this Commonwealth or a laboratory director qualified under the Clinical Laboratory Act of 1951 (P. L. 1539) (35 P. S. § 2151 et seq.).

(2) The person is collecting the specimen under the direction of a member of the healing arts licensed in this Commonwealth or a laboratory director qualified under the Clinical Laboratory Act.

(c) This section does not prohibit the transmission of specimens collected as set forth in subsection (b) under the following circumstances:

(1) To another laboratory licensed under the Clincial Laboratory Act.

(2) To a Federal laboratory.

(3) To a laboratory located in another state providing that laboratory has been issued a license or permit in conformity with the Clinical Laboratories Improvement Act of 1967 (35 P. S. § 2151) and related regulations.

(d) The acceptance of specimens submitted by a representative of the Department, or designated agent, for purposes of evaluation of testing procedures is not prohibited.

Notes of Decisions

A blood test performed by a trained phlebotomist under standard hospital procedures under directors of a physician and met the requirements of this section. *Commonwealth v. Dungan*, 539 A.2d 817 (Pa. Super. 1988).

§ 5.42. Transportation of specimens.

Procedures used for transporting specimens from collection points to the testing facilities of the clinical laboratory shall be such that the physical integrity and composition of the specimen remain intact, and changes do not occur in the specimen which will interfere with the validity of subsequent results. This

Enclosure 1

OSBORN GROUP, INC.
A CholeoPoint™ Company

Gilbert P. Bourk III
Senior Vice President & General Counsel
(913) 390-7146 (phone)
(913) 390-7129 (fax)
glb.bourk@osborngroup.com (email)

February 9, 2001

Pennsylvania Bureau of Laboratories
Attention: Joe Gasiewski
Division Director of Laboratory Improvement
P.O. Box 500
Exton, PA 19341-0500

Re: Appraise A1c Sample Collection Kit
(formerly known as Hemochek A1c Sample Collection Kit)

Dear Mr. Gasiewski:

On February 6, 2001 Sandy Price of Osborn Group had a discussion Mr. Ken Brody regarding Osborn's Appraise A1c Sample Collection Kit. During that conversation, Mr. Brody suggested we put our questions in writing and submit them to you. Mr. Brody thought our letter would eventually be passed on to him for review.

Accordingly, I am directing this letter to you. In the event I have misdirected this letter by sending it to the incorrect person, I would appreciate it if you would forward it to the correct person.

At issue is the Osborn Appraise A1c Sample Collection Kit. The Appraise A1c Sample Collection Kit is simply a dried blood spot collection kit that has been reviewed and cleared by the United States Food and Drug Administration ("FDA") for commercial distribution.

I have enclosed for your convenience and review the clearance letter from FDA, and a summary description of the Appraise A1c Sample Collection Kit. The attached summary is taken from our Pre-Market Notification submitted to the FDA, and describes the Collection Kit, its components and intended use.

Enclosure 2

The Appraise A1c Sample Collection Kit has been cleared in an Over-The-Counter ("OTC") format. In other words, FDA has cleared the use of the Kit without a doctor's involvement or prescription, otherwise known as prescription use. As you can see from the enclosed intended use statement, the Appraise A1c Kit is designed for an individual to self collect a specimen, via fingerstick, and send the collected specimen to a laboratory for analysis. Once the specimen has been analyzed, test results are returned to the individual submitting a specimen.

It is our understanding that you may perceive this FDA cleared system as a problem in your state due to requirements listed in Title 28 of the Pennsylvania Code, Section 5.41. Section 5.41 states that "specimens shall be accepted by a clinical laboratory only when tests are requested on the specimens by a member of the healing arts...."

Please keep in mind there are thousands of devices, kits and tests that have been cleared by FDA for OTC use. Our OTC clearance from FDA should not be treated any different than other OTC clearances. An interpretation that allows state law to supercede or create additional burdens beyond that required by federal law violates the concept of federal preemption. In other words, once the federal government cleared our device for an OTC use, it is inappropriate for Pennsylvania to require additional requirements (physician involvement or prescription use).

I would like to discuss this further with you, Mr. Brody, or any other appropriate person from you agency. I will contact you following your receipt of this letter. Thank you for your time and cooperation.

Sincerely,

Gilbert P. Bourk III

GPB:mo
0602091

Enclosures

cc w/ enc.: Sandy Price

DEPARTMENT OF HEALTH & HUMAN SERVICES

Food and Drug Administration
2098 Gaither Road
Rockville MD 20850

DEC 21 1999

Mr. Gilbert P. Bourk III
Vice President and General Counsel
Osborn Group, Inc.
14901 West 117th Street
Olathe, Kansas 66062

Re: K990899
Trade Name: HemoChek-A1c™ Sample Collection Kit
Regulatory Class: II
Product Code: LCP
Dated: October 29, 1999
Received: November 1, 1999

Dear Mr. Bourk:

We have reviewed your Section 510(k) notification of intent to market the device referenced above and we have determined the device is substantially equivalent (for the indications for use stated in the enclosure) to legally marketed predicate devices marketed in interstate commerce prior to May 28, 1976, the enactment date of the Medical Device Amendments, or to devices that have been reclassified in accordance with the provisions of the Federal Food, Drug, and Cosmetic Act (Act). You may, therefore, market the device, subject to the general controls provisions of the Act. The general controls provisions of the Act include requirements for annual registration, listing of devices, good manufacturing practice, labeling, and prohibitions against misbranding and adulteration.

If your device is classified (see above) into either class II (Special Controls) or class III (Premarket Approval), it may be subject to such additional controls. Existing major regulations affecting your device can be found in the Code of Federal Regulations, Title 21, Parts 800 to 895. A substantially equivalent determination assumes compliance with the Current Good Manufacturing Practice requirements, as set forth in the Quality System Regulation (QS) for Medical Devices: General regulation (21 CFR Part 820) and that, through periodic QS inspections, the Food and Drug Administration (FDA) will verify such assumptions. Failure to comply with the GMP regulation may result in regulatory action. In addition, FDA may publish further announcements concerning your device in the Federal Register. Please note: this response to your premarket notification submission does not affect any obligation you might have under sections 531 through 542 of the Act for devices under the Electronic Product Radiation Control provisions, or other Federal laws or regulations.

Under the Clinical Laboratory Improvement Amendments of 1988 (CLIA-88), this device may require a CLIA complexity categorization. To determine if it does, you should contact the Centers for Disease Control and Prevention (CDC) at (770) 488-7655.

This letter will allow you to begin marketing your device as described in your 510(k) premarket notification. The FDA finding of substantial equivalence of your device to a legally marketed predicate device results in a classification for your device and thus, permits your device to proceed to the market.

If you desire specific advice for your device on our labeling regulation (21 CFR Part 801 and additionally 809.10 for in vitro diagnostic devices), please contact the Office of Compliance at (301) 594-4588. Additionally, for questions on the promotion and advertising of your device, please contact the Office of Compliance at (301) 594-4639. Also, please note the regulation entitled, "Misbranding by reference to premarket notification"(21 CFR 807.97). Other general information on your responsibilities under the Act may be obtained from the Division of Small Manufacturers Assistance at its toll-free number (800) 638-2041 or (301) 443-6597, or at its internet address "http://www.fda.gov/cdrh/dsma/dsmamain.html".

Sincerely yours,

Steven Gutman

Steven I. Gutman, M.D, M.B.A.
Director
Division of Clinical
Laboratory Devices
Office of Device Evaluation
Center for Devices and
Radiological Health

Enclosure

OSBORN GROUP, INC.
A CholecPolar™ Company

510(k) SUMMARY

Osborn Group, Inc.

HemoChek-A1c Sample Collection Kit

March 17, 1999

Submitter Information:

Osborn Group, Inc.
19401 West 117th Street
Olathe, Kansas 66062

Submitter's Name: Gilbert P. Bourk III
Phone: (913) 390-7146

Device Name:

HemoChek-A1c Sample Collection Kit

Common Name: Hemoglobin A1c blood sample collection kit

Classification Name: Glycosylated Hemoglobin Assay

Predicate Device Equivalence:

Substantial equivalence is claimed to the EZCHEK™/HbA1c Sample Collection Kit, and to the HemoChek Sample Collection Kit, cleared for commercial distribution per K971919 and K984529, respectively.

Device Description:

The HemoChek-A1c Sample Collection Kit is a kit which is purchased by a patient a pharmacy or other retail store. The kit consists of the following:

- A Sample Card containing the proprietary filter paper that the blood sample is placed on and a place for the patient to print his/her name, address, social security number and the date the sample was collected
- A pamphlet containing detailed instructions about how to obtain a blood sample and mail it to Osborn Group, Inc.
- A specimen envelope with the words "After blood has dried, insert completed HemoChek test in this envelope. Seal flap and place in envelope" printed on it
- A self-adhesive envelope in which the card is inserted and then mailed to Osborn Group, Inc.

- A sterile lancet
- An alcohol swab
- A gauze pad
- An adhesive bandage
- An outer package containing all of the items listed above

After purchasing the HemoChek-A1c Sample Collection Kit, the patient then prints the required information on the Sample Card and collects a blood sample, using a lancet (either the one provided in the kit, one provided by the patient's physician or one supplied by the patient). The blood sample is placed on both circles on the right hand side of the Sample Card, as described in the instructions. The Sample Card is then placed in the specimen envelope which in turn is placed in the mailing envelope provided in the kit and mailed to Osborn Group, Inc. When the blood sample is received by Osborn Group, Inc., the patient's HbA1c level is measured using existing assay methods. The results are then mailed to the patient.

Intended Use:

The HemoChek-A1c Sample Collection Kit is indicated for over-the-counter sale for use in the measurement of HbA1c on blood specimens which can be collected at the patient's home or at a physician's office on filter paper and delivered to the laboratory by mail. The HbA1c test is used in the assessment of the average blood glucose over a 10-12 week period. The results are to be evaluated by the patient and their physician. The product is not indicated for the diagnosis of diabetes mellitus.

Comparison of Technological Characteristics:

Essentially, the devices use the same basic technology, i.e., collecting a blood sample and analyzing it using an existing assay methodology. However, the physical size of the device is different than the EZCHEK predicate device. Also, the existing assay methodologies used are different for the device and the EZCHEK predicate device, but are the same as for the HemoChek predicate device.

Summary of Performance Testing:

Information contained in this submission demonstrates that the HemoChek-A1c performs in the same manner as the HemoChek predicate device.

Conclusions:

Based on the above, we concluded that the HemoChek-A1c Sample Collection Kit is substantially equivalent to legally marketed predicate devices and is safe and effective for its intended use.

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department

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ss of the person charged with the opera-

alified person under whose supervision

signed or counter-signed by the Secretary

rounds for denial of permits

not, within six months after the filing of
permit, it shall state the grounds and
writing, furnishing a copy to the appli-

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laboratory using such means and standards as the department shall specify by rule or regulation.

1951, Sept. 26, P.L. 1539, § 11. Amended 1961, Aug. 4, P.L. 920, § 1.

Historical and Statutory Notes

The 1961 amendment added the second sentence.

§ 2161.1. Rules and regulations

The Department of Health shall have the power, and its duty shall be, to adopt rules and regulations for the proper enforcement of this act with regard to the following:

(1) Contents of application;

(2) Adequacy of laboratory quarters and equipment;

(3) Means and standards of accuracy of laboratory procedures;

(4) Definition of unethical practice and unethical advertising;

(5) Any other matters it may deem advisable for the protection of the public and for carrying out the provisions and purpose of this act.

1951, Sept. 26, P.L. 1539, § 11.1, added 1961, Aug. 4, P.L. 920, § 2.

Historical and Statutory Notes

Section 6 of 1972, Dec. 6, P.L. 1388, No. 297, provides:

"An annual registration fee shall be established by rule of the Department of Health, and shall be payable to the department. Funds obtained from registration fees shall be applied and used for the administration of the act."

Section 7 of 1972, Dec. 6, P.L. 1388, No. 297, made an appropriation.

Notes of Decisions

In general 1

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1. In general

In light of obvious purpose of 1972 amendments to the Clinical Laboratory Act, which deleted specific exemption for office laboratories of private physicians operated solely for treatment and diagnosis of their own patients, thereby manifesting legislative intent to subject office laboratories of private physicians to regulation under the Act, to enlarge scope of Act to encompass all clinical laboratories that perform tests that effect diagnosis and treatment of patients in the Commonwealth, department of health's regulation which subjected office laboratories of private physicians to regulation under the Act only sought to effectuate legislative intent and was within department's rule-making power. Masland v. Bachman, 374 A.2d 517, 473 Pa. 280, 1977.

Department of Health may not either by regulation or by agreement limit in any manner the persons in the healing arts profession which clinics may serve, and existing agreement contained in application for a permit to operate such laboratories, which restricts reporting to physicians or their authorized agents, is invalid. 1959 Op.Atty.Gen. No. 178.

Enclosure 3