



CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Andrew K. Choi, MD  
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Los Angeles, CA 90019

04-22-2011

**PROPOSAL TO DEBAR**  
**NOTICE OF OPPORTUNITY FOR HEARING**  
**DOCKET No. FDA-2011-N-0126**

Dear Dr. Choi:

This letter is to inform you that the Food and Drug Administration (FDA or the Agency) is proposing to issue an order debarring you for a period of four years from providing services in any capacity to a person that has a drug product application approved or pending with the Agency. FDA bases this proposal on a finding that you were convicted of a misdemeanor under Federal law for conduct relating to the regulation of a drug product under the Federal Food, Drug, and Cosmetic Act (the Act), and that the type of conduct that served as the basis for the conviction undermines the process for the regulation of drugs. This letter also offers you an opportunity to request a hearing on this proposal.

Conduct Related to Conviction

On April 2, 2007, you entered a plea of guilty to a one-count information charging you with a misdemeanor offense of Receipt in Interstate Commerce of Misbranded Drug and Delivery thereof. On August 11, 2008, judgment was entered against you in the United States District Court for the Central District of California for Receipt in Interstate Commerce of Misbranded Drug and Delivery Thereof in violation of 21 U.S.C. §§ 331(c), 333(a)(1), and 352(f). The underlying facts supporting this conviction are as follows.

You were a licensed physician in the State of California. Prior to 2009, BOTOX®/BOTOX® Cosmetic, a product manufactured by Allergan, Inc., was the only Botulinum Toxin Type A product licensed by FDA for use in humans for any indication, including for the temporary improvement in appearance of moderate to severe glabellar lines associated with corrugator and/or procerus muscle activity, commonly described as the treatment of facial wrinkles.<sup>1</sup>

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<sup>1</sup> On July 31, 2009, FDA approved a supplemental application to the license for BOTOX®/BOTOX® Cosmetic, which in relevant part changed the proper name of the biological product from Botulinum Toxin Type A to onabotulinumtoxin A. See Letter fr. FDA to Allergan Inc. (July 31, 2009), available at [http://www.accessdata.fda.gov/drugsatfda\\_docs/appletter/2009/103000s5209s5210ltr.pdf](http://www.accessdata.fda.gov/drugsatfda_docs/appletter/2009/103000s5209s5210ltr.pdf). This non-proprietary name change is not material to these purposes, and for the sake of consistency with the related criminal proceedings, the product will continue to be referred to in this letter as Botulinum Toxin Type A.

Prior to November 13, 2003, you injected patients with Botox, a Botulinum Toxin Type A drug manufactured by Allergan, Inc. that was approved by the FDA for treatment of glabellar lines.<sup>2</sup> In 2003, you began ordering an unapproved drug purported to be Botulinum Toxin Type A manufactured by Toxin Research International, Inc. (TRI), located in Tucson, Arizona, instead of the approved Botox (TRI-toxin).

From on or about November 13, 2003 and continuing until on or about August 3, 2004, you placed 14 orders for a total 28 vials of TRI-Toxin which you had shipped to your office. The TRI-Toxin did not come with labeling or directions on how to dilute the product for injection. The TRI-Toxin label stated “for research purposes only” and “not for human use” as did the TRI-Toxin invoices. You admitted to injecting the TRI-Toxin into your employees and patients. Between on or about November 13, 2003 and continuing until on or about August 3, 2004, you received and delivered the TRI-Toxin when you administered it to other persons, all in violation of 21 U.S.C. §§ 331(c), 333(a)(1), and 352(f).

### FDA’s Finding

Section 306(b)(2)(B)(i)(I) of the Act (21 U.S.C. § 335a(b)(2)(B)(i)(I)) permits FDA to debar an individual if FDA finds that the individual has been convicted of a misdemeanor under Federal law for conduct relating to the regulation of drug products under the Act, and if FDA finds that the type of conduct that served as the basis for the conviction undermines the process for the regulation of drugs. You pleaded guilty to receipt in interstate commerce of misbranded drug and delivery thereof in violation of 301(c), 303(a)(1) and 502(f) of the Act (21 U.S.C. §§ 331(c), 333(a)(1), and 352(f)). You admitted to receiving and offering for sale to patients TRI-toxin, an unapproved drug that was misbranded for failure to include adequate directions for use, and to delivering this unapproved misbranded drug by injecting it into patients. FDA finds that this type of conduct, which served as the basis for your Federal misdemeanor conviction, relates to the regulation of drug products under the Act and undermines the process for the regulation of drugs because the receipt and delivery of misbranded drugs is prohibited by the Act.

The maximum period of debarment under section 306(b)(2)(B)(i)(I) of the Act is five years. 21 U.S.C. § 335a(c)(2)(A)(iii). Section 306(c)(3) of the Act (21 U.S.C. § 335a(c)(3)) provides six factors for consideration in determining the appropriateness and the period of a permissive debarment. The factors applicable here include: (1) the nature and seriousness of the offense involved; (2) nature and extent of management participation; (3) the nature and extent of voluntary steps taken to mitigate the impact on the public; and (4) prior convictions involving matters within the jurisdiction of FDA.

#### **1. Nature and seriousness of the offense.**

FDA regulates the manufacture and distribution of drugs in the United States. FDA also regulates the manufacture and distribution of biologic products, which includes toxins like Botulinum Toxin Type A. As noted above, only one Botulinum Toxin Type A product was licensed by FDA prior to 2009. FDA licensed BOTOX® in 1991, and approved a supplement for the indication of treatment of glabuller lines in 2002. Products for the latter indication are marketed and labeled as BOTOX® Cosmetic. TRI-Toxin has never been licensed or approved by FDA for any use. In your plea

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<sup>2</sup> Although it is likely that you used product labeled BOTOX® Cosmetic rather than product labeled BOTOX®, it is not clear from the criminal proceedings which product you actually used. This difference is not relevant for these purposes because the products are identical with the exception of different labeling. For the sake of consistency with the related criminal proceedings, the product used will continue to be referred to in this letter as “BOTOX.”

agreement, you admitted to receipt and delivery of this unapproved misbranded drug.<sup>3</sup>

FDA finds that your conduct created a risk of injury to consumers due to the use of an unapproved drug. Furthermore, your conduct undermined the Agency's oversight of approved drug products, and seriously undermined the integrity of the Agency's regulation of a drug product. Accordingly, FDA considers the nature and seriousness of your conduct as an unfavorable factor.

**2. Nature and extent of management participation.**

In determining the appropriate period of debarment, FDA also considers the nature and extent of your management participation in the offense, and whether corporate policies and practices encouraged the offense, including whether inadequate institutional controls contributed to the offense. You admitted to ordering the TRI-toxin for use in your practice, and admitted to injecting patients with the drug, knowing that it was not approved for use on humans. You were the owner and operator of your medical practice and, as a licensed physician and owner, you held a position of authority in which you served as an example for your medical staff. Therefore, the pattern of conduct you engaged in is considered more serious than if you were an employee. Accordingly, the Agency will consider this as an unfavorable factor.

**3. The nature and extent of voluntary steps taken to mitigate the impact on the public.**

FDA next will consider the nature and extent of voluntary steps to mitigate the impact on the public of any offense involved, including, among other things, full cooperation with any investigations and any other actions taken to substantially limit potential or actual adverse effects on the public health. There is evidence that you accepted responsibility for your actions in a prompt fashion, and that you reimbursed your patients the monies they paid you for TRI-toxin injections. *Choi Sent. Mem.* at 4-5, *U.S. v. Choi*, Crim. Case No. CR 07-0136 (C.D. Cal. Aug. 1, 2008). The government did not contest these factual representations.

FDA considers this a favorable factor.

**4. Prior convictions under this Act or under other Acts involving matters within the jurisdiction of the Food and Drug Administration.**

FDA is unaware of any prior convictions. FDA considers this a favorable factor.

Weighing all factors, the Agency has determined that the facts supporting the unfavorable factors outweigh those in support of the favorable factors, and therefore warrant the imposition of a four year permissive debarment in this case. You were a licensed physician entrusted with patient care. By pleading guilty you admitted that you committed a crime when you ordered non-FDA approved drug product purported to be Botulinum Toxin Type A, and administered it to some of your patients beginning in November 2003 and ending in August 2004. As discussed above, the conduct that formed the basis of your conviction created a risk of injury to your patients from the use of an

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<sup>3</sup> FDA licensed BOTOX®/BOTOX® Cosmetic pursuant to the Agency's authority set forth in Section 351(a) of the Public Health Service Act (PHSA), 42 U.S.C. § 262(a). The misbranding provisions of the Act apply to products licensed under the PHSA. See 42 U.S.C. § 262(j) (“[t]he Federal Food, Drug, and Cosmetic Act (21 U.S.C. §§ 301 et seq.) applies to a biological product subject to regulation under this section”).



unapproved drug and demonstrated a disregard for the drug approval process, and the Agency's regulation of drug products.

### Proposed Action and Notice of Opportunity for Hearing

Based on the findings discussed above, FDA proposes to issue an order under section 306(b)(2)(B) of the Act (21 U.S.C. § 335a(b)(2)(B)) debaring you for a period of four years from providing services in any capacity to a person having an approved or pending drug product application. You were convicted of the receipt and delivery of an unapproved misbranded drug, a Federal misdemeanor offense under the Act. As explained above, this offense relates to the regulation of drug products under the Act. Furthermore, the conduct that served as the basis for this conviction undermines the process for the regulation of drugs. Based on the factors discussed above, FDA proposes a four-year debarment period.

In accordance with section 306 of the Act and 21 CFR part 12, you are hereby given an opportunity to request a hearing to show why you should not be debarred as proposed in this letter.

If you decide to seek a hearing, you must file the following: (1) on or before 30 days from the date of receipt of this letter, a written notice of appearance and request for hearing; and (2) on or before 60 days from the date of receipt of this letter, the information on which you rely to justify a hearing. The procedures and requirements governing this notice of opportunity for hearing, a notice of appearance and request for a hearing, information and analyses to justify a hearing, and a grant or denial of a hearing are contained in 21 CFR part 12 and section 306(i) of the Act (21 U.S.C. § 335a(i)).

Your failure to file a timely written notice of appearance and request for hearing constitutes an election by you not to use the opportunity for a hearing concerning your debarment and a waiver of any contentions concerning this action. If you do not request a hearing in the manner prescribed by the regulations, FDA will not hold a hearing and will issue a final debarment order as proposed in this letter.

A request for a hearing may not rest upon mere allegations or denials but must present specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. A hearing will be denied if the data and information you submit, even if accurate, are insufficient to justify the factual determination urged. If it conclusively appears from the face of the information and factual analyses in your request for a hearing that there is no genuine and substantial issue of fact that precludes the order of debarment, the Commissioner of Food and Drugs will deny your request for a hearing and enter a final order of debarment.

You should understand that the facts underlying your conviction are not at issue in this proceeding. The only material issue is whether you were convicted as alleged in this notice and, if so, whether, as a matter of law, this conviction permits your debarment under section 306(b)(2)(B) of the Act (21 U.S.C. § 335a(b)(2)(B)) as proposed in this letter.

Your request for a hearing, including any information or factual analyses relied on to justify a hearing, must be identified with Docket No. FDA-2011-N-0126 and sent to the Division of Dockets Management, Food and Drug Administration, 5630 Fishers Lane, Room 1061, Rockville, MD 20852. You must file four copies of all submissions pursuant to this notice of opportunity for hearing. The public availability of information in these submissions is governed by 21 CFR

§ 10.20(j). Publicly available submissions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under section 306 of the Act (21 U.S.C. § 335a) and under authority delegated to the Director, Office of Enforcement within the Food and Drug Administration.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard R. Sklamberg". The signature is written in a cursive style with a large, looped initial "H".

Howard R. Sklamberg  
Director  
Office of Enforcement  
Office of Regulatory Affairs

cc:

HFC-130/ Michael Rogers  
HFC-300/ Jeffrey Ebersole  
GCF-1/ Seth Ray  
HFD-1/Dr. John Jenkins  
HFD-300/ Deborah Autor  
HFD-300/Douglas Stearn  
HFD-300/Harry Schwirck  
HFD-003/Keith Webber  
HFC-2/ Michael Verdi  
HF-22/Matthew Warren

HFD-45/Ball, Leslie  
HFD-45/Constance Lewin  
HFD-45/Sherbet Samuels  
HFV-200/Daniel G. McChesney

HFA-305 (Docket No. FDA-2011-N-0126)  
HFC-230/Debarment File  
HFM-100 (CBER)  
HFC-200/CF