

PUBLIC CITIZEN LITIGATION GROUP

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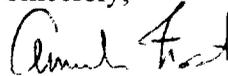
Re: Comments on Draft Guidance, Docket Number 99D-4959

To Whom it May Concern:

Enclosed are Public Citizen Health Research Group's Comments Concerning CDER's Guidance on Disclosing Information Provided to Advisory Committee Meetings Related to the Testing or Approval of a New Drug and Convened by the Center for Drug Evaluation and Research, Beginning on January 1, 2000.

Please contact me at the above number with any questions or concerns regarding the comments.

Sincerely,



Amanda Frost

Attorney for Public Citizen Health Research Group

Enc.

99D-4959

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**PUBLIC CITIZEN HEALTH RESEARCH GROUP'S COMMENTS
CONCERNING CDER'S GUIDANCE ON DISCLOSING INFORMATION PROVIDED
TO ADVISORY COMMITTEE MEETINGS RELATED TO THE TESTING OR
APPROVAL OF A NEW DRUG AND CONVENED BY THE CENTER FOR DRUG
EVALUATION AND RESEARCH, BEGINNING ON JANUARY 1, 2000**

DOCKET NUMBER 99D-4959

Public Citizen Health Research Group ("HRG") is submitting these comments concerning CDER's draft guidance on disclosure of information provided to advisory committees in connection with open advisory committee meetings related to the testing or approval of new drugs. HRG is an unincorporated division of Public Citizen Foundation, a non-profit consumer advocacy group with over 150,000 members nationwide. HRG has been involved in numerous Freedom of Information Act ("FOIA") cases against FDA and drug sponsors, including the case that resulted in CDER's November 30, 1999 draft guidance regarding disclosure of non-exempt advisory committee materials before or at advisory committee meetings.

HRG approves of the approach taken in CDER's draft guidance, which assumes that most of the information in drug sponsors' advisory committee materials do not qualify for an exemption under the FOIA, and therefore must be disclosed. We have only a few objections to the categorization of information as exempt from disclosure, which we describe below.

However, we believe that FDA should clarify that the guidance applies to disclosure of the information generated by FDA, as well as information generated by drug sponsors. Although the guidance only discusses disclosure of a sponsor's advisory committee materials and does not address disclosure of the materials provided to advisory committees by FDA, we assume that the categories of information deemed "ordinarily disclosable" apply to FDA's materials as well. Indeed, we are aware of no grounds for withholding information in FDA's advisory committee materials when the same type of material is ordinarily disclosable when found in a sponsor's

materials.¹ Accordingly, we believe that FDA should make clear that the "ordinarily disclosable" and "ordinarily nondisclosable" categories of information apply to its own materials, as well as to the sponsor's materials.

I. Advisory Committee Material That Should Generally Be Disclosed To The Public.

1) Raw Data:

Under the draft guidance, summaries of safety and effectiveness data are ordinarily disclosable, while full reports of that data are not. CDER justifies this distinction on the ground that "[a]lthough full reports of safety and effectiveness data might be used by a competitor to support approval of a competing product, a summary could not be so used and, therefore, generally does not constitute confidential commercial information." Draft Guidance at 5.

HRG agrees that summaries of safety and effectiveness data do not constitute confidential commercial information and should be disclosed, but we disagree that "full reports" of such data should be withheld from the public. We assume that CDER's concern about disclosing "full reports" of safety and effectiveness data is really a concern about disclosing "raw data," as later in the guidance CDER lists "full reports of raw clinical or preclinical data" as one of the three

¹ The only possible exception would be material that qualified as "inter-agency or intra-agency" records under Exemption 5, such as draft recommendations and other predecisional documents. However, Exemption 5 does not apply to records distributed outside of the government. Chilivis v. SEC, 673 F.2d 1205, 1212 (11th Cir. 1982); Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242, 253 (D.C. Cir. 1977). Because FDA's package of advisory committee materials are usually discussed and shared with the sponsor prior to distribution to the advisory committee, FDA's materials cannot qualify for Exemption 5. Moreover, even if some portion of the materials qualified for Exemption 5, the "privilege applies only to the 'opinion' or 'recommendatory' portion of [a document], not to factual information which is contained in the document." Coastal States Gas Corp. v. Department of Energy, 167 F.2d 854, 866 (D.C. Cir. 1980).

categories of information that is ordinarily exempt from disclosure under FOIA. Draft Guidance at 6 (emphasis added).

HRG disagrees with CDER's assertion that raw data ordinarily can be used by a competitor "to support approval of a competing product." A provision in the Food, Drug, and Cosmetic Act actually prohibits competitors from submitting another sponsor's data without the original submitter's consent. See 21 U.S.C. § 355(b)(2). This legal prohibition aside, the data is unique to the drug being tested and therefore could not be used to support a competitor's new drug application. The slightest difference in pharmaceutical formulation or dosage between the two drugs would change the results of tests and prevent a competitor from relying on the original submitter's raw data. Because not even very similar products have the same formulation or manufacturing process, competing manufacturers would be unable to use the raw data generated in the submitter's clinical trials to demonstrate the safety or effectiveness of its own products. In Public Citizen Health Research Group v. FDA, No. 99-0177, slip op. at 6-7 (D.D.C. Jan. 19, 2000), the district court recognized the logic of this argument and ordered that FDA disclose raw data regarding celecoxib, a recently-approved drug. In light of this recent decision, CDER should reconsider its position that raw data is likely to be capable of supporting a competitor's new drug application.

Of course, in the individual case a drug sponsor may be able to show that, because of its unique circumstances, disclosure of raw data could cause it substantial competitive harm. Ordinarily, however, raw data in advisory committee materials should not be withheld from the public because its disclosure is unlikely to cause substantial competitive harm.

2) Individual Adverse Reaction Reports

Individual adverse reaction reports should always be disclosed to the public. CDER's guidance provides that ordinarily "summaries of suspected adverse drug reaction data" should be disclosed, Draft Guidance at 5 (emphasis added), implying that individual reports of adverse reactions are not disclosable. However, nothing in these individual reports would give competitors information which could be applied to the development of competing drugs. Individual adverse reaction reports describe adverse events suffered by trial participants. They do not provide insights into a drug's mechanism of action or its effectiveness, but instead catalogue ailments experienced by trial participants that might be drug-related. At worst, the adverse reaction reports could be used by a submitter's competitor to generate negative publicity for the submitter's drug. That type of potential harm does not qualify for protection under FOIA. See Public Citizen v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983); Public Citizen Health Research Group v. FDA, 964 F. Supp. 413, 415 (D.D.C. 1997). Accordingly, courts have held that individual adverse reaction reports must be released. See, e.g., Citizens Commission on Human Rights v. FDA, 45 F.3d 1325, 1329 (9th Cir. 1995).

Furthermore, FDA regulations require that individual adverse reaction reports be released once a drug is approved. See 21 C.F.R. § 314.430(e)(4). Their routine release post-approval demonstrates that disclosure at the advisory committee stage -- when the drug is far along the development process -- will also not cause the drug sponsor substantial competitive harm. Accordingly, individual adverse reaction reports, as well as summaries of that data, should be disclosed.

3) Investigators' Names

CDER's draft guidance states that the names of principal investigators should be

disclosed. Draft Guidance at 5. The guidance does not define the term "principal," and it is unclear how CDER distinguishes between principal investigators and other investigators. Assuming that "principal investigators" is defined broadly, HRG is satisfied with FDA's disclosure policy.

The names of clinical investigators and contract research organizations ("CRO") should not be exempt from disclosure because they are ordinarily publicly available. FDA posts on its web site a database of the names and addresses of all clinical investigators and CROs that have worked on clinical trials. See <<http://www.fda.gov/cder/foi/special/bmis/index.htm>> (visited Feb. 7, 2000). In addition, clinical investigators frequently publish the work they perform for drug sponsors, in which they name the drug and the drug company for which they performed the work. See, e.g., Paul Emery et al., Celecoxib Versus Diclofenac In Long-Term Management of Rheumatoid Arthritis: Randomised Double-Blind Comparison, 354 *The Lancet* No. 9196 (Dec. 18, 1999) (naming the 10 authors and 113 additional investigators involved in the study); Toshihiko Kawamori et al., Chemopreventive Activity of Celecoxib, a Specific Cyclooxygenase-2 Inhibitor, against Colon Carcinogenesis, 58 *Cancer Research* 409 (Feb. 1, 1998); Peter E. Lipsky, M.D., The Clinical Potential of Cyclooxygenase-2-Specific Inhibitors, 106 *The American Journal of Medicine* 51S (May 21, 1999). CROs actively advertise their research activities in order to recruit subjects into clinical trials. See, e.g., <<http://www.drkoop.com/hcr/trials/participate/asp>> (visited Feb. 7, 2000) (Dr. Koop assists Quintiles, a CRO, by recruiting subjects for clinical trials on his web site). Companies and the government provide registries of clinical trials on the internet. See, e.g., <<http://cancertrials.nci.nih.gov/>> (visited Feb. 7, 2000). Sponsors of new drugs often fund

symposiums before a drug is approved in which its clinical investigators discuss their research work for the company. See, e.g., Arthritis in the Next Millenium, 26 *The Journal of Rheumatology* 1-56 (April 1999) (containing seven articles concerning arthritis and the drug celecoxib presented at a symposium funded by G.D. Searle & Co., the company that manufacturers celecoxib). Because the names of investigators and CROs are not confidential, they do not qualify as "confidential commercial information" that should be withheld under Exemption 4.² Moreover, the regular publication of investigators' and CROs' names and locations is a strong indication that release of this information is not likely to cause substantial competitive harm to drug sponsors.

II. Timing of Disclosure

HRG does not object to the draft guidance's procedures for determining which portions of a sponsor's advisory committee materials are exempt from disclosure and which are not.

However, in the past, very little, if any, information in a drug sponsor's advisory committee submission has qualified as confidential commercial information. See

<<http://www.fda.gov/ohrms/dockets/ac/cder00.htm>> (visited Feb. 7, 2000). Moreover, post-

² In Public Citizen Health Research Group v. FDA, CA No. 99-0177, slip op. at 8-10 (Jan. 19, 2000), the district court concluded that G.D. Searle & Co.'s investigators' names constituted confidential commercial information and were thus exempt from disclosure. HRG disagrees with the district court's conclusion in that case. CDER, however, need not disagree with the district court to find that "principal" investigators' names are ordinarily not exempt because the district court based its conclusion on the specific evidence presented by G.D. Searle in the case, and did not decide whether disclosure of the names would ordinarily be likely to cause substantial competitive harm to a drug sponsor.

In addition, principal investigators are those most likely to publish articles about the drugs they tested, and thus most likely to publicly disclose their affiliation with the drug sponsor. Of course, once their names and the affiliation with a drug sponsor is made public, their names do not qualify for withholding under Exemption 4.

approval, FDA typically releases a sponsor's advisory committee submission in its entirety. Therefore, we think it unlikely that many drug sponsors will need the entire time allotted to determine which portions of their materials should be exempt from disclosure. FDA should post the advisory committee's materials as soon as possible after the sponsor and agency complete their review. Also, FDA should encourage sponsors to minimize their redactions.

HRG does object to the posting of materials only 24 hours in advance of advisory committee meetings. The purpose of section 10(b) of the Federal Advisory Committee Act is to give the public the ability to "follow the substance of the discussion" at advisory committee meetings, which in turn enables the public to participate meaningfully in that discussion. See Food Chemical News v. HHS, 980 F.2d 1468, 1472 (D.C. Cir. 1993). Providing advisory committee materials a week, or at least a few days, in advance of the meeting better serves this purpose. Indeed, because the briefing packages are often complex and voluminous, meaningful public participation will often be impossible without sufficient time to examine the materials prior to the meeting. Because HRG does not think most sponsors will need the full time allowed to determine what to redact from their materials, HRG hopes that CDER will alter its guidance to require that sponsors' and FDA's advisory committee materials will be posted as far in advance of a meeting as possible, and a minimum of three days in advance.

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