

WASHINGTON LEGAL FOUNDATION

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October 11, 2005

Dockets Management Branch  
Food and Drug Administration  
Room 1061  
5630 Fishers Lane  
Rockville, MD 20852

**Docket No. 2005P-0204; Citizen Petition Requesting Denial of  
PMAs to Market Silicone Gel-Filled Breast Implants**

**Response of Washington Legal Foundation**

Dear Sir or Madam:

The Washington Legal Foundation (WLF) files this response to the above-referenced Citizen Petition, filed on May 23, 2005, by 21 groups and individuals (referred to collectively herein as "Public Citizen"), as well as to two supplements to the Petition filed on September 21, 2005.<sup>1</sup> The Petition requests that the Food and Drug Administration (FDA) deny pending applications, filed by Mentor Corporation and Inamed Corporation, for premarket approval to market silicone gel-filled breast implants.

WLF requests that the petition be denied. In light of the ongoing PMA proceedings, WLF does not believe that a Citizen Petition is an appropriate vehicle for determining whether

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<sup>1</sup> The Petitioners are Public Citizen; The National Women's Health Network; Breast Cancer Action; Command Trust; Eugene Goldberg, PHD; Suzanne Parisian, MD; Sidney M. Wolfe, MD; The National Organization of Women; The National Research Center for Women and Families; Consumer Action; In the Know; the League of United Latin American Citizens; the Massachusetts Consumers' Coalition; Men Against Breast Cancer; The North Carolina Consumer Council Inc.; Our Bodies, Ourselves; The Breast Cancer Fund; The Women's Bioethics Project; Toxic Discovery; and the Women's Community Cancer Project.

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PMAs are appropriate for silicone breast implants. More importantly, Public Citizen has not set forth any valid reasons for denying the applications for PMA. Because it is not privy to all of the submissions made by Mentor and Inamed in connection with the PMAs, Public Citizen simply is not in a position to critique whether those companies have provided reasonable assurances of safety and effectiveness.<sup>2</sup> Moreover, the Petition has badly misstated applicable legal principles set forth in the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 301 *et seq.*, and the Administrative Procedure Act (APA).

**I. Interests of WLF**

WLF is a public interest law and policy center with members and supporters in all 50 states. It devotes a substantial portion of its resources to defending the rights of individuals and businesses to go about their affairs without undue interference from government regulators. Among WLF's members are doctors and medical patients who seek access to innovative drugs and medical devices shown to be reasonably safe and effective for their intended uses. WLF regularly litigates in support of the public's right of access to such products. *See, e.g., Abigail Alliance for Better Access to Developmental Drugs and Washington Legal Found. v. McClellan*, No. 04-5350 (D.C. Cir., dec. pending) (seeking to strike down FDA regulations that prohibit terminally ill patients with no approved treatment

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<sup>2</sup> Public Citizen's lack of access to that information is not surprising – many aspects of the PMA process are explicitly designed to ensure confidentiality. That confidentiality allows manufacturers to share proprietary information with FDA without risking competitive disadvantage.

options from obtaining new drugs while the drugs are undergoing clinical trials). A lawsuit brought by WLF in 1993 on behalf of patients in need of heart valve implant surgery, as well as several leading heart surgeons, forced FDA to abandon a policy that imposed draconian restrictions on use of human-tissue heart valves. WLF successfully challenged, on First Amendment grounds, FDA restrictions on dissemination of truthful information about off-label uses of FDA-approved drugs and medical devices. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed*, 202 F.3d 331 (D.C. Cir. 2000).

For more than a decade, WLF has been involved in the public debate over the marketing of silicone breast implants. Its involvement dates to January 1992, when FDA Commissioner David Kessler announced a “voluntary” moratorium on the marketing of silicone breast implants. In a January 15, 1992 legal memorandum addressed to HHS Secretary Louis Sullivan, WLF concluded that Kessler had acted illegally and that FDA’s consideration of then-pending PMAs had been tainted by improper political pressures. WLF is concerned that FDA’s consideration of the current PMAs not be similarly tainted.

On March 28, 2005, WLF filed comments regarding the pending PMAs with the General and Plastic Surgery Devices Panel of the Medical Devices Advisory Committee. The comments argued that, when considering the PMAs submitted by Inamed and Mentor, the panel should not draw any negative inferences regarding safety and effectiveness based on the absence of clinical follow-up data beyond three years. WLF argued that, particularly in light of FDA’s past practices, the APA and other federal law does not permit FDA to predicate

approval of the PMAs on submission of more than three years of clinical data. A copy of WLF's comments are attached hereto. On April 11, 2005, WLF Chief Counsel Richard Samp made many of those same points in testimony before the Advisory Panel. As explained in those comments and testimony, WLF urges FDA to consider the two PMAs based on the same safety and effectiveness standards it has applied to other medical devices.

## **II. The Citizen Petition**

The May 23, 2005 Citizen Petition makes a number of factual allegations regarding the PMAs submitted by Mentor and Inamed. But Public Citizen and the other organizations and individuals submitting the Citizen Petition candidly admit that they have had no access to many of the relevant documents, including the January 2004 "nonapprovable" letter sent by FDA to Inamed, the March 2004 deficiency letter sent by FDA to Mentor, the confidential data submitted by Inamed and Mentor to the FDA Advisory Panel, the July 28, 2005 "approvable" letter sent by FDA to Mentor, the modified PMA submitted by Inamed to FDA in July 2005, and the September 21, 2005 "approvable" letter sent by FDA to Inamed. Given that the Citizen Petition's rendition of relevant facts was based on an admittedly deficient understanding of the administrative record, there is little point in repeating that rendition here.

Based on its limited understanding of the facts, Public Citizen makes several legal assertions. First, the Citizen Petition asserts that neither company has met the FDCA standard for marketing approval because neither company has provided a "reasonable assurance" that its product is safe for its intended use. Pet. 14-25. Second, it asserts that the FDCA does not

permit post-marketing conditions to substitute for provision of such reasonable assurance. *Id.* at 26-31. Third, it asserts that neither alleged benefits of silicone breast implants nor the concept of “freedom of choice” supports approval of the PMAs. *Id.* at 32-34. Fourth, it asserts that rejection of Mentor’s PMA is mandated by the FDCA notwithstanding the Advisory Panel’s recommendation. *Id.* at 34-37. Finally, it asserts that the Administrative Procedure Act requires rejection of both PMAs. *Id.* at 37-38.

The September 21, 2005 supplement concerning Mentor essentially repeats those assertions. It adds that, in light of allegedly new factual allegations submitted by Public Citizen, approval of Mentor’s PMA would violate the APA. Mentor Pet. Suppl. 12. The September 21, 2005 supplement concerning Inamed alleges that approval of Inamed’s PMA based on Inamed’s revised submissions, without first opening up the process to a new round of public comments, would violate the APA. Inamed Pet. Suppl. 11.

WLF has no greater access to the administrative record than does Public Citizen. Accordingly, this response does not attempt to take issue with Public Citizen’s rendition of relevant facts. Rather, WLF is filing this response to take issue with a number of assertions of law made by Public Citizen. In particular, the Public Citizen has badly misstated the requirements of the Administrative Procedure Act (APA); far from undercutting the PMAs in this case, based on the publicly accessible record the APA actually *mandates the approval* of Mentor’s and Inamed’s PMAs. Moreover, Public Citizen has misstated what it means to provide the “reasonable assurance” of safety and effectiveness mandated by the FDCA.

**III. Public Citizen Incorrectly Asserts that the APA Requires Rejection of the PMAs In Light of FDA's Past Actions Regarding Silicone Breast Implants.**

Public Citizen argues that any decision to approve either the Mentor PMA or Inamed PMA “would be an unwarranted departure from the Agency’s longstanding approach to silicone implants” and “would therefore constitute arbitrary and capricious action in violation of the Administrative Procedure Act.” *Id.* at 37. It argues that in light of Mentor’s and Inamed’s alleged failure to provide “the scientific data necessary to satisfy the Draft Guidance standards . . . there is no basis whatsoever on which FDA can justify a decision to reverse course and approve either PMA.” *Id.* at 38.

Public Citizen is wrong on both the facts and the law. First, it simply is not true that approval of either PMA would constitute a “180-degree departure from the Agency’s long-standing approach to silicone implants.” The “long-standing” approach has been a general acceptance of silicone breast implants: prior to 1992, silicone breast implants had been widely marketed in this country for *decades* without objection from FDA. After 1992, they continued to be available to certain groups of patients.

Public Citizen points to the January 2004 Draft Guidance as establishing, as a binding agency policy, the minimum data submissions required to provide “reasonable assurance” of safety and effectiveness. The Draft Guidance did no such thing. To the contrary, that document states explicitly that it “does not create or confer any rights for or on any person and does not operate to bind FDA or the public” and does not “establish legally enforceable

responsibilities. Instead, guidance documents describe the Agency's current thinking on a topic and should be viewed only as recommendations."

Those limitations are consistent with FDA's longstanding understanding of all guidance documents. Indeed, FDA's regulation on "good guidance practices" provides the following question-and-answer explanation regarding the intended scope of guidance documents:

- (d) Are you or FDA required to follow a guidance document?
  - (1) No. Guidance documents do not establish legally enforceable rights or responsibilities. They do not legally bind the public or FDA.
  - (2) You may choose to use an approach other than the one set forth in a guidance document. . . .

21 C.F.R. § 10.115(d).

Moreover, FDA has not even issued a guidance document in final form. When it issued the document in January 2004, FDA appended the word "Draft" to the title of the guidance document, and no final version has ever been released. The Draft Guidance states explicitly, "This draft guidance, *when finalized*, will represent the Food and Drug Administration's (FDA's) current thinking on this topic." (Emphasis added.) Thus, it cannot even be said that the Draft Guidance necessarily represented FDA's "current thinking" on data requirements in January 2004. Nor does it represent the "current thinking" of Inamed, Mentor, or the Advisory Panel. Contrary to Public Citizen's contention, neither Inamed's nor Mentor's comments on the Draft Guidance have any *legal* relevance, and those comments most certainly do not suggest that either company has agreed to comply with the Draft Guidance.

Nor does the Draft Guidance bind the Advisory Panel in any way.

Public Citizen's reliance on material presented to the Advisory Panel by FDA Staff is similarly unavailing. That material in no way binds the Advisory Panel or FDA, and Public Citizen does not even attempt to present a legal argument that it is binding. Indeed, the whole point of the Advisory Panel is to create a group of independent experts that can assist FDA in making a decision by providing FDA with an opinion that is totally independent of the views of FDA Staff.

Moreover, Public Citizen's argument is predicated on a factual assertion that Mentor and Inamed have not met the recommended data requirements of the Draft Guidance. As noted above, Public Citizen has not seen the confidential data submissions made by Mentor and Inamed to the Advisory Panel and to FDA itself and thus has no basis for that assertion.

In its September 21 supplement to the Citizen Petition, Public Citizen asserts that "two important pieces of information" regarding Mentor's PMA were not addressed during the Advisory Panel meetings and support rejection of the PMA. Mentor Pet. Suppl. 9-11. The allegedly new information concerns whether Mentor silicone breast implants should be deemed "low bleed" and whether the implants used in the Sharpe/Collis study were made differently than implants made in the United States. *Id.* Public Citizen contends that, in light of this information, approval of the Mentor PMA would be arbitrary and capricious in violation of the APA. *Id.* at 12. WLF is as uninformed as is Public Citizen regarding the full scope of the administrative record and thus will leave to FDA and others consideration of whether Public

Citizen's alleged new evidence is accurate and/or relevant to Mentor's PMA. Suffice to say that Public Citizen's cryptic September 21 description makes no serious attempt to demonstrate that its alleged new evidence renders arbitrary and capricious any decision to approve Mentor's PMA.

Even if the all the facts were as alleged by Public Citizen, it still could not prevail on its APA argument. Contrary to Public Citizen's assertion, the APA does not prevent an agency from changing its mind on an issue. As the Supreme Court recently explained, "'An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis.'" *Nat'l Cable & Telecommunications Assoc. v. Brand X Internet Services*, 125 S. Ct. 2688, 2700 (2005) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984)). The only requirement under the APA is that an agency "adequately explain[]" any reversal of policy. *Id.* at 2699. If Public Citizen were correct that an initial rejection of a PMA by FDA should be given binding significance, then new medical devices would virtually never be approved – because FDA often rejects PMAs as initially submitted, and requires manufacturers to come back with additional data.

None of the cases cited by Public Citizen is to the contrary. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), involved a federal agency that rescinded a requirement that automobile manufacturers must install passive restraint systems (airbags or automatic seatbelts), even though the agency candidly admitted that it had "no basis

. . . for changing its earlier conclusions” that airbag technology was sound and demonstrated to be effective. 463 U.S. at 48. Thus, *Motor Vehicle Mfrs.* stands merely for the proposition that it is arbitrary and capricious under the APA for a federal agency to change its position without providing *any* sort of reasoned analysis. It does not support Public Citizen’s assertion that the APA invites courts to examine just how well-reasoned is an agency’s decision to shift positions. Certainly, the Advisory Panel’s recommendation that Mentor’s PMA be approved was accompanied by well more than enough explanation to qualify as a “reasoned analysis.”

The other cases cited by Public Citizen provide even less support for its position. *Dart v. United States*, 848 F.2d 217, 231 (D.C. Cir. 1988), held merely that the APA requires a federal agency to articulate “a[] rational connection between the facts found and the choices made.” *Puerto Rico Higher Educ. Assistance Corp. v. Riley*, 10 F.3d 847, 850 (D.C. Cir. 1993), emphasized that a court’s scope of review under the APA “arbitrary and capricious” standard is “narrow” and that a court “cannot substitute its judgment for that of the agency.” The court said that the U.S. Department of Education, the agency whose denial of a fee waiver request was being challenged under the APA, was required to do no more than “address all of the factors upon which [the plaintiff] based its request.” *Id.* at 849. *Wisconsin Valley Improvement Co. v. Fed. Energy Regulatory Comm’n*, 236 F.3d 738 (D.C. Cir. 2001), did not involve a substantive policy at all, but rather reversal of a procedural rule (with the result that the plaintiff rather than the agency suddenly bore the burden of proof on a key evidentiary issue). The court’s admonition that an agency may not abruptly depart from well-established

procedural rules “without a reasoned explanation,” *id.* at 748, has very little relevance to cases, as here, in which an agency is asked to assess a product’s safety and effectiveness on the basis of evidence that constantly is being supplemented.<sup>3</sup>

Indeed, as explained in the attached March 28, 2005 WLF submission to the Advisory Panel, the APA cuts strongly in favor of approval of the Mentor and Inamed PMAs. The health consequences of breast implant failures is, of course, a legitimate safety concern. Nonetheless, such concerns must be examined in the context of concerns inherent in FDA approval of any PMA. All implantable products and prostheses eventually fail – whether by rupture, breakage, or other form of malfunction. Such failure, whether it occurs soon after implantation or many years later, in many cases will entail health risks. However, WLF is unaware of *any* instance in which FDA has required *pre-approval clinical testing* of an

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<sup>3</sup> Nor is there any merit to Public Citizen’s assertion that FDA would be departing from some well-established procedural rule if it were to approve Inamed’s PMA without providing the general public with an opportunity to examine all of Inamed’s post-Advisory Panel submissions to FDA and to comment on them. Inamed Pet. Suppl. 11. FDA routinely acts on PMAs based in part on information received from manufacturers after the conclusion of Advisory Panel meetings and without providing an opportunity for public comment on that information. Contrary to Public Citizen’s assertion, FDA regulations are silent regarding any pre-approval right of the public to comment on manufacturer submissions; rather, the regulations contemplate that the public will not be fully informed about the administrative record until *after* a PMA has been approved. *See* 21 C.F.R. § 814.44(d)(1) (“FDA will also give the public notice of the order [approving a PMA]. . . . [A] detailed summary of information respecting the safety and effectiveness of the device, which was the basis for the order approving the PMA, including information about any adverse effects of the device on health, is [to be made] available on the Internet and [to be] placed on public display. . . . When a notice of approval is published, data and information in the PMA file will be available for public disclosure in accordance with [21 C.F.R.] § 814.9.”)

implantable or prosthesis, specifically designed to demonstrate when the product is likely to fail due to wear and tear, and to measure the health consequences of such failure. Nor is WLF aware of *any* instances in which FDA has required pre-approval long-term clinical follow-up testing of a duration that even approaches the number of years Public Citizen would require here. In the vast majority of cases of which WLF is aware, FDA required pre-approval clinical data of no more than two years. Those cases include FDA-approved products comparable to silicone breast implants in terms of intended uses, the risk-benefit profile, and material used; *e.g.*, inflatable penile prostheses and testicular prostheses. An agency is not free to permit two sets of similar products to run down two separate tracks, one more treacherous than the other, for no apparent reason. The APA's reasoned decision-making requirement mandates that FDA not impose clinical data requirements for breast implants that it has not imposed for similar products. Moreover, Congress has prescribed the approval standard for medical devices: a product need not meet an "absolute safety" requirement; a manufacturer need only provide a "reasonable assurance" of safety and effectiveness. As evidenced by FDA's review of PMAs for other products, the PMAs for breast implants meet that standard with respect to the quantity of post-implant clinical data submitted to FDA. The APA's "reasoned" decision-making requirement requires that FDA not impose more onerous clinical data requirements on silicone breast implants than it has imposed on medical devices with similar safety/benefit profiles. For example, the U.S. District Court for the District of Columbia recently struck down an FDA effort to apply different approval standards to

essentially identical products. *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20 (D.D.C. 1997).<sup>4</sup> The court said that “[t]he disparate treatment of functionally indistinguishable products is the essence of the meaning of arbitrary and capricious.” *Id.* at 28. The court explained that although FDA had discretion regarding how it wished to categorize the products in question, “What the FDA is not free to do, however, is to treat them dissimilarly and to permit two sets of similar products to run down two separate tracks, one more treacherous than the other, for no apparent reason.” *Id.*

In sum, to the extent that the APA has relevance to Mentor’s and Inamed’s PMAs, it actually cuts strongly in favor of approval. Public Citizen’s arguments to the contrary are without merit.

**IV. Public Citizen Has Misstated What It Means to Provide the “Reasonable Assurance” of Safety and Effectiveness Mandated by the FDCA**

WLF has no greater access to the administrative record than does Public Citizen. Accordingly, WLF sees little point in debating with Public Citizen whether that administrative record provides a basis for finding that Inamed and/or Mentor have provided the “reasonable assurance” of safety and effectiveness required by the FDCA in order to gain FDA approval of

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<sup>4</sup> The case involved competing manufacturers seeking FDA approval of injectable imaging agents for use with diagnostic ultrasound equipment in the diagnosis of cardiac dysfunction. FDA deemed one manufacturer’s product a medical device and was reviewing the manufacturer’s PMA under standards applicable to devices. It deemed essentially identical products from three other manufacturers to be drugs subject to the substantially dissimilar product-approval requirements applicable to drugs. The court held that the APA required FDA to treat all the products the same – either as drugs or as medical devices. *Id.* at 27-28.

a PMA. WLF does take issue, however, with Public Citizen's interpretation of the FDCA's requirements; Public Citizen has significantly overstated the evidence an applicant must introduce in order to meet the FDCA's "reasonable assurance" requirement.

The Citizen Petition is premised on the assumption that a PMA should be denied if there are any lingering doubts regarding a device's safety or effectiveness. But the FDCA does not impose such an exacting standard; rather, an applicant need only provide a "reasonable" assurance that the device is safe and effective "under the conditions of use prescribed, recommended, or suggested in the proposed labeling." 21 U.S.C. § 360e(d)(2)(A) & (B). When it adopted the Medical Device Amendments of 1976, Congress made clear its understanding that manufacturers would not be required to demonstrate *absolute* safety, explaining:

Contained in various provisions throughout the proposed legislation is the requirement that regulatory action be taken to provide reasonable assurance of the safety and effectiveness of the medical devices. *This requirement is predicated upon the recognition that no regulatory mechanism can guarantee that a product will never cause injury, or will always produce effective results.* Rather, the objective of the legislation is to establish a mechanism in which the public is afforded a reasonable assurance that medical devices are safe and effective.

H.R. Rep. No. 94-853, at 15-16 (1976) (emphasis added).

Public Citizen asserts that "any uncertainties as to the safety of a Class III device . . . cannot be resolved by approving the product." Pet. 27. It asserts that "uncertainties as to the safety of a Class III device *must* be resolved in favor of non-approval." *Id.* Such a standard would be impossible for device manufacturers to meet and, as Public Citizen full well knows,

is not the standard mandated by the FDCA. Manufacturers meet the “reasonable assurance” of safety standard if they “adequately demonstrate the absence of *unreasonable* risk of illness or injury associated with the use of the device for its intended uses and conditions of use.” 21 C.F.R. § 860.7(d)(1) (emphasis added). A device would not be classified as a Class III device in the first place unless there were *some* risk that its use, even in connection with its intended uses and conditions of use, might cause illness or injury. So long as the risk posed is shown not to be *unreasonable*, the “reasonable assurance” of safety standard has been met.

Moreover, much of the evidence cited by Public Citizen speaks to the *effectiveness* of silicone breast implants,<sup>5</sup> and the Citizen Petition misstates the FDCA’s requirements as to effectiveness as well. The language and structure of §§ 513 and 515 of the FDCA, 21 U.S.C. §§ 360c and 360(e), make clear that FDA is not permitted to demand evidence beyond that necessary to provide a “reasonable assurance” of effectiveness, and should consider the least burdensome means by which such assurance can be provided. *See, e.g.*, 21 U.S.C. § 360c(a)(3)(D) (“The Secretary shall consider, in consultation with the applicant, the least burdensome appropriate means of evaluating device effectiveness that would have a reasonable likelihood of resulting in approval.”).

Public Citizen also misstates the balancing process that FDA must undertake in

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<sup>5</sup> For example, issues concerning the definition and evaluation of failure, and the rate of change in failure over time, relate both to the safety *and* the effectiveness of silicone breast implants.

addressing safety issues. While correctly noting that whether a device meets the FDCA safety standards is to be determined by balancing the device's therapeutic benefits against its risks, Public Citizen incorrectly asserts that the only benefits to be taken into account are those in excess of benefits conferred by previously-approved alternative breast implant products. Pet. 2, 32-33. Public Citizen contends that FDA-approved saline breast implants already provide the same benefits that would be provided by silicone breast implants and thus, when determining whether silicone breast implants meet FDCA safety standards, that there are no benefits conferred by silicone breast implants that can be balanced against their risks.

WLF notes initially that Public Citizen's factual contention – that silicone breast implants provide no benefits over saline breast implants – flies in the face of the great weight of the evidence presented to the Advisory Panel. The Advisory Panel heard substantial evidence that patients view silicone breast implants as a vastly superior product in comparison to saline breast implants.<sup>6</sup> But even if they did not confer significant additional benefits, Public Citizen's argument is based on a flawed understanding of the FDCA. The FDCA provides that safety and effectiveness are to be determined by “weighing any probable benefit to health *from the use of the device* against any probable risk of injury or illness from such

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<sup>6</sup> We also find it highly disingenuous that the Citizen Petition signatories are singing the praises of saline breast implants, terming them “a safe and adequate alternative to silicone breast implants.” Pet. 33. In other forums, many of those groups have questioned the safety of saline breast implants and have been highly critical of FDA's decision to approve PMAs for them.

use.” 21 U.S.C. § 360c(a)(2)(C) (emphasis added). Similarly, FDA regulations provide:

There is a reasonable assurance that a device is safe when it can be determined, based upon valid scientific evidence, that the probable benefits to health *from use of the device* for its intended uses and conditions of use, when accompanied by adequate directions and warnings against unsafe use, outweigh any probable risks.

21 C.F.R. § 860.7(d)(1) (emphasis added).

Neither the FDCA nor its implementing regulations so much as suggest that “probable benefits” should be measured only by counting those benefits that exceed the benefits that could be obtained by using a comparable, previously-approved device. Rather, the statute and regulations make plain that the measured “benefits” are any and all benefits that are likely to accrue to a patient “from use of the device.” Although Mentor and Inamed have convincingly demonstrated that their silicone breast implants provide substantially more therapeutic benefits than other types of breast implants, Public Citizen errs as a matter of law in suggesting that a device manufacturer must demonstrate that its product is superior to existing products before it can win approval of its PMA.

Finally, Public Citizen’s assertion that the Advisory Panel adopted an “approve first, test later” approach to medical device approvals (Pet. 27) is based on a similarly flawed understanding of the FDCA. As evidence for its assertion, Public Citizens cites the numerous post-marketing conditions that the Advisory Panel recommended be imposed on Mentor. *See, e.g.,* Pet. 26-27. But FDA routinely requires device manufacturers, following approval of their PMAs, to undertake numerous activities to ensure the device’s safety, and such

requirements have never been viewed as evidence that the manufacturer has not yet provided the “adequate assurance” of safety required by the FDCA. Indeed, FDA regulations explicitly contemplate that safety testing will continue after a PMA has been approved and marketing has begun. The regulations provide:

- (a) FDA may impose postapproval requirements in a PMA approval order or by regulation at the time of approval of the PMA or by regulation subsequent to approval. Postapproval requirements may include as a condition to approval of the device:

...

- (2) Continuing evaluation and periodic reporting on the safety, effectiveness, and reliability of the device for its intended use.

21 C.F.R. § 814.82(a). There is nothing inconsistent between an FDA finding that a manufacturer has provided an “adequate assurance” of safety and effectiveness and an FDA requirement that the manufacturer continue to evaluate safety and effectiveness after marketing has begun.

Moreover, many of the post-marketing requirements recommended by the Advisory Panel are designed to limit the conditions of use of silicone breast implants so as to ensure safety, not as a means of determining their safety. Thus, a sponsor would be directed to recommend to implant recipients that they undergo an MRI after five years and every two years thereafter, to check for “silent” ruptures. A sponsor would also be required to commit to selling its product only to board-certified plastic surgeons who have undergone special training. Commitments of this sort increase the manufacturer’s “assurance” of safety and

effectiveness provided prior to PMA approval and are in no way inconsistent with a finding that the manufacturer provided a “reasonable assurance” of safety and effectiveness before the commencement of marketing. Contrary to Public Citizen’s contention (Pet. 29), the post-marketing requirements at issue here are a far cry from the exacting monitoring and reporting requirements typically imposed in connection with an Investigational Device Exemption (IDE). *See* 21 C.F.R. Part 812. IDEs are issued for the very purpose of determining whether a device’s safety and effectiveness can be reasonably assured, and thus are issued based on far lower showings of safety and effectiveness than are required for a PMA. *See* 21 C.F.R. § 812.30(b)(4) (IDE’s should be issued unless “[t]here is reason to believe that the risks to the subjects are not outweighed by the anticipated benefits to the subjects and the importance of the knowledge to be gained.”). Indeed, IDEs were issued to Mentor and Inamed years ago, long before those companies compiled the massive amounts of clinical data submitted in connection with their PMAs.

Moreover, to the extent that Public Citizen is claiming that Mentor and Inamed have failed to demonstrate the effectiveness of their silicone breast implants, the FDCA explicitly contemplates that “the extent of data that otherwise would be required for approval of the application with respect to effectiveness can be reduced through postmarket controls.” 21 U.S.C. § 360c(a)(3)(C). Thus, far from demonstrating that the manufacturers failed to provide reasonable assurances of safety and effectiveness, the extensive post-marketing requirements recommended in connection with the contemplated PMAs is fully consistent with

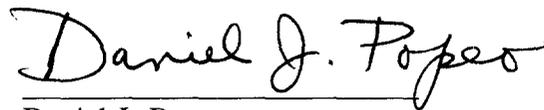
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a finding that the manufacturers' data have met the requisite level for demonstrating effectiveness – a level that is properly lowered in light of those post-marketing requirements.

### CONCLUSION

For the foregoing reasons, the Washington Legal Foundation respectfully requests that FDA reject the Citizen Petition filed by Public Citizen, *et al.*

Respectfully submitted,



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