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PhRMA

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By Messenger

February 22, 2000

Dockets Management Branch (HFA-305)
Food and Drug Administration
5630 Fishers Lane Rm. 1061
Rockville MD 20852

Re: Response of the Pharmaceutical Research and Manufacturers of America to *Guidance for Industry: Disclosing Information Provided to Advisory Committees in Connection with Open Advisory Committee Meetings Related to the Testing or Approval of New Drugs and Convened by the Center for Drug Evaluation and Research, Beginning on January 1, 2000*

Dear Sir/Madam:

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents the country's leading research-based pharmaceutical and biotechnology companies, which are devoted to inventing medicines that allow patients to lead longer, happier, healthier and more productive lives. Investing over $26 billion annually in discovering and developing new medicines, PhRMA companies are leading the way in the search for cures.

PhRMA is pleased to submit these comments on FDA's *Guidance for Industry: Disclosing Information Provided to Advisory Committees in Connection with Open Advisory Committee Meetings Related to the Testing or Approval of New Drugs and Convened by the Center for Drug Evaluation and Research.* PhRMA's members routinely submit new drug applications to CDER and participate in advisory committee meetings relating to those applications.

In these comments, PhRMA explains that the FDA's *Draft Guidance* does not adequately protect industry trade secrets and confidential commercial information. If adopted as currently drafted, the *Draft Guidance* will place the Food and Drug Administration (FDA) in violation of the Trade Secrets Act, 18 U.S.C. § 1905, and it may have unintended and undesirable effects on the usefulness of the advisory committee process. CDER should adopt a Guidance that emphasizes cooperation between CDER and new drug sponsors, and that allows for adequate dialogue between the two. We

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attach a substitute proposed "draft guidance," originally submitted to FDA in October 1999 (Attachment A), which we continue to believe strikes the appropriate balance between the competing concerns in this process.

The *Draft Guidance* does not adequately protect proprietary information belonging to new drug sponsors and it may actually have a detrimental impact on the advisory committee process. While PhRMA is in complete agreement with some of the materials that CDER identified as presumptively releasable or non-releasable, under the *Draft Guidance*, many items would be treated as presumptively releasable that are, in fact, confidential commercial information. PhRMA asserts that many of the items CDER has identified as presumptively releasable are exempt from disclosure under FOIA Exemption 4.

In addition, If FDA were to release any of these enumerated items, it would violate federal criminal law. The Trade Secrets Act, 18 U.S.C. § 1905, prohibits any federal employee from disclosing any "trade secrets, processes, operations, style of work, or apparatus." Many of the items CDER has identified as presumptively releasable constitute trade secrets. To suggest — as the *Draft Guidance* does — that these items are not within Exemption 4 would significantly deviate from prior agency practice. Since 1974, FDA has treated the materials within an NDA as trade secrets or confidential commercial information, within Exemption 4 of the FOIA and protected from disclosure under the Trade Secrets Act. 39 Fed. Reg. 44602, 44633-44642 (December 24, 1974).

PhRMA recommends that the final Guidance also discuss the CDER staff briefing packet, similarly separating it into categories that would be presumptively releasable and presumptively non-releasable. PhRMA notes that FOIA Exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency," should apply to some FDA staff documents included in briefing packets. In order to ensure that CDER does not mistakenly release confidential commercial information and compromise the competitive position of an NDA sponsor, the final Guidance <u>must</u> give the sponsor adequate time to review and assess the materials CDER proposes to release. PhRMA also urges that <u>no</u> CDER packet — redacted or not — should be transmitted to members of the advisory committee until agreement has been reached with the sponsor about the content of the package and which portions will be considered confidential — or at least until the sponsor's views have been heard.

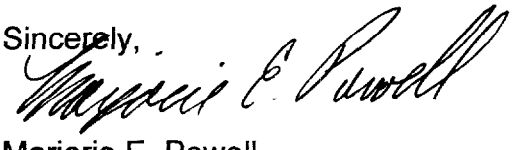
PhRMA strongly objects to the *Draft Guidance's* statement that a sponsor with a new drug undergoing priority review will be deemed to have "agreed" to a two month delay in the review cycle of that drug, if the sponsor includes any confidential commercial information or trade secrets in the briefing packet it prepares for the advisory committee (or if it includes such material and declines to waive confidentiality). This proposal is contrary to the public interest, has no basis in law, and would violate FDA's commitments under the Prescription Drug User Fee Act. In addition, it is not in the best interests of the patient population to require new drug sponsors to choose between protecting their trade secrets on the one hand and priority approval of new therapies on the other.

Some portions of the *Draft Guidance* need clarification. For example, PhRMA notes that briefing packets for postapproval advisory committee meetings may contain confidential information deserving of protection, even if they contain less Exemption 4 material than packets for preapproval meetings. PhRMA urges that FDA clarify how it intends to decide that materials are "germane to the issues to be discussed at the meeting," and therefor disclosable. The *Draft Guidance* states that data presented in briefing packets is presumptively releasable unless it is presented by individual subject, but PhRMA recommends that, because much of the data in briefing packets falls within Exemption 4, it should be presumed non-releasable, whether or not it is "presented by individual subject."

PhRMA respectfully suggests that the proposal it submitted to FDA in October strikes a more appropriate balance between the competing concerns in this process. PhRMA urges CDER to adopt our proposal or to modify its own *Draft Guidance* to address the issues enumerated in the attached comments.

We would be pleased to discuss any of these comments further with CDER, or to work with a CDER work group to revise the *Draft Guidance*.

Sincerely,



Marjorie E. Powell

Enclosures

PhRMA comments on CDER's Guidance: *Disclosing Information Provided to Advisory Committees in Connection with Open Advisory Committee Meetings Related to the Testing or Approval of New Drugs* and attachments

February 22, 2000

Response of the Pharmaceutical Research and Manufacturers of America to *Guidance for Industry: Disclosing Information Provided to Advisory Committees in Connection with Open Advisory Committee Meetings Related to the Testing or Approval of New Drugs and Convened by the Center for Drug Evaluation and Research, Beginning on January 1, 2000*

The Center for Drug Evaluation (CDER) has released for public comment a document entitled *Guidance for Industry: Disclosing Information Provided to Advisory Committees in Connection with Open Advisory Committee Meetings Related to the Testing or Approval of New Drugs and Convened by the Center for Drug Evaluation and Research, Beginning on January 1, 2000* (*Draft Guidance*). The *Draft Guidance* describes the presumptions and procedures that will govern the exchange, redaction, and public release of briefing packets provided to advisory committee members by CDER staff and new drug application (NDA) sponsors.

PhRMA represents the research-based pharmaceutical industry. Its members routinely submit new drug applications to CDER and participate in advisory committee meetings relating to those applications. In these comments, PhRMA explains that the *Draft Guidance* does not adequately protect industry trade secrets and confidential commercial information. If adopted as currently drafted, the *Draft Guidance* will place the Food and Drug Administration (FDA) in violation of the Trade Secrets Act, 18 U.S.C. § 1905, and it may have unintended and undesirable effects on the usefulness of the advisory committee process. CDER should adopt a

Guidance that emphasizes cooperation between CDER and new drug sponsors, and that allows for adequate dialogue between the two. PhRMA attaches a substitute proposed "draft guidance," originally submitted to FDA in October 1999 (Attachment A), which PhRMA continues to believe strikes the appropriate balance between the competing concerns in this process.

I. Background

In the fall of 1999, Public Citizen Health Research Group brought suit against FDA, asserting that its practice of not sharing with the public the complete briefing packets provided to advisory committee members violates section 10(b) of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. II § 10(b). PhRMA intervened, pointing out that FDA has a regulation — on the books since 1974 — that adequately addresses the FACA disclosure requirement and the limitations on that requirement. That regulation provides for public disclosure of a summary of the safety and effectiveness data in an NDA, for the purposes of an open advisory committee meeting. *See* 21 C.F.R. § 314.430(d)(1). The case settled without a ruling by the court on the merits and without any admission by FDA.

Pursuant to the terms of settlement, FDA released a guidance document on November 30, 1999, acknowledging FACA's disclosure requirement as well as the fact that FACA does not apply to materials that are within an exemption under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). That guidance also cites section 314.430(d)(1) of FDA's regulations and states that FDA will exercise its discretion under the regulation consistently with FACA and FOIA. The subsequent *Draft Guidance* sets forth the procedures according to which materials provided to advisory committee members in connection with open

meetings convened by CDER will be disclosed to the public. These comments address the *Draft Guidance*.

II. Comments

FDA is legally required to ensure that the Guidance ultimately adopted protects confidential commercial information and trade secrets belonging to new drug sponsors. Subject to this requirement, the Guidance will allow for release of non-confidential portions of briefing packets in accordance with FACA. In implementing these standards, FDA should be mindful of the additional policy goal of using the advisory committee process to assist FDA decision makers. The *Draft Guidance* does not adequately protect proprietary information belonging to new drug sponsors and it may actually have a detrimental impact on the advisory committee process.

A. The *Draft Guidance* Does Not Adequately Protect Trade Secrets and Confidential Commercial Information.

The vast majority of information FDA proposes to release falls within Exemption 4 of FOIA, 5 U.S.C. § 552(b)(4). The FACA obligation to make briefing packets publicly available at or before the meeting in question does not apply to these materials. 5 U.S.C. App. II § 10(b); *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 446-47 (1989). Furthermore, the federal Trade Secrets Act prohibits their public disclosure.

1. The *Draft Guidance* Misclassifies a Substantial Amount of Sponsor Material as Presumptively Releasable under FACA.

CDER appropriately separates material in sponsor briefing packets into documents presumed releasable and documents presumed non-releasable. As to some of

CDER's classifications, PhRMA is in complete agreement.[1] For instance, sponsors view as presumptively releasable a summary of pivotal safety and effectiveness information (including a statistical analysis) that relates to the indication to be discussed in open session at the meeting. A sponsor also views as presumptively releasable any summary of other safety and effectiveness information that it anticipates presenting at the meeting, as well as published articles and abstracts and any other information that it has already publicly disclosed. In addition, PhRMA agrees with CDER that product formulation, "full reports of raw clinical or preclinical data," and reports of unpublished studies are presumptively non-releasable.[2]

However, under the *Draft Guidance*, many items would be treated as presumptively releasable that are, in fact, confidential commercial information. These are:

- summaries of non-pivotal safety and effectiveness data;
- summaries of any safety and effectiveness data that relate to anything other than the indication to be discussed in open session of the advisory committee meeting or anything else the sponsor anticipates will be discussed in the open session;
- summaries of adverse reaction data;
- clinical and preclinical protocols;
- names of principal investigators;
- proposed indications for usage, dosage, and administration; and
- safety sections of product labeling.

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[1] In any particular case, the presumption may be overcome, and individual sponsors reserve the right to take that position in light of their specific factual circumstances.

[2] PhRMA disagrees, however, with FDA's position that <u>only</u> full reports and <u>only</u> data presented by individual subject (see below, page 17) are presumptively non-releasable.

As explained below, all of these are confidential commercial information and should be deemed presumptively non-releasable by CDER.

2. These Items Are Within Exemption 4 of the FOIA.

Material submitted voluntarily to an agency is confidential and within Exemption 4 of the FOIA if it is "of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). Briefing packets are voluntarily submitted by pharmaceutical companies to FDA for use by advisory committees. No statute, regulation, or agency policy requires a sponsor to prepare or submit a briefing packet in connection with an advisory committee meeting, nor does any regulation dictate the contents of such packets.[3] Moreover, it is beyond dispute that sponsors do not customarily release to the public their safety and effectiveness data, protocols, adverse events, names of investigators, proposed indications, or draft labeling. Accordingly, under the *Critical Mass* test, these items are within Exemption 4.

In any event, these items also satisfy the legal requirement for Exemption 4 that applies to information required to be submitted to the government. Such information is within Exemption 4 if its disclosure would cause "substantial competitive harm" to the submitter. *See National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *Critical*

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[3] Briefing packets are therefore unlike NDAs, the submission of which is mandatory prior to marketing a new drug and the contents of which are also dictated by law. *See* 21 U.S.C. § 355; 21 C.F.R. § 314.50.

Mass, 975 F.2d at 878-80. Disclosure of safety and effectiveness data beyond what is discussed at the advisory committee meeting, and disclosure of protocols, adverse events, names of investigators, proposed indications, and draft labeling would cause substantial competitive harm to NDA applicants. All of this information could be used by a competitor to substantially reduce the time and effort otherwise required to bring a competing product to market.

For instance, if a competitor had a complete picture of all of the studies conducted by the applicant, including studies on indications for which approval is not sought, it could learn of the applicant's future plans for the drug. This would allow the competitor to develop competitive programs for its own drugs. Disclosure of clinical and preclinical protocols would similarly threaten the sponsor's competitive position. A competitor could determine which study designs were successful and which were not, thereby saving the time and money invested by the original applicant. It would avoid the uncertainty, and associated delays and expenses, involved in determining whether a particular test will generate the type of scientific proof that FDA will accept as demonstrating the safety and effectiveness of the type of drug product in question. The names of principal investigators would be of substantial value to a competitor in developing a network of qualified investigators capable of enrolling sufficient numbers of subjects and completing the studies. In addition, researchers retain knowledge of the test procedures that turned out to be fruitless, the ones that turned out to be useful, and even the test results. A

competitor who employed them would have the advantage of their experience with the first drug.[4]

Disclosure of proposed indications for usage, dosage, and administration, and disclosure of the safety sections of product labeling would similarly cause "substantial competitive harm" to the sponsor. They represent the sponsor's own conclusions, based on both scientific and commercial considerations, as to the uses and claims that the data will support, and the claims that will most effectively and accurately promote the drug to physicians and consumers. Moreover, a competitor could compare the draft labeling contained in the NDA and briefing packet with the final labeling approved by FDA, and thereby know where the applicant was and was not successful in its development program. Finally, disclosure of summaries of adverse reaction data might enable a competitor to avoid repeating the sponsor's trial and error process with respect to dosages and routes of administration. It could also give a competitor valuable information about alternative indications for the drug product.[5]

3. Under the Trade Secrets Act, FDA May Not Release These Items.

If FDA were to release any of these enumerated items, it would violate federal criminal law. The Trade Secrets Act, 18 U.S.C. § 1905, prohibits any federal employee from

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[4] The U.S. District Court for the District of Columbia recently found that the names of scientific investigators were within Exemption 4. *See Public Citizen Health Research Group* v. *FDA*, No. 99-0177 (JR) (Memorandum Opinion) (January 19, 2000).

[5] In *Public Citizen Health Research Group* v. *FDA*, 704 F.2d 1280 (D.C. Cir. 1983), the Court of Appeals found that adverse reaction data relating to an investigational device exemption were not "trade secrets" within Exemption 4 of the FOI Act, but held that this data could nonetheless constitute "confidential commercial information" within the same exemption.

disclosing any "trade secrets, processes, operations, style of work, or apparatus." *See* 41 Fed. Reg. 52148, 52152 (November 26, 1976) (acknowledging applicability of Trade Secrets Acts to FDA advisory committees). The term "trade secrets" in this criminal statute extends to all information within the scope of FOIA Exemption 4, including confidential commercial information. *See, e.g.*, *McDonnell Douglas Corp.* v. *NASA*, 180 F.3d 303, 305 (D.C. Cir. 1999); *CNA Fin. Corp.* v. *Donovan*; 830 F.2d 1132, 1151 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *see also* Department of Justice, *Freedom of Information Act Guide* (September 1998) <www.usdoj.gov/oip/exemption4.htm> (visited February 15, 2000) (DOJ Guide). The "practical effect" of the Trade Secrets Act is to limit an agency's ability to make a discretionary release of otherwise exempt material, because to do so in violation of the Trade Secrets Act is not only a criminal offense, but constitutes "'a serious abuse of agency discretion' redressable through a reverse FOIA suit." DOJ Guide, *supra*. Under the Trade Secrets Act, therefore, FDA may not release confidential commercial information contained in an NDA sponsor's briefing packet.[6]

To suggest — as the *Draft Guidance* does — that these items are not within Exemption 4 would significantly deviate from prior agency practice. Since 1974, FDA has treated the materials within an NDA as trade secrets or confidential commercial information, within Exemption 4 of the FOIA and protected from disclosure under the Trade Secrets Act. 39 Fed. Reg. 44602, 44633-44642 (December 24, 1974). PhRMA recommends that the Guidance state that these items are at least presumptively non-releasable. If, in a particular instance, the

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[6] The release of information within Exemption 4 is also prohibited by 21 U.S.C. § 331(j).

agency views an item as releasable, the agency and sponsor should discuss the possibility of public release. But the working presumption should be that these items fall within Exemption 4 and the Trade Secrets Act.

4. Treating These Items as Presumptively Releasable Would Make the Advisory Committee Process Less Helpful to FDA.

In the *Draft Guidance*, CDER "encourages" sponsors to submit fully releasable packets. *See Draft Guidance*, pages 3-4. If CDER retains the *Draft Guidance* in present form, many sponsors may do so. This does not mean, however, that sponsors would waive their rights to assert the confidentiality of the material that the Guidance identifies as presumptively releasable. It means, instead, that sponsors would be obliged to omit these materials from their briefing packets, to avoid release or litigation. CDER should consider the practical consequences of adopting a policy that discourages open discussion between sponsors and FDA advisory committees.

The advisory committee process provides FDA with a mechanism for the agency to obtain medical and scientific advice on a wide variety of topics that can affect its regulatory decision making. It provides agency decision makers with access to medical and scientific experts who can provide pertinent and up-to-date advice to the agency. "Utilization of outside experts adds to the quality and credibility of the decision making process." 50 Fed. Reg. 7452, 7481 (February 22, 1985). This mechanism is particularly important today, given the ever-increasing pace of medical advances and scientific change. A briefing packet for advisory committee members that omits the information discussed above — a packet containing only (1) a

summary of pivotal safety and effectiveness information relating to the indication to be discussed at the meeting, and (2) published articles and abstracts — would be considerably less helpful to the advisory committee members, and the committee's input would thus be less helpful to the agency.

B. The Process of Exchange, Redaction, and Release of Briefing Packets Should Emphasize Dialogue and Agreement Between CDER and the Sponsor.

The NDA sponsor and CDER staff create briefing packets for advisory committee members in order to facilitate the members' preparation for the meeting and to enable them to focus on the issues that most need their attention. Particularly since no law "requires" the submission of briefing packets — or indeed advisory committee review of NDAs — the advisory committee process depends on mutual cooperation. PhRMA recommends that any Guidance addressing the exchange, redaction, and release of briefing packets should reflect that spirit of cooperation — by addressing both the CDER and the sponsor briefing packets, by treating them comparably, and by assuming good faith on both sides.

1. The Time Frames for Handling CDER and Sponsor Briefing Packets Should be Comparable.

The final weeks before an advisory committee meeting are an extremely busy time for an NDA sponsor. Preparation of a briefing packet, presentation, and slides is time-consuming and resource-intensive, and often entails last-minute changes. No doubt the

preparation and finalization of CDER briefing packets is equally laborious. Basic principles of fairness dictate that the process for handling CDER and sponsor briefing packets be comparable.[7]

The *Draft Guidance* inappropriately requires sponsors to submit their briefing packets a full month earlier than CDER staff. Unless it is fully releasable, the sponsor must send its packet to the CDER Advisors and Consultants Staff (ACS) 48 business days (*i.e.*, almost ten weeks) prior to the meeting,[8] while CDER staff may wait until 19 business days before the meeting. The sponsor sees FDA's preliminary redactions of its own packet 35 business days before the meeting, but would not see redactions of the CDER packet until 14 business days before. And final discussions about redaction of the sponsor packet are to be completed 30 business days before the meeting, while final discussions about the CDER draft are to be completed 8 business days before the meeting.

PhRMA is also troubled by the fact that CDER's decision as to the content of its packet would be made <u>after</u> the sponsor's final decision about its own packet. As noted, nothing in FACA, FOIA, or NDA regulations requires the submission of a briefing packet by the sponsor or specifies any particular content for that packet. Thus, the *Draft Guidance* appropriately provides that after FDA has reached a final decision about the redactability of material in the sponsor's packet, the sponsor may modify the packet (*i.e.*, remove materials about which

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[7] The *Draft Guidance* states that sponsors should bring extra hard copies of the slides they intend to present to the meeting, for distribution to the public. While PhRMA does not object to the distribution of hard copies to the public in attendance, PhRMA does not view photocopying and distribution as the sponsor's responsibility.

[8] By way of contrast, PhRMA recommends 45 calendar days (*i.e.*, slightly over <u>six</u> weeks).

agreement is not reached). Under the *Draft Guidance* this decision must be made by 22 business days before the meeting. However, CDER is not required to submit the first draft of its own packet until 19 business days before the meeting. In order to ensure that a sponsor's decision to eliminate a disputed item from discussion is genuinely respected, PhRMA believes that the sponsor's decision as to the final contents of its packet should be made at or after the time that CDER staff makes its final decision about what to include in its own briefing packet.

In any event, the time table set forth in the Guidance should be considered a temporary solution. PhRMA recommends that CDER revisit the question — with industry input — in six or twelve months time, to determine whether the proposed time frames actually work.

2. The *Draft Guidance* Should Address the CDER Packet Just as it Does the Sponsor Packet.

The *Draft Guidance* discusses material in sponsor briefing packets, appropriately separating that material into documents presumed releasable and documents presumed non-releasable. PhRMA recommends that the Guidance also discuss the CDER staff briefing packet, similarly separating it into categories that would be presumptively releasable and presumptively non-releasable.

In particular, CDER should explain how it intends to apply FOIA Exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). Draft reviews of the NDA prepared by agency medical officers and scientists, for instance, are classic Exemption 5 "pre-decisional" and "deliberative" documents. *See, e.g., Renegotiation Bd.*

v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 186 (1975); *Mapother* v. *United States Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Coastal States Gas Corp.* v. *United States Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The agency addressed this very topic in 1993. When she was Deputy Commissioner, Commissioner Henney denied a petition to change the advisory committee process, explaining that staff briefing packets "represent the predecisional and tentative positions of agency personnel." Letter from Jane E. Henney, MD, to Larry R. Pilot, August 16, 1993 (FDA Docket No. 89-0188/CP) (Attachment B). She took the position that disclosure prior to the advisory committee meeting "would be premature and disruptive to the agency's deliberative process." *Id.* Furthermore, she noted, disclosure "may hamper the approval process, because the concerns expressed in such interim documents are sometimes ill-founded and are actually resolved prior to the [advisory] panel meeting." *Id.*

The agency has already taken the position that disclosure of Exemption 5 material prior to advisory committee meetings would be premature, disruptive, and possibly even detrimental to the approval process. Accordingly, the Guidance may simply reiterate these earlier findings and explain that the agency will not waive Exemption 5 unless none of these concerns apply.

3. Sponsors Should Have Adequate Time and Opportunity to Challenge the Inclusion of Exemption 4 Material in CDER Briefing Packets.

CDER briefing packets typically contain material that is within FOIA Exemption 4, because they discuss and often include information from the sponsor's NDA. The burden of identifying material that is "confidential commercial information" can be shared by CDER and

the sponsor, but ultimately the sponsor is best positioned to articulate the reason a particular piece of information is within Exemption 4 and to defend its non-release. In order to ensure that CDER does not mistakenly release confidential commercial information and compromise the competitive position of an NDA sponsor, the Guidance must give the sponsor adequate time to review and assess the materials CDER proposes to release. The *Draft Guidance* does not do so.

CDER proposes that a sponsor would see the redacted version of the CDER briefing packet 14 business days prior to the advisory committee meeting, and proposes that any discussions about the applicability of Exemption 4 be completed within six business days. In all fairness, CDER should share the entire unredacted CDER packet with sponsors before the packet is sent to advisory committee members.[9] Another alternative might be for CDER to articulate a list of presumptions regarding what will be redacted and what will not, and then to initiate a dialogue — prior to providing the CDER packet to the advisory committee members — in any particular instance in which it deviates from the presumptions. In any event, PhRMA strongly urges that no CDER packet — redacted or not —be transmitted to members of the advisory committee until agreement has been reached with the sponsor about the content of the package and which portions will be considered confidential — or at least until the sponsor's views have been heard. To provide for release to advisory committee members before any dialogue with the

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[9] Disclosure of an exempt document on a limited basis with an explicit confidentiality agreement, to facilitate the agency's own decision making, would not waive Exemption 5. *Cf. Kimberlin* v. *United States Dep't of Justice*, 139 F.3d 944 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 210 (2000); *National Ass'n of Criminal Defense Lawyers* v. *United States Dep't of Justice*, No. 97-372 (GK)(D.D.C. July 22, 1998).

sponsor suggests a disinclination to take sponsor objections seriously and would compromise the sponsor's confidentiality rights by implicating FACA before a decision can be made to keep materials out and thereby avoid FACA.

C. The Review of Drugs Undergoing Priority Review Should Not be Delayed Simply Because the Sponsor Asserts its Proprietary Rights.

CDER proposes that a sponsor with a new drug undergoing priority review will be deemed to have "agreed" to a two month delay in the review cycle of that drug, if the sponsor includes any confidential commercial information or trade secrets in the briefing packet it prepares for the advisory committee (or if it includes such material and declines to waive confidentiality). This proposal is contrary to the public interest, has no basis in law, and would violate FDA's commitments under the Prescription Drug User Fee Act.

This part of the *Draft Guidance* is designed to discourage priority drug NDA sponsors from (a) providing confidential information to the advisory committee members or (b) asserting any claim of confidentiality that might apply. The advisory committee process is not helped by an agency policy that discourages frank and open discussion with sponsors. The notion that a priority drug's approval might be delayed if the sponsor asserts its right to maintain the confidentiality of sensitive commercial information sounds punitive. And it is not in the best interests of the patient population to require new drug sponsors to choose between protecting their trade secrets on the one hand and priority approval of new therapies on the other. Finally, lengthening the review clock by two months violates FDA's PDUFA commitments and is considered by PhRMA to be a serious breach of faith on the agency's part.

D. Portions of the Draft Guidance Should be Clarified.

Finally, there are several statements in the *Draft Guidance* that should be clarified or omitted. *First*, on page 3 CDER states that the *Draft Guidance* does not apply to "submissions in connection with open advisory committee meetings that do not concern the approval or testing of products" and cites, as an example, meetings that involve "postapproval monitoring programs." CDER states that "the submissions for such meetings do not generally involve as much redaction as submissions for meetings on unapproved products or unapproved new indications for approved products." While it is undoubtedly true that briefing packets prepared for postapproval advisory committee meetings contain less Exemption 4 material and different procedures may apply, PhRMA asserts that it is important that CDER affirm that the same confidentiality protections apply to those briefing packets.

Second, CDER states on page 5 of the *Draft Guidance*, that "it is appropriate to make [the items listed above] available . . . if they are germane to the issues to be discussed at the meeting." CDER does not explain how it proposes to determine germaneness. Further, CDER states that these items "will be considered disclosable" unless the sponsor demonstrates substantial competitive harm will result from disclosure. PhRMA recommends that FDA make clear in the Guidance that, as to any item "presumptively" disclosable, the presumption only applies if the sponsor itself anticipates discussion or presentation of the item in the open session of the meeting. The notion that sponsors "generally" know these items "will often" be discussed — *see* page 5 — even if true is not adequate to justify placing the burden on the sponsor to show that the FOIA Exemption applies. Moreover, it is inappropriate to require the sponsor to show

"substantial competitive harm" (under the *National Parks* test) with respect to items that are voluntarily submitted to FDA. *See* page 5.

Third, FDA suggests on page 6 that data is "raw data" (and hence presumptively non-disclosable) only if it is "presented by individual subject." Data is presented in NDAs and briefing packets in a variety of ways – for instance, in tables and charts. It is not customarily released to the public in these forms, or in other forms, and its disclosure would cause "substantial competitive harm" to the NDA sponsor because – as explained above – it would provide valuable insights to a competitor and substantially reduce both the time and the expense of developing a competing drug. Accordingly, it falls within Exemption 4, and PhRMA asserts that it should be presumed non-releasable, whether or not it is "presented by individual subject."[10]

Fourth, NDA sponsors are as interested as FDA in ensuring that advisory committee members are fully and accurately informed. Thus PhRMA urges that FDA omit the

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[10] On January 19, the U.S. District Court for the District of Columbia found that raw patient data in a briefing packet submitted by G.D. Searle & Co. was releasable under FACA. The ruling was based on the fact that Searle had "not successfully *rebutted HRG's evidence* that the raw data points would *not* be useful in assisting" competitors. *Public Citizen Health Research Group* v. *FDA* (Mem. Op.), at 6 (first emphasis added). PhRMA disagrees that Searle's showing was insufficient. But the case makes it clear that raw patient data is at least presumptively within FOIA Exemption 4.

suggestion that sponsors might inappropriately include "misleading" information in their briefing packets.[11]

III. Conclusion

PhRMA respectfully suggests that the proposal it submitted to FDA in October strikes a more appropriate balance between the competing concerns in this process. PhRMA urges CDER to adopt our proposal or to modify its own *Draft Guidance* to address the issues enumerated above.

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[11] In any event, it is not within the agency's authority to "take appropriate action" —such as "posting a correction" — if it views the sponsor's briefing packet as "promotional or misleading." *See Draft Guidance*, page 6.

ATTACHMENT A

October 13, 1999

GUIDANCE FOR INDUSTRY AND STAFF

Preparation and Release to the Public of Materials Pertaining to Advisory Committee Meetings Convened by the Center for Drug Evaluation and Research

I. INTRODUCTION

The Center for Drug Evaluation and Research (CDER) relies on advisory committees for advice concerning a variety of issues, including the approval of pending new drug applications (NDAs). CDER reaffirms the importance of the advisory committee process, which Congress recognized in section 120 of the Food and Drug Administration Modernization Act, 21 U.S.C. § 355(n). The advisory committee process is subject to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. II, and the Freedom of Information Act (FOIA), 5 U.S.C. § 552.[1] FDA has issued regulations implementing the FOIA in general, 21 C.F.R. Part 20, and with respect to particular categories of records, such as NDAs, 21 C.F.R. § 314.430.

This guidance document is issued pursuant to the settlement of litigation challenging FDA's practices under the FACA.[2]

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[1] This guidance does not apply to meetings that are not meetings of advisory committees within the meaning of the FACA. In addition, this guidance does not apply to advisory committee meetings convened by components of the Agency other than CDER.

[2] *Public Citizen Health Research Group* v. *FDA*, Civ. No. 99-0177 (JR) (D.D.C., filed Jan. 21, 1999). The Pharmaceutical Research and Manufacturers of America (PhRMA) intervened as a defendant in support of FDA's practices. The stipulation for settlement, dated September 24, 1999, was signed by plaintiff Public Citizen Health Research Group, FDA, and PhRMA, and was approved by the Court on September 27, 1999. There was no ruling by the Court on the lawfulness of FDA's practices.

II. GENERAL PRINCIPLES

Section 10(b) of the FACA, 5 U.S.C. App. II, § 10(b), provides that, subject to the FOIA, documents made available to advisory committee members shall be available for public inspection and copying. Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), provides that trade secrets and confidential commercial and financial information are exempt from public disclosure. Under the Trade Secrets Act, 18 U.S.C. § 1905, the disclosure of information within Exemption 4 is a criminal offense. Section 301(j) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 331(j), also prohibits the disclosure of trade secrets. Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), provides that certain "inter-agency or intra-agency" memorandums, such as draft recommendations and other pre-decisional documents, are exempt from disclosure.

FDA's FOIA regulations provide that "Data and information submitted or divulged to the Food and Drug Administration which fall within the definitions of a trade secret or confidential commercial or financial information are not available for public disclosure." 21 C.F.R. § 20.61(c). The regulations establish a procedure under which the submitter of records reasonably considered to be within Exemption 4 may object to a determination by the Agency that the records are releasable. 21 C.F.R. § 20.61(e).

With respect to pending NDAs, the Agency's FOIA regulations provide as follows:

> If the existence of an application or abbreviated application has been publicly disclosed or acknowledged before the agency sends an approval letter to the applicant, no data or information contained in the application or abbreviated application is available for public disclosure before the agency sends an approval letter, but the Commissioner may, in his or her discretion, disclose a summary of selected portions of the safety and effectiveness data that are appropriate for public consideration of a specific pending issue; for example, for consideration of an open session of an FDA advisory committee.

21 C.F.R. § 314.430(d)(1).

FDA construes the FACA to require that, with respect to any open advisory committee meeting convened pursuant to the FACA, whenever practicable and subject to any applicable exemptions of the FOIA, those materials that are provided to the members of an advisory committee in connection with that meeting must be made available for public inspection and copying before or at the time of the advisory committee meeting. FDA interprets 21 C.F.R. § 314.430 to be consistent with the FACA and therefore will exercise its discretion under 21 C.F.R. § 314.430(d)(1) in a manner consistent with the FACA and the FOIA as described in the previous sentence to make available for public inspection and copying materials provided to the members of an advisory committee in connection with open advisory committee meetings convened by CDER, beginning on January 1, 2000.

III. POLICIES AND PROCEDURES

CDER will make advisory committee materials available consistent with the principles stated above. With respect to advisory committee meetings convened to consider pending NDAs (including supplements), CDER will follow the procedures described below in order to comply with its regulations and to maintain the confidentiality of information that is exempt from disclosure under the FOIA. CDER will work together with the applicant as early as possible to resolve questions presented under this guidance and, more generally, to come to a common understanding of the issues to be considered at the advisory committee meeting.[3]

[3] For example, CDER may provide the sponsor with a draft of its portion of the briefing package to obtain the sponsor's comments on its accuracy, clarity, and completeness, and to allow the sponsor to ensure that its own presentation adequately addresses the issues identified by CDER. This process can facilitate preparation by the sponsor and CDER for an advisory committee meeting and thereby enhance the quality of the committee's deliberations. The FACA applies only to materials actually provided to an advisory committee and not to drafts exchanged by the sponsor and CDER.

A. The Applicant's Portion of the Briefing Package

The applicant should submit a preliminary version of its portion of the advisory committee member briefing package to the executive secretary for the advisory committee in question no later than 45 days before the meeting. The applicant should designate which portions of the package are available for public disclosure and which are confidential based on FOIA Exemption 4 (or any other applicable provision). Within five business days after receiving the preliminary package, the executive secretary will advise the applicant if the Agency tentatively disagrees with any of the confidentiality designations of the applicant. Within five business days thereafter, the applicant will have the option, in its sole discretion, of revising the briefing package (for example, by omitting the material in question), rescinding its confidentiality designation, or contesting the Agency's tentative position. The executive secretary will not transmit the applicant's portion of the briefing package to the members of the advisory committee until agreement has been reached with the applicant on the content of the package and which portions will be considered confidential.

In order to minimize the burdens on the Agency and applicants, and in accordance with its longstanding interpretation of the FOIA, the Agency intends, whenever practicable, to follow a categorical approach to determining the confidentiality of information in the briefing package. Thus, it is expected that, ordinarily, the following materials, if included by the applicant in the briefing package, will be releasable in accordance with the FACA and the FOIA:[4]

[4] There is no requirement that the applicant prepare a briefing package or include any particular information in a package if it does decide to prepare one. This list applies only to the extent that the applicant has included information in any particular category in a briefing package.

- summary of pivotal safety and effectiveness information, including statistical analyses, relating to the indication to be discussed in open session at the advisory committee meeting;
- summary of other safety and effectiveness information that the applicant anticipates presenting in open session at the advisory committee meeting;
- published articles and abstracts; and
- any other information that has previously been publicly disclosed by the applicant.

In addition, the final version of the applicant's presentation materials for use at an open session of an advisory committee meeting will be releasable, when available.

It also is expected that, ordinarily, the following portions of the briefing package will be confidential, and not releasable, in accordance with the FACA and the FOIA:

- draft labeling;
- product formulation and other manufacturing, chemistry, and controls information;
- safety and effectiveness information relating to indications other than those to be discussed in open session at the advisory committee meeting;
- protocols and names of investigators, unless previously disclosed;
- full reports of safety or effectiveness studies; and
- raw clinical or preclinical data.

Special considerations may arise in any particular situation, and the applicant may designate portions of the briefing package as confidential regardless of whether they fit within any of these categories. In all cases, the question of confidentiality ultimately will be decided by reference to the applicable statutory and regulatory provisions.

B. The Agency's Portion of the Briefing Package

The Agency continues to adhere to its longstanding position that draft review memorandums prepared by medical officers and other persons reviewing an NDA are pre-

decisional documents within Exemption 5 of the FOIA. Therefore, these documents will not ordinarily be subject to release if included by the Agency in the advisory committee member briefing package.

The Agency may designate other documents within the portion of the briefing package that it prepares as releasable, or it may prepare a summary document for disclosure consistent with the regulations. If it does so (or if it tentatively decides that Exemption 5 is not applicable because of special considerations applicable to a particular situation), the executive secretary will provide a preliminary version of the summary or parts of the Agency's portion of the briefing package that it tentatively considers releasable to the applicant at least 45 days prior to an advisory committee meeting. Within five business days after receiving the preliminary package, the applicant will advise the executive secretary of any portions of these materials that the applicant regards as confidential within Exemption 4. Within five business days thereafter, the Agency will make a good faith effort to accommodate the reasonable concerns of the applicant. In any case in which agreement on confidentiality is not reached, the Agency will follow established procedures under 21 C.F.R. § 20.61(e). The executive secretary will not transmit the Agency's portion of the briefing package to the members of the advisory committee until agreement has been reached with the applicant on the content of the package and which portions will be considered confidential or until the procedures specified in 21 C.F.R. § 20.61(e) have been completed.

C. Making Materials Publicly Available

As soon as practicable after the procedures described above have been completed, and no later than the day of the advisory committee meeting whenever practicable, the Agency will make the releasable portions of the advisory committee briefing package publicly available. In its discretion, the Agency may do so by placing the materials on public display, providing

copies at the advisory committee meeting, putting the materials on the Agency web site, or any combination of these methods.

DEPARTMENT OF HEALTH & HUMAN SERVICES Public Health Service

Food and Drug Adminstration
Rockville MD 20857

August 16, 1993

Larry R. Pilot
McKenna & Cuneo
1575 Eye Street, N.W.
Washington, D.C. 20005

Re: Citizen Petition 89-0188/CP

Dear Mr. Pilot:

This letter is in response to the citizen petition submitted by you regarding proposed changes to 21 C.F.R. Part 14. In the petition you requested that the Commissioner of Food and Drugs amend certain regulations regarding public advisory committees for the purposes of:

1. Requiring timely release of all disclosable written information transmitted to a public advisory committee upon the written request of any interested person;
2. Requiring separation of functions and prohibiting *ex parte* communication whenever an application or submission is transmitted to a public advisory committee to assure that such committee is not inappropriately influenced by the parties (i.e., representatives of the FDA, applicant, or sponsor);
3. Requiring that all communications with a public advisory committee about an application be undertaken through the executive secretary or other designated agency employee; and
4. Describing the function of the "executive secretary or other designated agency employee."

Petition at 1-2.

In your petition, you requested that the Commissioner of Food and Drugs add the following paragraphs to 21 C.F.R. § 14.35:

(f) Upon receipt by the executive secretary or other designated agency employee of a written request, the Commissioner will provide copies of all written information transmitted to any member of a committee which has been prepared by an employee of the FDA, another member, or any other party including an applicant or sponsor. Where such written information relates to an application or submission for a product that is subject to approval by FDA, complete copies will be made available to the applicant or sponsor at the same time it is provided to any member. The applicant or sponsor will advise the executive secretary or other designated agency employee promptly after receipt of the requested information of any information that is not disclosable to the public under Part 20.

(g) Where the independent advisory committee is asked to review an application or submission for which the Commissioner requires a committee recommendation to approve or disapprove an application or submission, communication with any voting member shall be subject to the requirements of § 13.15(a).

> Where oral or written communications between any member and either employees of the FDA or representatives of the applicant or sponsor are necessary prior to or after a public meeting, the executive secretary or other designated agency employee who is not involved as a party will coordinate and maintain a record of such communication. This record will be made available to each party as provided in paragraph (f) of this section.

Id. at 2-3.

In addition, you requested that the Commissioner add the following regulation:

§ 14.3 - Function of executive secretary or other designated agency employee.

> The executive secretary for a public advisory committee or other designated agency employee assigned to assist a public advisory committee shall be responsible for coordinating all communications between and among members of the committee to assure compliance with the Federal Advisory Committee Act. The executive secretary or other designated agency employee shall neither participate in, nor advise on, any matter in which the FDA has an interest and for which the advisory committee is expected to review such matter, unless such participation or advice is available to the public at the time such participation or advice occurs.

Id. at 3.

We will address each requested change in turn, but are denying your petition for the reasons discussed below. Many of the changes you propose in the regulatory language replicate existing regulations and therefore are unnecessary. Your petition even cites some of these existing regulations. *See, e.g.*, Petition at 4-5 (citing 21 C.F.R. §§ 14.35 and 14.75 (a)(1) regarding submission of information to the executive secretary and public disclosure of written information).

Other changes you suggest would, in our view, encumber the agency in the performance of its duties and convert FDA's advisory committee reviews into an adversarial process rather than a scientific forum.

In addition, your petition suggests that the real concern may be abuse of existing regulations. If this is the case, a procedure exists to identify and document any alleged abuses and seek administrative remedy under 21 C.F.R. § 14.7.

a. Availability of written communications

FDA regulations require the administrative record of a public advisory committee, as well as certain other committee records, to be made available for public disclosure subject to Part 20, FDA's public information regulations.[1] 21 C.F.R. § 14.75(a). The administrative record includes "[a]ll written submissions to and information considered by the committee." *Id.* at § 14.70(a)(3) the (emphasis added). Written submissions are made available to the committee. *Id.* at § 14.75(a)(1).

As you can see, the above regulations fulfill your first request since they provide for public availability of all disclosable written communications to an advisory committee. Section 14.75(a) provides that these written communications to an advisory committee are available to the public pursuant to Part 20. Since Part 20 sets forth FDA's implementation of the Freedom of Information Act (FOIA), all exemptions to public disclosure under the FOIA apply, including §

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[1] Note that advisory committee members are special government employees. General Medical Company v. FDA, 770 F.2d 214 (D.C. Cir. 1985); Aviation Consumer Action Project v. Washburn, 535 F.2d 101 (D.C. Cir. 1976); Bristol-Myers Co. v. Kennedy, No. 77-2122, (D.D.C. January 24, 1979).

552(b)(4) (exemption for trade secret and confidential commercial information) and § 552(b)(5) (exemption for inter-agency or intra-agency memoranda).

On a practical note, most of the materials provided to advisory committee members on specific applications are prepared by the sponsors themselves for the committee meeting. Much of the information that the Centers submit to the advisory committee is extracted from the materials submitted by the sponsor and is, therefor, already in the hands of the sponsor.

Congress has recognized the importance of not requiring that internal memoranda be subject to public disclosure by including an exemption for this class of documents in the Freedom of Information Act. *See* 5 U.S.C. § 552(b)(5). Accordingly, Part 20 and § 14.75(b) of FDA's regulations exempts this type of information from public disclosure. 21 C.F.R. § 14.75(b); *See also* Federal Advisory Committee Act (FACA), 5 U.S.C. App. § 10(b). These documents represent the predecisional and tentative positions of agency personnel. Disclosure of these internal memoranda would be premature and disruptive to the agency's deliberative processes. Disclosure of preliminary agency deliberations and recommendations may hamper the approval process, because the concerns expressed in such interim documents are sometimes ill-founded and are actually resolved prior to the panel meeting.

We find that the latter part of your proposed amendment to § 14.35(f) regarding an additional procedure to allow the sponsor to delete information not disclosable under Part 20 (presumably trade secret and confidential commercial information) is also unnecessary. FDA regulations already provide that written information is to be disclosed subject to the procedures of Part 20. 21 C.F.R. § 14.75(a) and (b).

In addition, despite agency efforts to provide materials to members as early as possible, briefing materials are frequently being developed by the sponsor and FDA on short notice. It would be extremely difficult to implement your amendments without a tremendous expenditure of resources. Moreover, FOIA and the current regulations make additional procedures unnecessary. Requests from the public for records relating to any advisory committee are handled pursuant to FOIA, and responsive records are purged of information that is exempt under § 552(b)(4) before any public disclosure is made.

b. Separation of functions and *ex parte* communication

As for the proposal to institute a separation of functions policy and to prohibit *ex parte* communications, there are no such legal requirements applicable to advisory committee reviews. FACA does not apply *ex parte* or separation of function rules to advisory committee meetings.[2] *See General Medical Company,* 770 F.2d 214 (D.C. Cir. 1985). Nor would the imposition of such procedures be sound policy. It would be counterproductive for FDA to impose such a restriction on itself. Such restrictions would substantially hinder the agency's work. The role of an advisory committee is to aid the agency in what ultimately are the agency's decisions. FACA §§ 2(b) and 9(b); *Washburn,* 535 F.2d at 107. This advisory role requires frequent exchange of information between committee members and agency officials, a role that would be hindered substantially by the imposition of rules that restrict communications between FDA staff and committee members.

In addition, if FDA denies approval of an application, the applicant has a right to request a public hearing. When FDA holds a formal evidentiary hearing, the agency does observe separation of functions and *ex parte* rules. Both the Administrative Procedure Act[3] and 21 C.F.R. § 10.55 require FDA to do so. To impose separation of functions and *ex parte* communication

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[2] In contrast, the Administrative Procedure Act imposes such rules in formal adjudicatory hearings. *See* 5 U.S.C. § 554(d).

[3] 5 U.S.C. § 554(d).

restrictions at an earlier, less formal stage of the process would be not only cumbersome but unnecessary.

c. Communication through the executive secretary

Current FDA regulations deal with communications with an advisory committee concerning an application or submission. *See* 21 C.F.R. §§ 14.35(a), 14.29(b).

d. Description of the function of the executive secretary

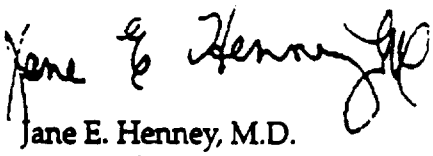
Current FDA regulations describe in detail the functions of the executive secretary or other designated agency employee. *See e.g.* 21 C.F.R. § 14.22(a), (d); 14.27(b); 14.29(b); 14.35(a), (d); 14.60(a); 14.65(b). The Handbook for Committee Members and Executive Secretaries also describes functions of the executive secretary or other designated agency employees.

Additional regulations are not necessary to set forth the role of the executive secretary or other designated agency employees. FDA is expanding the guidance provided to its advisory committee members and executive secretaries as part of the agency's response to the Institute of Medicine (IOM) report on FDA advisory committees.

The agency recognizes the value of a free flow of information. We realize that the advisory committee process is assisted when the parties at a panel meeting are informed about the issues before the Agency and the panel. Although we understand your concerns, the changes you request are either inadvisable or unnecessary, for the reasons discussed above. FDA is, therefore, denying your citizen petition.

Because of your interest in FDA advisory committees, we are sending you a copy of the executive summary of the IOM report. You may obtain a copy of the full report from the National Academy Press, 2101 Constitution Avenue, N.W., Washington, D.C. 20418.

Sincerely yours,



Jane E. Henney, M.D.
Deputy Commissioner for
Operations