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ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
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April 22, 2014

Margaret Hamburg, M.D.
Commissioner
U.S. Food and Drug Administration
10903 New Hampshire Avenue
Silver Spring, MD 20993

Dear Commissioner Hamburg:

Pursuant to Rules X and XI of the U.S. House of Representatives, the Energy and Commerce Committee is examining the development, review, and issuance of a proposed rule by the Food and Drug Administration (FDA) on November 13, 2013, relating to prescription drug labeling changes.[1] If finalized, the rule would contradict the plain language of section 505(j) of the Federal Food, Drug and Cosmetic Act (FFDCA) and effectively obligate generic manufacturers to unilaterally change their labeling to include warnings that differ from their brand-name equivalent or reference listed drug (RLD). As discussed in a bicameral letter we sent to you on January 22, 2014, the Committee has significant questions about FDA's primary motivation for initiating this rulemaking, the agency's legal basis for proceeding in this manner, and the consequences such an approach would have on providers and patients.[2] Further, the Committee is interested in better understanding the involvement of certain individuals and outside organizations in the development and review of the proposal, particularly as it relates to the Supreme Court decision in *PLIVA, Inc. v.* Mensing, 131 S. Ct. 2567 (2011). It is critical that the public have confidence in the impartiality of FDA's regulatory actions.

The process followed by FDA in proposing this rule appears to stand in stark contrast to the approach taken by the agency in developing changes to the content and format of prescription drug labeling under the Clinton administration. At that point in time, FDA determined that "the use of labeling in product liability and medical malpractice lawsuits, together with increasing litigation costs, has caused manufacturers to become more cautious and include virtually all known adverse event information, regardless of its importance or its plausible relationship to the drug" and that the "increase in the length and complexity of prescription drug labeling" has made

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[1] *See* Supplemental Applications Proposing Labeling Changes for Approved Drugs and Biological Products, 78 Fed. Reg. 67985 (proposed Nov. 13, 2013) (to be codified at C.F.R. pts. 314 and 601) [hereinafter November 13, 2013, Proposed Rule].

[2] *See* letter from Rep. Fred Upton, Chairman, H. Comm. on Energy & Com, et al., to Margaret A. Hamburg, M.D., Comm'r, U.S. Food & Drug Admin. (Jan. 22, 2014).

drug" and that the "increase in the length and complexity of prescription drug labeling" has made it "harder for health care practitioners to find specific information and to discern the most critical information in product labeling."[3] In response to these developments and prior to issuing the proposed rule on physician labeling, FDA conducted a number of focus groups, surveys, and public meetings involving providers and the drug industry over the course of several years to discuss "how practitioners use prescription drug labeling, which aspects of labeling are most important to practitioners, and how current labeling can be improved."[4]

Despite FDA's assertion that the primary goal of the proposed rule issued on November 13, 2013 was to "speed the dissemination of new safety information about generic drugs to health professionals and patients,"[5] and contrary to your testimony in front of a House Appropriations Subcommittee on March 27, 2014, that FDA has "certainly had meetings and input from the [generic drug industry] and others,"[6] the only outside interest group agency officials apparently met with while developing the proposal was the American Association for Justice (AAJ), otherwise known as the Association of Trial Lawyers of America. On April 1, 2014, in testimony before the Energy and Commerce Subcommittee on Health, Dr. Janet Woodcock, Director of FDA's Center for Drug Evaluation and Research (CDER), informed the Health Subcommittee that while FDA did not in fact meet with the generic drug industry, branded drug industry, physicians, or pharmacists, it was her understanding that "part of the agency did meet with the trial lawyers."[7]

On January 29, 2014, FDA stated in response to a letter from Representative Yoder that while "FDA generally does not participate in a dialogue during the development of proposed rules, there are occasions when FDA staff will participate in a listen-only session with interested parties" and that on February 15, 2013 "FDA's Chief Counsel and others" met with AAJ's regulatory counsel as well as a lawyer and a lobbyist closely associated with the organization.[8]

Based on FDA's stated rationale for proposing this rule, and considering the agency's past concerns about the impact tort litigation has had on effectively communicating appropriate warning information to physicians, it is not at all clear why plaintiffs lawyers would have any role in the development and review of the proposed rule. Since the early 1970s and for reasons appropriately focused on the importance of labeling in the doctor's office and not the courtroom, FDA has vigorously defended its role as gatekeeper in this process.[9] For example, in 2008, FDA

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[3] Requirements on Content and Format of Labeling for Human Prescription Drugs and Biologics; Requirements for Prescription Drug Product Label, 65 Fed. Reg. 81082, 81083 (proposed Dec. 22, 2000) (codified at 21 C.F.R. Pt. 201).

[4] *Id.*

[5] November 13, 2013, Proposed Rule, *supra* note 1.

[6] *FY 2015 Budget Hearing – Food and Drug Administration: Hearing Before the Subcomm. on Agric. Rural Dev., Food and Drug Admin., and Related Agencies of the H. Comm. on Approps.*, 113th Cong. __ (Mar. 27, 2014) (draft transcript on file).

[7] *Examining Concerns Regarding FDA's Proposed Changes to Generic Drug Labeling: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Com.* 113th Con. 45 (Apr. 1, 2014) (draft transcript on file).

[8] Letter from Walter S. Harris, Dep. Comm'r for Operations, U.S. Food & Drug Admin. to Rep. Kevin Yoder (Jan. 29, 2014) .

[9] *See* DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 616 (In 1972, FDA Commissioner Donald Kennedy stated that the approval of labeling was a core responsibility of the FDA "just as equivalent in stature and burden, as the evaluation of safety and efficacy. . . .").

> A critical part of FDA's mission is its review of the adequacy of labeling. FDA carefully controls the content and labeling of medical products, because such labeling is FDA's principal tool for educating health care professionals and consumers about the risks and benefits of the approved products to help ensure safe and effective use. FDA employs scientists and other experts to review the information submitted by the manufacturer on a product's risk and carefully calibrate warnings and other information that should be placed on the labeling. FDA continually evaluates the latest available scientific information to monitor the safety of products and to incorporate new information into product labeling when appropriate.
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> FDA takes care that labeling neither underwarns nor overwarns. FDA works to ensure that approved labeling not omit important risk information that patients and physicians should consider in making healthcare decisions. FDA further works to ensure that less important risks not be presented in a way that detracts from important risk information, and that risk information not adequately supported by scientific information not be presented in labeling, as such unsupported information could deter beneficial use of medical products.
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> ....
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> FDA abides by standards set forth in regulations and guidance documents that are issued through a public process. FDA is the scientific regulatory body that is publicly accountable for effectively executing its mission of protecting and promoting the public health. FDA also believes, as explained in more detail below, that state court actions that undermine FDA decisions may have the consequence of serving to hinder, rather than help, public health.
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> ....
>
> FDA is [ ] concerned that state tort actions would create requirements on manufacturers to seek to amend labeling to include warnings of speculative risks or warnings that do not accurately communicate FDA's careful evaluation of the risks and benefits of the product. Including warnings in the labeling without a determination by FDA that they are well-grounded in science can have the effect of overwarning and confusion as well as deterring use of a beneficial drug.[10]

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[10] *The Safety of Medical Products Regulated by FDA: Hearing Before the House Comm. On Oversight & Gov't.*

This testimony echoes positions the agency has taken over numerous administrations. We share these longstanding views, and in fact are *very* concerned that the result of this proposed rule would be therapeutically equivalent products with different warnings and contraindications based on companies taking actions to mitigate litigation risks—not based on communicating genuinely new risks to patients. These concerns are not, as some members asserted during the hearing on April 1, just concerns raised by the drug industry and critics of the proposed rule. As FDA itself stated in 2011, "situations where a [generic manufacturer] alone has a basis to believe stronger warnings should be added to its drug's approved labeling have not been known to arise frequently."[11]

If FDA is in fact interested in having a conversation about creating an orderly process—consistent with the statute—that would provide physicians, pharmacists, and patients with new evidence-based safety information in a timely yet responsible manner, we are ready and willing. If FDA is interested in establishing timeframes by which generic manufacturers must make conforming changes to ensure consistency with other therapeutically equivalent products, we are open to having such a dialogue.

Should the agency be open to discussing alternative approaches, please contact Committee staff to schedule an appropriate time to do so. In the meantime, please provide the Committee with all documents and communications, including meeting minutes, referring or relating to the February 15, 2013, meeting with representatives from the AAJ by no later than May 6, 2014. In addition, as was requested in the aforementioned January 22, 2014, letter, please provide the Committee with the names of all executive branch employees outside the FDA who were involved in the decision to proceed with this proposed rule or who participated in drafting or reviewing it. The Committee reserves its rights to all documents and communications between and among such individuals, in addition to the participants of the February 15, 2013, meeting, referring or relating to the proposed rule. Should you have any questions about these requests, please contact John Stone with the Committee staff at (202) 225-2927.

Sincerely,

Fred Upton
Chairman

Joseph R. Pitts
Chairman
Subcommittee on Health

[11] Brief for the United States as Amicus Curaie at 20-21, PLIVA, Inc. v. Mensing, 121 S. Ct. 2567 (2011).

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