ONE HUNDRED EIGHTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515–6115

JOE BARTON, TEXAS
CHAIRMAN

May 28, 2004

The Honorable David M. Walker
Comptroller General
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Comptroller General Walker:

We are writing to ask you to investigate the decision by the Food and Drug Administration (FDA) to find "non-approvable" an application to make emergency contraception available over the counter (OTC) without a prescription. This decision was made by Dr. Steven Galson, acting director of the FDA's Center for Drug Evaluation and Research and reversed the recommendations of his own staff and the Nonprescription Drugs Advisory Committee and the Reproductive Health Drugs Advisory Committee, which had voted 23-4 to make this drug, known as "Plan B," available to the public without a prescription. Plan B is available without a prescription in 33 other countries and six U.S. states.

This decision was particularly puzzling because on December 16, 2003, these panels made the following additional findings in favor of the OTC sale prior to the final vote:

- A unanimous vote (28-0) determining that the drug was safe for use in a non-prescription setting.
- A unanimous vote (28-0) determining that there was no evidence that non-prescription availability of Plan B would lead to its substitution for regular use of other contraceptives.
- A 27-1 vote that the data from the actual use study submitted by the applicant was generalizable to the overall population of potential non-prescription users of Plan B.

There also have been allegations of improper outside influence ("Two FDA Officials Urged to Resign over Plan B," *The Washington Post*, May 13, 2004).

The stated reason given by Dr. Galson in the non-approval letter was that Barr Research, Inc., the applicant, had not provided adequate data to support a conclusion that Plan B can be used safely by young adolescent women for emergency contraception without the professional supervision of a licensed practitioner. Dr. Galson said that this concern had been raised by the joint committee chairman and the other three members who voted against the OTC sale. Although not stated in the non-approval letter, in a subsequent press article Dr. Galson was quoted as saying that he was concerned that Barr Research had not submitted sufficient evidence to show that girls under 14 would not discontinue use of condoms, which serve as a birth control method and also as protection against sexually transmitted diseases, if OTC emergency contraception was available. He also said he was concerned that access to Plan B would increase the rates of sexual activity among younger girls ("FDA Drug Chief Says He Made 'Morning After' Pill Decision," *The Washington Post*, May 8, 2004; "Morning-After-Pill Ruling Defies Norm," *The New York Times*, May 8, 2004).

Dr. Galson has stated that it is unusual to go against both the recommendations of his staff and two advisory committees in refusing to approve a drug for over-the-counter use. He also has admitted that the "[w]ide availability of safe and effective contraceptives is important to public health" (May 6, 2004, letter from Dr. Steven Galson to Barr Research, Inc.). Initial estimates are that 1.5 million pregnancies a year could be prevented with the use of Plan B, a not inconsequential public health contribution, considering the risks of pregnancy, especially to women under 16 who have higher percentages of complications during pregnancy and of delivering underweight babies with additional health problems. This is the very group that Dr. Galson has said he is most interesting in protecting.

We are very concerned that the FDA may have not followed its own processes for approving OTC drugs when considering Plan B, concerns that have also been voiced in the media and by members of the advisory committees. Therefore, we are requesting that GAO review the process used by the FDA in rejecting this drug and address the following questions:

1. Is it routine for the FDA to consider whether persons under 16 will access OTC drugs or devices and use them improperly when determining whether they should be approved for OTC use? Are there any other OTC drugs or devices for which separate studies of their use by persons under 16 was required before approval, particularly when the advisory panel had already concluded that the actual use study data was "generalizable" to all potential users?

2. In previous reviews of birth controls drugs, the FDA has determined that all users, regardless of age, are to be treated equally. What is the basis for changing that position for this method of birth control? Is there any data to suggest there is a safety problem or a problem with unintended health consequences in the 30 years of pharmakovigilance data on use of levonorgestrel contraceptive pills?

3 Would it be possible to obtain parental permission for a study of 11-14-year-olds sexual behavior with and without access to Plan B?

4. In reviewing Plan B for OTC sale, did Dr. Galson change the value given to the public health benefit to women, particularly those under 17, from avoiding pregnancy when compared with the risks of use by the public? Did FDA require that a lower level of risk be achieved for Plan B than for other drugs before OTC sale would be approved?

5. What is the criteria for "safe use" by persons under 16?

6. In the past 10 years, how many times and for what drugs has the director or acting director of the Center for Drug Evaluation and Research (CDER) rejected the recommendation of the advisory committees and/or the FDA staff for OTC drugs? What review of the record did Dr. Galson undertake? With whom did he consult?

7. Who made the decision to issue a letter of non-approval? Was there communication with the chairman, other dissenting members of the Joint Advisory Committee or any other persons outside of the CDER after the December 16, 2003 vote? Were those communications recorded in the New Drug Approval docket for Plan B?

8. Is it routine for the director or acting director to sign approval or non-approval letters? How often has this occurred in the past 10 years and for what OTC drugs?

9. Did persons under Dr. Galson who would normally sign non-approval letters refuse to sign this letter?

10. What role, if any, did political appointees at FDA, the Department of Health and Human Services, or elsewhere play in this decision? Did they communicate with Dr. Galson in any way?

11. When and by whom was it determined that the information that the FDA had requested on adolescent use was "extensive enough to qualify as a major amendment" to the New Drug Application?

12. How many OTC drugs in the past 10 years have ultimately received approval from the FDA after receiving a non-approval letter?

If you have any questions about this request or require further clarification, please have your staff contact Edith Holleman, Minority Counsel, at (202) 226-3400.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

LOIS CAPPS
MEMBER

cc: The Honorable Joe Barton, Chairman
Committee on Energy and Commerce

The Honorable Michael Bilirakis, Chairman
Subcommittee on Health

The Honorable Sherrod Brown, Ranking Member
Subcommittee on Health