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Dockets Management Branch
Food and Drug Administration
12420 Parklawn Drive, Room 1-23
Rockville, Maryland 20857

Re: Docket No. 98P-0610/CP1 (Rx-OTC Switch of Antihistamine Drugs)

The Pharmaceutical Research and Manufacturers of America (PhRMA) submits these comments following the joint meeting of the Nonprescription Drugs Advisory Committee and the Pulmonary-Allergy Drugs Advisory Committee held May 11, 2001, to consider the citizen petition submitted by Blue Cross of California. The citizen petition requests that FDA switch three second-generation antihistamines (fexofenadine HCl, loratadine, and cetirizine HCl) from prescription to nonprescription status over the objections of their manufacturers.

PhRMA represents the country's leading research-based pharmaceutical and biotechnology companies, which are devoted to inventing medicines that allow patients to lead longer, healthier, and more productive lives. Investing over $30 billion this year in discovering and developing new medicines, PhRMA companies are leading the way in the search for cures. PhRMA's members are the source of nearly all new drugs that are discovered, made, and used worldwide. Virtually all major new nonprescription drugs are based on the prescription drugs that are discovered and developed by PhRMA members. PhRMA therefore has a vital interest in the issues presented by the citizen petition.

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PhRMA opposes the citizen petition. The petition constitutes an unprecedented call for governmental interference in the drug development and marketing decisions of private firms. Granting the petition would represent poor public health policy and would violate the legal rights of the NDA holders under the Federal Food, Drug, and Cosmetic Act (FD&C Act) and U.S. Constitution for reasons previously set forth in submissions by PhRMA and other interested persons.

PhRMA has participated extensively in FDA's proceedings to consider this petition and related issues. On June 28-29, 2000, FDA held a public hearing to consider issues relating to over-the-counter drug products, including switch issues. Copies of PhRMA's hearing testimony and post-hearing comments are attached hereto and thereby made part of this record. More generally, because of the direct relevance of that hearing to this proceeding, PhRMA requests that the entire record of the earlier hearing (Docket No. 00N-1256) be made part of the administrative record for the citizen petition and that it be considered by FDA in making a decision on the petition.

As made clear in PhRMA's previous testimony and comments, FDA lacks the statutory and constitutional authority to switch any prescription drug over the objection of the sponsor without providing a formal hearing, and a forced switch would violate the sponsor's proprietary rights in its safety and effectiveness data. The FD&C Act, the Administrative Procedure Act, and the Constitution all require a formal hearing to change the terms of a sponsor's approved new drug application in such a fundamental fashion. Moreover, the FD&C Act, Constitution, and other federal laws recognize and protect a sponsor's rights in its safety and effectiveness data, the use of which would be essential to a switch. The legal issues are discussed in further detail in

submissions to the citizen petition docket made on May 11, 2001, by Covington & Burling and on May 24, 2001, by Hyman, Phelps & McNamara, P.C., and PhRMA endorses those comments. While the recent submission by Blue Cross (now Wellpoint) on FDA's authority may be the subject of specific rebuttal by one or more interested persons at a later date, nothing in that submission undercuts the legal and policy analysis previously presented by PhRMA.

PhRMA also presented testimony and responded to questions at the recent joint advisory committee meeting convened to consider the citizen petition. Rather than summarizing or repeating its earlier submissions, PhRMA wishes to take this opportunity briefly to discuss two additional issues that became clear at the joint advisory committee meeting.

First, FDA's willingness to consider switching these drugs with as little supporting data as exists in the record is a clear and arbitrary departure from established evidentiary standards for switch applications. The typical switch application, submitted through the NDA process, contains extensive safety and effectiveness data as well as actual use and label comprehension studies. Such data are entirely lacking here. Indeed, there is not even a proposed label to review. Had one of the second-generation antihistamine manufacturers requested a switch through an NDA as thin and unsupported as the petition here, FDA surely would have refused to file it. It is the essence of arbitrary and capricious action for an agency to apply different standards to similar situations. *See, e.g.*, *Independent Petroleum Ass'n* v. *Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996); *Airmark Corp.* v. *FAA*, 758 F.2d 685, 691-692 (D.C. Cir. 1985); *United States* v. *Diapulse Corp.*, 748 F.2d 56 (2d Cir. 1984) (FDA is required to act

"evenhandedly" and cannot "treat like cases differently"). In order to act consistently, FDA must reject the citizen petition.

Second, FDA's restriction of the issues to be considered at the meeting and its narrow framing of the questions put to a vote raise significant concerns about the agency's use of advisory committees. The purpose of an advisory committee meeting, obviously, should be for FDA to obtain the advice of outside experts, unrestrained by preconceived notions of how the matter should be decided. *See* FD&C Act § 505(n) (added by FDAMA § 120); FDA, *Guidance for Industry, Advisory Committees: Implementing Section 120 of the Food and Drug Administration Modernization Act of 1997* (Oct. 1998), at 1 ("Through the advisory committee system, FDA is able to secure independent professional expertise in accomplishing its mission and maintaining the public trust.").

Here, however, FDA prevented the advisory committee members from addressing scientific and regulatory issues they deemed relevant to the task at hand. This is shown most clearly in the remarks of Dr. Vollmer (transcript, pp. 316-317):

> I feel compelled to state that, while I voted yes, it was under some duress and that I was trying to be compliant with the mandate that you have given us and the conditions under which we are supposed to be providing the advice.
>
> So you have made some assumptions which have been challenged throughout the day about [whether we] should be looking at other things. You said, "Well, that is not what we are supposed to be talking about today."
>
> I really think that there have been a number of relevant issues raised. Most notably is the actual-use-study that you said is off-bounds. So, therefore, trying to focus just on the safety data at hand, I have given a vote but it really makes me feel uncomfortable.

Similarly, Dr. Kelly said that he "would like to second what Dr. Vollmer said" and that he "really ha[s] the same concerns" (transcript, p. 319).

It hardly serves the purposes of "secur[ing] independent professional expertise" and "maintaining the public trust" for FDA to restrict advisory committee members' deliberations so severely that they feel under "duress" and "uncomfortable" about their votes. Given the limitations imposed by the agency, the nominally favorable votes here for OTC status deserve little if any weight in FDA's continued consideration of the issues raised by the petition.

Conclusion

For the reasons set forth above and in PhRMA's other submissions and testimony, the citizen petition should be denied.

Respectfully submitted,

Matthew B. Van Hook

Enclosures:

- Testimony of R. Bantham/PhRMA, June 28, 2000 (Docket No. 00N-1256; Public Hearing Re Regulation of OTC Drug Products)
- PhRMA Post-Hearing Comments, August 25, 2000 (Docket No. 00n-1256)