Date: September 6, 2022

A. Action Requested

The undersigned submits this petition under 21 U.S.C. 301 et seg., and the Public Health Service Act, 42 U.S.C. 301 et seq. and other statutory provisions delegated to the Commissioner of Food and Drugs to request the Commissioner of Food and Drugs to amend labeling regulations to require label updates for generic drugs once the reference drug's patents and exclusivities expire and new information is available.

B. Statement of Grounds

This petition demands the Food and Drug Administration (FDA) use its authority under the Food, Drug and Cosmetic Act (the FD&C Act), 21 U.S.C. 301 et seq., and the Public Health Service Act (the PHS Act), 42 U.S.C. 301 et seq., to require manufacturers to independently update the labeling of generic drugs to reflect new scientific evidence, updated requirements for format or content, new clinical uses or other changes to benefit public health and safety.

Labeling, commonly referred to as "package insert" or "prescribing information," provides healthcare practitioners with the essential information necessary to make medical decisions on which drug to prescribe -- enhancing safety, efficacy and reducing the likelihood of medication errors.

In January 2020, the MODERN Labeling Act, codified in Section 503D to Chapter V of the FD&C, 21 U.S.C. 351 et seq., permits FDA to require generic drug manufacturers to update the labeling for generic drugs to eliminate a safety gap for patients. The law states FDA may require a generic drug manufacturer to update a medication's label where:

- There is new scientific evidence available pertaining to the existing conditions of use;
- The approved labeling does not reflect current legal and regulatory requirements for content or format;
- There is relevant accepted use in clinical practice that is not reflected in the approved labeling; or,
- Updating the labeling would benefit the public health. 503D(a)(1).

The Act, however, does not require drug manufacturers to take any independent action.

These critical labeling changes can be made only when FDA identifies a product, determines there is a basis for updating the labeling, notifies the manufacturer, documents the need and provides a "clear statement regarding the additional, modified or supplemental information" for the labeling. The drug maker has 30 days to respond and challenge the FDA's determination.

The Act does not require generic drug makers to monitor the safety or efficacy of the medications they sell. Change occurs only after a specific request from FDA.

When the FDA authorizes a medication, it also approves the drug's labeling. The agency's regulations require brand-name manufacturers to update the hazards associated with their products. Brand-name manufacturers can strengthen warnings or contraindications, clarify

After knee replacement surgery, I was prescribed hydrocodone-bitrate 325-10, a generic drug manufactured by Qualitest Pharmaceuticals. After suffering agonizing abdominal pain, bloating and an inability to relieve myself, I was rushed to the hospital.

I was diagnosed with acute renal failure and a catheter inserted to ease the swelling and pain. After more than eight years, I'm still battling these so-called side effects and undergoing physical therapy to mitigate the damage.

It is clear from information gathered from the FDA and medical journals that acute renal failure has been reported by a significant number of patients after using this drug. Despite these known side effects, the generic drug sold by Qualitest offered no warning.

This failure to warn places Americans in a real-life Catch-22 that requires them either through, law, dictates of their health insurers or cost, to substitute generic for brand-name drugs. We suffer without recourse when we are harmed.

Safety issues and deficient drug labeling often emerge only after a medication has been on the market for many years. One study concluded, "only half of newly discovered serious [adverse drug reactions] are detected and documented in Physician's Desk Reference within 7 years after drug approval."

Protecting patient safety is at the core of the FDA's mission.

The FD&C and the PHS Act provide the FDA with authority over the labeling for drugs and biological products and authorize the agency to enact regulations to facilitate its review and approval of applications regarding labeling for these products.

It is time for the FDA to use its vast authority to ensure the safety and efficacy of medications to protect the public, most of whom can expect their treatment to include these copycat drugs – drugs that may well offer out-of-date and substandard safety and use instructions.

In 2018, FDA withdrew a proposed rule that would have allowed generic drug companies to independently update and distribute new safety information on the labels of their drugs without prior approval using the "changes-be-effected" process now given to brand-name manufacturers.

Then FDA Commissioner Scott Gottlieb wrote:

"And let us be very clear – the withdrawal of the 2013 proposed rule does not change the ongoing obligations under the FDA's current regulations for all drug manufacturers to take steps to update their product labels when new information becomes available that cause the label to become inaccurate, false or misleading."

Generic drug companies which hold an ANDA approval maintain they don't gather or possess the information need to make changes on their own. They contend that requiring them to gather the safety, efficacy and scientific information would be unduly burdensome and costly, costs that would drive up drug prices.

instructions for use and make other changes without first obtaining FDA approval under a process known as "changes-being-effected."

Labels on generic drugs mimic those of the corresponding brand name drug, known as the reference listed drug or RLD. If the branded RLD manufacturer changes the label, the generic drug maker must revise its own labeling "at the very earliest time possible" under the "sameness" requirement put in place by the 1984 Hatch-Waxman Act.

Lower-priced generic drugs now make up nine of every 10 prescriptions dispensed in the United States, according to the 2021 annual report of the Office of Generic Drugs of the FDA. Historically, brand-name manufacturers stop selling these reference drugs within a few years of generics entering the market. Once their products are withdrawn, the RLD makers no longer track tracking safety and efficacy of these products and stop updating package inserts and prescription information. With no changes to mimic, the generic drug labels become frozen in time.

Despite their market dominance, generic drug manufacturers have no responsibility to update safety information, warnings and instructions for use. Decisions from the federal and U.S. Supreme Court concluded a patient injured because a generic manufacturer failed to warn of a serious risk, or provided unclear or misleading instructions for use, is unable to seek compensation.

This concept of "sameness" became the critical factor in U.S. Supreme Court decisions that effectively conferred immunity from liability on generic drugs. A five-justice majority concluded since generic companies aren't allowed to update their own labels – the labels must be the same as those of the brand-name manufacturer -- they should not be held liable for failing to issue updated warnings.

A successful legal action to force changes now depends on whether consumers happened to receive a brand-name or a generic drug. Brand-name manufacturers still face tort liability. Generics do not.

In a 2011 decision, PLIVA, Inc. v. Mensing, Supreme Court Justice Clarence Thomas acknowledged consumers would see "little sense" in the decisions as their claims would not have been preempted if a brand-name drug had been dispensed.

Supreme Court Justice Clarence Thomas acknowledged "the unfortunate hand that federal drug regulation has dealt." The Mensing opinion added a quotation from Justice Thomas' comments in another case, "it's not this Court's task to decide whether the statutory scheme established by Congress is unusual or even bizarre."

The effects dealt by this "unfortunate hand" are counted in human suffering: skin diseases that disfigure, gangrene that forces amputation, severe neurological disorders, blindness and renal failure, among others. My own story illustrates the damage.

FDA annual reports tout the numbers of new generics approved, the benefits of competition, its commitment to monitoring, its policies toward supporting the efficient development of safe, high quality and affordable generics and its approach to safety and surveillance.

The agency's inaction and tacit approval add credibility to labels and warnings that may or may not be current and may or may not divulge dangerous side effects.

The FDA must fulfill its mission to protect consumers who, given recent court rulings have no recourse, by requiring generic drug manufacturers to comply with their ongoing obligations and take the steps needed to independently update their labels.

Consumers have no recourse.

C. Environmental Impact

We claim categorical exclusion under 25.30, 25.31, 25.32, 25.33 or 25.34 of this chapter or an environmental assessment under 25.40.

D. Economic Impact

The Congressional Budget Office estimated that implanting a revised labeling plan would could cost less than $500,000 over a four-year period. The CBO estimated the cost to the private sector as less than $168 million a year.

E. Certification

The undersigned certifies, that, to the best knowledge and belief of the undersigned, this petition includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioner which are unfavorable to the petition.

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