COMMENTS OF PUBLIC CITIZEN, INC.
REGARDING THE FOOD AND DRUG ADMINISTRATION'S PROPOSED RULE ON MUTUAL RECOGNITION OF FDA AND EUROPEAN COMMUNITY MEMBER STATE CONFORMITY ASSESSMENT PROCEDURES

Docket No. 95N-0185

Public Citizen submits these comments in response to the Food and Drug Administration's (FDA) proposed rule to allow FDA to endorse good manufacturing practice (GMP) inspection reports for pharmaceuticals provided by equivalent European Community (EC) regulatory authorities as well as certain medical device evaluation reports provided by equivalent conformity assessment bodies (CABs), published in the Federal Register on April 10, 1998. Our comments regarding the two FDA-related sectoral annexes of the Agreement on Mutual Recognition between the United States and the EC ("the MRA") are based on three fundamental principles: (1) the paramount goal of FDA's participation in the MRA must be to safeguard the public health of the people in the United States, (2) equivalence of inspection systems should be found only when an equivalence determination would improve (or equally maintain) public health, and (3) our domestic, democratically-accountable policy making process must be maintained. In these comments, we address our concerns with the proposal and offer specific suggestions to ensure that FDA's participation in the MRA does not undermine the public health.

The Interests of Public Citizen

Public Citizen, a not-for-profit lobbying and advocacy group founded by Ralph Nader in 1971, works in Congress, in courts and in federal agencies for government reforms that serve the public interest. Public Citizen has approximately 120,000 supporters

nationwide. Since its founding, Public Citizen has worked to strengthen the ability of citizens to participate in the domestic policy-making process and to assure public health and safety. In particular, Public Citizen's Health Research Group has actively monitored the activities of the FDA over the years and has fought for safe, effective, and affordable drugs and medical devices. For the past six years, Public Citizen has worked to educate the American public about the enormous impact of international trade and economic globalization on our nation's health, safety, and environmental standards, democratic accountability, and policy-making procedures. Public Citizen submits these comments to ensure that the MRA does not diminish the safety and effectiveness of our drugs and medical devices.

The Proposed Rule

The United States has a worldwide reputation for the highest quality drugs and medical devices. The reason for this well-deserved reputation is simple -- a strong FDA with a public health mandate to ensure that the drugs and medical devices that reach the U.S. public are safe and effective. The proposed rule would replace FDA-conducted inspections of foreign pharmaceutical plants and FDA review of foreign medical devices with inspections and evaluations conducted by foreign regulatory authorities and private CAB's determined to be equivalent by the United States and the EC jointly. Making such equivalence decisions without exacting review of the foreign regulatory system poses a significant risk of harm to public health and safety in the United States.

"Equivalence" between U.S. and foreign inspections and medical device evaluation systems should be found only in those circumstances in which the foreign procedure -- after careful public examination of the evidence -- meets or exceeds the level of public health protection, enforceability, transparency and effectiveness of the U.S. system. An erroneous determination of equivalence will lower the safety and quality of our drugs and medical devices and expose the American public to an increased risk of harm.

Public Citizen's specific comments regarding the proposed rule implementing the MRA follow:

1. Public Participation

One key feature missing in the proposed rule is mechanisms for the public to participate in the equivalence determination process. Whenever a federal agency seeks to determine that the regulatory system used by a foreign country is "equivalent" to the regulatory system of the United States, public participation is crucial. Yet, FDA has not spelled out any role for the public or for consumer and non-government health organizations in the equivalence assessment process.

At a bare minimum, the factual basis for a determination of equivalence should be publicly available and clearly understood. A Federal Register notice should spell out the details by which a foreign regulatory authority meets the specific equivalence criteria set forth at Appendix D of Subpart A. Here in the United States, the public must also have the opportunity to participate in

the process. Public input should be solicited throughout the three-year transition period, and as soon as FDA determines which foreign regulatory systems and CABs will be reviewed to determine whether they are equivalent to ours. Public input at the initial stages of the review process would inform the agency's design of its review to ensure that the concerns of public health and safety experts and consumers are taken into account before the review process moves forward. For example, public comments may suggest that a proposed equivalence determination for a particular regulatory authority exclude certain types of inspections, product classes or processes, or may offer guidance on particular regulatory practices of a foreign country that must be considered. Not only should initial notices be published in the Federal Register as FDA conducts its equivalency review, but notice of a preliminary equivalence determination must be published for public comment. The final determination should take into account the comments received, and when published, should explain why the agency accepted or rejected the comments.

2. On-going Verification

Public Citizen supports the proposed rule's recognition that an equivalence assessment must be based not only on information exchanges, but also on joint training and joint inspections. And, as the proposed rule recognizes in section 26.15, it is critical that there be monitoring and verification of on-going equivalence. Verification of equivalence must include on-going training of European inspectors, on-going joint inspections, and periodic on-

site visits. Moreover, the proposed rule should provide for a periodic expiration of an equivalence determination that is no more than three to five years following the initial determination. In the United States, as the expiration date approaches, FDA should publish a notice in the Federal Register for public comment on whether the equivalence determination has worked and should be renewed. Before renewing an equivalence determination, the United States should verify that the foreign country's or CAB's procedure continues to meet or exceed the level of public health protection, enforceability, and effectiveness of the U.S. system.

3. Public Access to Records

The proposed rule fails to provide for a key verification procedure -- public disclosure to ensure accountability. Before a foreign regulatory authority or CAB is found to be equivalent to what is provided for here in the United States, FDA must ensure that the foreign system allows public access to information about its regulatory activities so that the public can conduct an independent verification of on-going equivalence.

A key element of the U.S. regulatory system that ensures consumer confidence in the safety of our drugs and medical devices is the public's ability to obtain access to information about the enforcement activities of agencies like FDA. In order for U.S. consumers to maintain confidence in the safety provided by an "equivalent" inspection system, the foreign system must allow public access to information about its regulatory activities -- either through mechanisms readily accessible to U.S. consumers

through the foreign government or through the U.S. government -- so that U.S. consumers can verify that the foreign government's activities prevent unsafe or ineffective products from being exported into the United States.

In the United States, the public has access to a myriad of information about FDA activities and the safety and effectiveness of drugs and medical devices through the agency's web page, Federal Register notices, and by visiting the public reading room. FDA publishes notices of recalls, and routinely makes its adverse reaction data public. Moreover, the Freedom of Information Act (FOIA) is an important safeguard to assuring that our drugs and medical devices are safe and effective because it allows the American public and press to find out what agencies like FDA are up to and to hold our public officials accountable for their actions. No equivalence determination should be reached unless the foreign system allows the public independently to verify adequacy through a FOIA-type procedure or other mechanisms that ensure public access to information.

Not only does the proposed rule fail to guarantee that foreign government records are available to the same extent U.S. government records would be, but it specifically allows an inspecting country to hold documents confidential to the extent allowed by its law, even if that law is not as disclosure-oriented as U.S. law. See § 26.76. FDA should not agree to keep secret data that is disclosable in the United States, simply because it would not normally be released by a foreign government. The proposed rule

should be amended to ensure that the U.S. public has access to information about foreign inspections and evaluations to the same extent the information is available when inspections and evaluations are conducted in the United States.

4. FDA's Authority to Determine Equivalence

The United States's participation in the MRA must not undermine the FDA's authority to safeguard the public health, yet certain provisions in the proposed rule implementing the MRA would do just that.

First, the proposed rule provides that equivalence determinations and subsequent suspensions are made jointly by both the United States and the EC, not by the importing country alone. See §§ 26.9, 26.16, 26.17, 26.47, 26.73. Yet, in order to maintain countries' sovereign prerogatives to protect the health and safety of their citizens, importing countries must have the sole authority to determine that a foreign inspection system or that a foreign CAB is "equivalent" to their own. Although it makes sense for an exporting country to develop the case for equivalence based on input from the importing country, it must be the importing country that has complete control over the final decision.

Under the proposed rule, the United States does have de facto sole authority to make an equivalence determination since equivalence is not found until there is joint agreement and the United States could simply refuse to agree. However, the proposed rule undercuts this fundamental right by providing that, when a country contests the equivalence of a regulatory authority, the

issue is first presented to the Joint Sectoral Committee for discussion and efforts to reach unanimous consent; if no agreement is reached, the matter is referred to the Joint Committee; if after 30 days no joint agreement is reached, than the equivalence determination will be suspended. This provision means that if the United States determines that a foreign regulatory system or CAB is not equivalent to ours, an extended negotiation must ensue rather than an immediate suspension. Instead, the proposed rule should provide for immediate suspension first, and then referral to the Committee process for discussion and negotiation. Because a finding of equivalence should be based on the importing country's judgment -- not on the joint judgment of the United States and the EC -- we urge FDA to amend the proposed rule to provide that an importing country has an absolute right to reject an exporting country's request for an equivalence determination and an absolute right to terminate an equivalence determination at any time.

Second, the proposed rule further undercuts the importing country's fundamental right to make an equivalence determination on its own by providing that an importing country will accept inspection reports from exporting countries that have not been found to be equivalent when the country conducts a joint inspection with another equivalent country. See Sec. 26.11(b). We strongly oppose the concept of "piggy back" equivalence such as proposed here. Such arrangements take away the authority of the United States to make its own equivalence determination, eliminate the ability of the American public to participate in the equivalence

determination process, and could saddle the United States with endorsing and relying on inspection or evaluation reports that do not provide sufficient safeguards.

5. FDA Resources and Increased Inspections

FDA must make a commitment to seek the additional resources necessary to conduct the on-going verification activities that are critical to ensuring equivalence determinations do not undermine the public health. Even without the additional responsibilities the MRA imposes -- the information exchange, on-going training, and joint inspections required in making and verifying equivalence assessments -- FDA has failed to adequately ensure the safety and quality of the increasing volume of foreign-produced drugs imported daily into the United States.[1]

Implementation of the MRA has the positive potential of increasing periodic surveillance inspections of all foreign pharmaceutical manufacturers -- one of the GAO's key recommendations for improving foreign drug safety.[2] Yet, FDA states that "FDA does not anticipate an increase in the total number of inspections, and in fact, the coverage intensity of FDA inspections in the EC would continue to fall during the transition period, as it has been for the past several years." 63 Fed. Reg. 17746. We urge FDA to use the additional inspection opportunities offered by the determination that foreign regulators provide

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[1]United States General Accounting Office, Improvements Needed in the Foreign Drug Inspection Program, GAO/HEHS-98-21 (March 1998).

[2]Id. at 34.

equivalent inspections to improve surveillance of foreign pharmaceutical manufacturers, not to simply maintain the inadequate status quo. In addition, FDA must devote substantial resources to ensuring that the inspections are truly equivalent by conducting on-going verification activities.

6. Privatization

Public Citizen is concerned with the movement toward privatization reflected in the MRA and proposed rule, which would allow medical device quality system evaluation and certain premarket evaluation requirements to be conducted by non-governmental bodies. The U.S. system of third party review established last year by the FDA Modernization Act is brand new, and has yet to be fully implemented or evaluated. Likewise, the EC system of private-organization review is new, and it is "too early to evaluate its success in ensuring the safety of medical devices and bringing them to market in an efficient manner."[3] Therefore, on-going verification of the evaluation reports produced by the CAB's are vital to ensuring the safety and effectiveness of medical devices.

The potential for conflicts of interest are substantial in a system of private review. FDA must review the conflict-of-interest rules and the implementation of those rules in a foreign country before finding equivalence. Indeed, GAO reports that EC reviewers are subject to less comprehensive conflict-of-interest rules than

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[3]United States General Accounting Office, Medical Device Regulation: Too Early to Assess European System's Value as Model for FDA 18 GAO/HEHS-96-65 (March 1996).

FDA reviewers.[4] Thus, the proposed rule should ensure that a foreign regulatory authority offers the same level of protection against conflicts of interest that the U.S. system offers, before an equivalence determination is made.

Another concern with private systems of review is the lack of transparency. In order to provide the American public with the ability to monitor and verify the evaluations conducted by CABs, the public should have access to CAB records to the extent those records would be available if the review was conducted by FDA. The proposed rule should provide mechanisms of public access to CAB processes.

Conclusion

Public Citizen urges FDA to incorporate the above suggestions in the final rule implementing the MRA. In particular, we urge FDA to incorporate additional public participation mechanisms in the equivalence assessment process; devote the necessary resources to ensure that on-going verification is conducted; ensure that a foreign country has strong information disclosure and conflict-of-interest requirements before equivalence is found; and strengthen the United States's authority to suspend an equivalence determination without the need to negotiate. We welcome the opportunity to submit additional comments during the transition

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[4] Id. at 15.

period, and to participate in any public meeting on the equivalence assessment process.

Respectfully submitted,

Lucinda Sikes
Staff Attorney
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009

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