November 25, 2016

Division of Dockets Management
Food and Drug Administration
Department of Health and Human Services
5630 Fishers Lane, Room 1061
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COMMENTS ON
PROCEDURES FOR EVALUATING APPEARANCE ISSUES AND GRANTING AUTHORIZATIONS FOR PARTICIPATION IN FDA ADVISORY COMMITTEES
DRAFT GUIDANCE FOR THE PUBLIC, FDA ADVISORY COMMITTEE MEMBERS, AND FDA STAFF
Docket No. FDA-2016-D-1399

The undersigned nonprofit organizations, with members and supporters nationwide, submit these comments with regard to the draft guidance "Procedures for Evaluating Appearance Issues and Granting Authorizations for Participation in FDA Advisory Committees," the availability of which was announced by the Food and Drug Administration (FDA) in the Federal Register on June 29, 2016.

The draft guidance addresses the FDA's process for evaluating whether an advisory committee member has interests and relationships that do not create a recusal obligation under federal financial conflict of interest laws, but that may create the appearance that a member lacks impartiality, known as "appearance issues." Guidance at 3-4.

In general, we commend the FDA for proposing guidance that would identify a wide range of circumstances involving interests and relationships that could create, at a minimum, the appearance of a conflict of interest and, therefore, could reasonably justify recusal of the member of an advisory committee. In particular, we generally support the sections of the guidance that address the following circumstances that could create the appearance of a lack of impartiality:

(1) Where the particular matter coming before the advisory committee is likely to have a "direct and predictable effect" on the current financial interest of a member of the advisory committee member's household. Guidance at 7-8; and

(2) Where a person or entity with whom the member has a "covered relationship" is or represents a "party to the matter." Guidance at 8-11.

However, as explained below, based on prior FDA actions and current agency policies in screening advisory committee members for appearances of a lack of impartiality, we have serious concerns about the agency's actual practice implementing the catch-all category described in section IV.B.3, "Other Circumstances that May Raise a Question about the Member's Impartiality." In particular, we are concerned that the draft guidance reflects the FDA's overly broad interpretation of the relevant regulatory provision at 5 CFR § 2635.502(a)(2) and would encourage the agency to continue inappropriately excluding advisory committee members from participating in committee meetings based on an "intellectual bias"—a phrase that does not appear in the draft guidance but that the FDA now routinely uses in Attachment A to

Form FDA-3410 (Confidential Financial Disclosure Report for Special Government Employees) when screening individual advisory committee members for conflicts of interest prior to committee meetings.

For example, Attachment A to Form FDA-3410 required for the most recent meetings of the Pharmacy Compounding Advisory Committee and the Bone, Reproductive and Urologic Drugs Advisory Committee contained a section titled "Impartiality/Intellectual Bias," which included a question asking committee members whether they had "made any public statements (written or oral) that would indicate to an observer that [the members] have taken a position" on the matter, such as a drug, at issue in the upcoming advisory committee meeting. Using an affirmative answer to this question as presumptive grounds for disqualifying a member constitutes a policy which would tend to remove those members most knowledgeable about the drug from participating and voting in the upcoming advisory committee meeting.

Discussion

The draft guidance addresses the FDA's screening of advisory committee members for the following category of potentially disqualifying interests or relationships: "other *interests and relationships* that do not create a recusal obligation under Federal conflict of interest laws but that may create the appearance that a member lacks impartiality, known as 'appearance issues.'" Guidance at 3 (emphasis added).

The draft guidance describes the FDA's process for evaluating whether an advisory committee member has such disqualifying appearance issues and for determining whether to authorize a member with an appearance issue to participate in an advisory committee meeting. The FDA cites the following legal basis for conducting these evaluations and making these determinations:

> Members of FDA's advisory committees are subject to Government-wide standards of ethical conduct regulations in addition to Federal conflict of interest laws. Even where a member has no financial interests that would require her to refrain from participating in an advisory committee meeting ("recuse" herself) under Federal conflict of interest laws, the member may be disqualified from participation under the Government-wide Federal regulation at 5 CFR § 2635.502 ("section 502") if she has *interests* or *relationships* that may create the appearance that she lacks impartiality on the issue before the advisory committee. Section 502 implements the ethical principle that a Government employee should be impartial in performing her official duties, meaning that she *must not give preferential treatment to any private organization or individual or use public office for private gain*. To the extent that a member's performance of official duties might appear to benefit her or certain other individuals close to her, she must take appropriate steps to avoid even an appearance of violating these ethical principles.

Guidance at 4 (emphasis added).

The draft guidance proceeds to explain the FDA's interpretation and implementation of section 502, which in part states:

§ 2635.502 Personal and business relationships.

(a) *Consideration of appearances by the employee.* Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section. …

(2) An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.

(Emphasis in original)

Relying on the above regulatory provisions, the draft guidance delineates three categories of circumstances that may create appearance issues for advisory committee members. The first category, derived directly from section 502(a), involves scenarios "***where the particular matter coming before the advisory committee is likely to have a 'direct and predictable effect' on the current financial interest of a member of the advisory committee member's household***." Guidance at 7 (emphasis in original). The second category, also derived directly from section 502(a), involves scenarios "***where a person (or entity) with whom the advisory committee member has a "covered relationship" is or represents a "party to the matter" coming before the advisory committee.***" Guidance at 8-9 (emphasis in original). We agree that these two categories of circumstances may create appearance issues for advisory committee members and warrant recusal. We endorse the draft guidance's framework for defining these two categories of circumstances and for determining whether such circumstances would cause a reasonable person with knowledge of the relevant facts to question the advisory committee member's impartiality. We believe the draft guidance is consistent with the both the letter and intent of the underlying regulations.

The third category of circumstances that may create appearance issues for advisory committee members, derived from section 502(a)(2), is characterized in the draft guidance as a "catch all" for other such circumstances. Guidance at 11. This category involves "***circumstances other than those specifically described [in section 502 that] may raise a question about the member's impartiality***." Guidance at 11 (emphasis in original). In describing this third category further, the draft guidance identifies four types of circumstances that in the FDA's experience implementing section 502 represent such other circumstances: (a) particular matters of general applicability; (b) relationships that are not technically "covered relationships;" (c) past financial interests ending more than one year before the meeting that suggest a close relationship with the sponsor or involvement with the product(s) before the committee; and (d) other relationships or

interests, whether current or past, that may raise questions about the member's impartiality, such as involvement in a lawsuit related to the product or issue before the committee or involvement as a subject in a clinical trial of one of the products at issue. Guidance at 11-13. We agree that each of these circumstances may create appearance issues for advisory committee members and warrant recusal. Of note, each of the four types of circumstances identified by the FDA appropriately involve *relationships or interests* that may raise questions about a committee member's impartiality

Importantly, the draft guidance properly does *not* identify either of the following as falling within the catch-all category of other circumstances that may create an appearance issue for advisory committee members and warrant recusal:

- so-called intellectual bias, as evidenced by the member having made any public statements (written or oral) that would indicate to an observer that the member has taken a position on the matters or issues being brought before the advisory committee; and
- situations in which an advisory committee member's employer or organization has taken a position, submitted a petition, issued a statement, written a letter, or testified before an FDA advisory committee on the matters or issues being brought before the advisory committee.

In practice, however, the FDA has relied on an overly expansive interpretation of section 502(a)(2) to inappropriately screen advisory committee members for each of these two types of circumstances and to inappropriately exclude them from participating in committee meetings if either is found to exist.

For example, Public Citizen's Dr. Michael Carome, who currently serves as the consumer representative member on the FDA's Pharmacy Compounding Advisory Committee (PCAC), has been screened prior to each committee meeting for "intellectual bias" and for whether Public Citizen has taken a position or issued anything in writing about matters or issues to be considered at the PCAC meetings. Questions about such matters routinely are included in Attachment A to Form FDA-3410 when the FDA screens individual advisory committee members for conflicts of interest prior to committee meetings. For some PCAC meetings, Carome was allowed to participate in the discussion of a particular matter before the committee but was excluded from voting because Public Citizen previously had opined on the matter in written comments to the agency or in testimony before a prior advisory committee. In other cases, he was excluded from participating in all deliberations on a particular matter because he himself had signed a letter to the FDA requesting a specific action that was being considered by the PCAC.

Our organizations object to such an expansive interpretation of section 502(a)(2) for the several reasons. First, neither nonprofit organizations like Public Citizen nor their employees as a result of such employment have any financial or other personal interest or stake in the outcome of matters that come before FDA advisory committees. For example, with respect to matters being considered by the PCAC—such as whether the FDA should allow a particular bulk drug substance to be used in pharmacy compounding or whether a particular drug or class of drugs should be classified as a drug product that presents demonstrable difficulties for compounding that reasonably demonstrate an adverse effect on the safety or effectiveness of that drug

product—the FDA's decision on these matters will not affect any financial or other personal interest or relationship of Public Citizen or Carome, other than their general interest in drug safety.

Second, the fact that a non-profit organization or one of its employees has expressed a view or taken a position on a particular issue being considered by an FDA advisory committee based on prior independent research and review of the relevant evidence does not mean that the employee is biased—that is, unable to exercise independent judgment in the matter at hand. The FDA invites individuals to serve on FDA advisory committees because those individuals have expertise in and informed views about the matters that come before these committees. Their views, based on their evaluation of the science, do not automatically make them "biased."

Importantly, the Federal Advisory Committees Act (FACA) does not require that a member of an advisory committee be excluded, entirely or partially, from participation in a meeting at which the member (or his or her employer or organization) has expressed a position regarding the matter or issue before the committee. Rather, section 5 of FACA requires that "the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. § 5(b)(2). For members of FDA advisory committees, possessing information and expert views on matters within the purview of the committees should not be considered a disqualifying factor or a lack of impartiality for an individual member. To the contrary, the FDA chooses committee members "for their expertise and skills [who] are expected to provide advice on the basis of their own best judgment." GAO, *FDA Advisory Committees: Process for Recruiting Members and Evaluating Potential Conflicts of Interest* 12 (2008). As a result, "[m]ost [FDA] advisory committee members are expert scientists and esteemed clinicians." Eastern Research Group, *Measuring Conflict of Interest and Expertise on FDA Advisory Committees* 1-3 (2007), *available at* http://www.fda.gov/oc/advisory/ergcoireport.pdf. Such experts are likely to have developed views on a variety of subjects based on their professional experience, including their own independent research and their review of data compiled by other researchers. As a legal matter, neither the fact that experts have acquired information and reached conclusions in the course of their work, nor the possibility that other scientists not on the committee might reach different conclusions on review of the same data renders a scientific advisory committee not "fairly balanced" or an individual member "intellectually biased."

Disqualifying advisory committee members because they (or their organization) have expressed views on scientific matters being considered by the committee threatens the utility of advisory committees by depriving agencies of advice from the very experts most qualified to give it—those who have actual knowledge and research experience concerning the subjects to be addressed by the committee. It also deters qualified scientists from accepting appointment to advisory committees out of concern that their very expertise may become a matter of distracting controversy, and encourages politicization of scientific matters as interested parties seek to exclude scientific experts whose views are inconvenient to them. The FDA's policy also discourages expert individuals from speaking publicly on important matters of public interest. Thus, the FDA should reconsider its approach to disqualifying advisory committee members based on "intellectual bias" and instead consider, in each case, whether the member has formed a view that would prevent him from giving informed advice based on consideration of all the

material. An unwillingness to form a view based solely on the scientific evidence should be the concern, not formation of views based on that evidence.

Finally, the FDA's practice of disqualifying advisory committee members for intellectual bias in our experience is often implemented in an asymmetric manner: Advisory committee members who may have unfavorable views of a particular medical product being considered by the committee—as evidenced, for example, by written materials advising against use of the product or urging that the product be removed from the market—are routinely disqualified, but other members who have a favorable view of that product—as evidenced, for example, by prescribing the product to patients—generally are not. This can lead to an advisory committee that is no longer fairly balanced.

Conclusion

So-called intellectual bias and situations in which an advisory committee member is an employee or member of an organization, like Public Citizen, that has taken a position in writing on a matter or issue before the committee are not circumstances involving interests or relationships that fall within the scope of appearance issues under section 502. We therefore urge the FDA to immediately cease applying such considerations when screening advisory committee members for financial conflicts of interest and other relationships or interests that may create the appearance of a lack of impartiality. In addition, we urge the FDA to revise the proposed guidance to explicitly state the agency does not consider such circumstances when evaluating advisory committee members for appearance issues.

Center for Digital Democracy
Government Accountability Project
National Coalition Against Censorship
National Women's Health Network
Project on Government Oversight
Public Citizen
Union of Concerned Scientists
Woody Matters