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**VIA ELECTRONIC SUBMISSION**

Division of Dockets Management
Food and Drug Administration
Department of Health and Human Services
5630 Fishers Lane
Room 1061, HFA-305
Rockville, MD 20852

Response to Citizen Petition (Docket No. FDA-2013-P-0846)

The undersigned submits this petition in opposition to a Citizen Petition filed on July 11, 2013, by K&L Gates LLP (Docket No. FDA-2013-P-0846), on behalf of a client, seeking action by the Agency to permit the client to demonstrate bioequivalence in reference to a product other than the actual Reference Listed Drug ("RLD"). According to Petitioner, the client intends to use the bioequivalence data as part of abbreviated new drug application ("ANDA"). We believe this request is not permitted under the Drug Price Competition and Patent Term Restoration Act, Pub. L. No. 98-417, 98 Stat. 1585 (1984) (known as the "Hatch-Waxman Act") and that the relief the law firm is seeking should be denied as it is not authorized by law.

1. **Citizen Petition filed on July 11, 2013 Should be Denied**

The petition by K&L Gates, on behalf of a client, is asking the agency to modify the existing requirements to permit its client to file an ANDA based on bioequivalency studies conducted on a drug product, not approved in the United States, which is marketed in Israel, in lieu of the RLD. The petitioner believes that its request is not a significant departure from existing law and should be permitted as a matter of policy. However, the Food, Drug, and Cosmetic Act (the "Act" or "FDCA") and its implementing regulations do not authorize the action requested by petitioner.

The Act and its implementing regulation support the current policy and the Agency has no flexibility to adopt a policy that is inconsistent with either its organic legislation or regulations.[1] Public support for generic requirements is very important as the law was enacted to provide assurances that a generic drug is identical to or within an acceptable range of the brand name product they would otherwise receive. Consumers can save $8 to $10 billion on the use of generic drugs; however, they expect that the product is bioequivalent to an approved product sold and marketed in the United States. This was the public policy for the express provision of the law – the offering of generic products that are bioequivalent to brand name products approved, listed, and sold in the United States – not a product that is approved in another country.

[1] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988); *Berkowitz v. United States*, 486 U.S. 531 (1988).

Even if the Act authorizes this, the requested change would require a modification to agency's existing rules. The rules governing Citizen Petitions state that the Petitioner must identify the provision in the Act, Public Health Service Act, or other provision under which "authority has been delegated to the Commissioner of Food and Drugs . . . . to issue, amend, or revoke a regulation . . . ."[2] Rulemaking authority, though, has not been delegated to the Commissioner by statute.[3]

2. **Proposed Change is Not Authorized and is Inconsistent with the FDCA**

The Petitioner has suggested that there is no requirement that the reference drug used for testing be one that is purchased in the United States. This is incorrect. Under the Act, an ANDA must contain information demonstrating that it is "bioequivalent to a listed drug."[4] A RLD is one approved under section 505(c) of the Act.[5] The product sold in Israel has not been approved under section 505(c). Thus, the FDCA prohibits the Agency from allowing a manufacturer to use a foreign registered product as a substitute for the RLD in the bioequivalence studies and the Agency's regulations are consistent with the statute.[6]

There is no discretion in making a determination of whether a product that is approved in one country is the same as a drug approved under 505(c). The language of the statute does not accommodate the use of an **unapproved** drug in conducting bioequivalency studies. This was not the intent of the authors of the law as they sought requirements that generic products are, in fact, bioequivalent to products that are approved for marketing under section 505(c). The statute requires any testing for an ANDA be done on the "listed drug," and that "listed drug" must have been approved for sale in the United States pursuant to FDCA § 505(c).

The Agency has testified before Congress and argued before the Courts that a drug approval is specific to the manufacturer. For example, Dr. Janet Woodcock, Director of the Center for Drug Evaluation and Research**,** recently testified that "FDA drug approvals are manufacturer-specific, product-specific, and include requirements relating to the product." [7] The

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[2] 10 C.F.R. § 10.30(b).

[3] See FDCA § 701(a) (all rulemaking authority is vested in the Secretary of Health and Human Services).

[4] FDCA § 505(j)(8)(B).

[5] FDCA § 505(j)(7)(A).

[6] *See* 21 C.F.R. § 314.3 defining a "listed drug" as "a new drug product that has an effective approval under section 505(c) of the act for safety and effectiveness…".

[7] Statement of Janet Woodcock, M.D., Director, Center for Drug Evaluation and Research, before the Subcommittee on Health Committee on Energy and Commerce, United States House of Representatives (**July 16, 2013)** http://www.fda.gov/NewsEvents/Testimony/ucm360945.htm**.** *See also* Statement of William K. Hubbard, Associate Commissioner for Policy and Planning before the Subcommittees on Health Care and International Trade, Senate Committee on Finance (April 27, 2004) ("FDA drug approvals are manufacturer-specific, product-specific") http://www.fda.gov/NewsEvents/Testimony/ucm114735.htm; FDA Statement Before the Nevada State Board of Pharmacy (April 20, 2006) ("FDA approvals are manufacturer-specific, product-specific") (quoting from FDA Letter to Governor Kenny Guinn (May 20, 2005)) http://www.fda.gov/Drugs/DrugSafety/ucm175852.htm; Statement of Janet Woodcock, M.D., Director, Center for Drug Evaluation and Research, before the Subcommittee on Health, Committee on Energy and Commerce, United States House of Representatives (May 1, 2008) ("FDA

Agency has issued Warning Letters premised on the statutory and regulatory commands that drug approvals are manufacturer specific. [8]

Also, in *USV Pharm. Corp. v. Weinberger*, 412 U.S. 655, 664 (1973), the Court held that "[section 505] when applied to [a new drug application] is personal to the manufacturer who files it. Section [505], in other words, addresses itself to drugs as individual products."[9]

Therefore, the only drug approved for distribution in the United States under FDCA § 505(c) is the product manufactured by the holder of the 505(c) approval and listed as the reference drug and that is the only drug against which bioequivalence may be measured. Doing otherwise would thwart the law and regulations and not follow the legislative intent of the drafters of the law who carefully crafted it so that patients would have generic products that were equivalent to prior approved products that had sought such approval through the FDA's new drug approval process contained under § 505(c).

### 3. Citizen Petition Cannot Be Used To Seek a Change in Rules Implementing Section 505(j)

Even if the Act authorized the change sought by petitioner, a Citizen Petition could not be used to seek that regulatory change. A Citizen Petition can only be used to seek to amend a rule where rulemaking authority has been delegated to the Commissioner. The Commissioner, though, no longer has rulemaking authority; all rulemaking authority concerning the Act is vested in the Secretary of Health and Human Services.[10] Therefore, a Citizen Petition cannot be used to seek to modify an existing rule.[11] Indeed, the Act itself provides no vehicle, independent of APA § 4, 5 U.S.C. § 553(e), for seeking a change in the rules governing ANDAs under FDCA § 505(j).

While the Act contains various provisions that authorize persons to file citizen petitions, the scope of those provisions vary.[12] The only provision that could arguably authorize this Citizen Petition is Section 701(e), which provides as follows:

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approvals are manufacturer-specific and product-specific")
http://www.fda.gov/NewsEvents/Testimony/ucm115241.htm

[8] *See* Warning Letter to Canadian Discount Drugs (June 30, 2003) ("The reason that Canadian or other foreign versions of U.S.-approved drugs are generally considered unapproved in the U.S. is that FDA approvals are manufacturer-specific, product-specific"); Warning Letter to Discount Prescriptions from Canada, Inc. (Feb. 18, 2004) (same); Warning Letter to CanaRx Services, Inc. (Sept. 16, 2003) (same).

[9] *See also Pharmanex v. Shalala*, 221 F.3d 1151, 1157 (10th Cir. 2000) (the new drug approval process is manufacturer-specific); Brief of the Solicitor General of the United States in Support of Certiorari in *Thompson v. Western States Med. Ctr.*, 2001 WL 1605836 (U.S.), 4-5 (U.S. Pet. Brief, 2001).

[10] *See* FDCA § 701(a).

[11] *See* 21 C.F.R. § 10.30(b).

[12] *See* e.g., FDCA § 409(b)(1) ("[a]ny person may, with respect to any intended use of a food additive, file with the Secretary [of the Department of Health and Human Services] a petition proposing the issuance of a regulation prescribing the conditions under which such additive may be safely used.")

> (1) Any action for the issuance, amendment, or repeal of any regulation under section 343(j), 344(a), 346, 351(b), or 352(d) or (h) of this title, and any action for the amendment or repeal of any definition and standard of identity under section 341 of this title for any dairy product (including products regulated under parts 131, 133 and 135 of title 21, Code of Federal Regulations) shall be begun by a proposal made (A) by the Secretary on his own initiative, or (B) by petition of any interested person, showing reasonable grounds therefor, filed with the Secretary. The Secretary shall publish such proposal and shall afford all interested persons an opportunity to present their views thereon, orally or in writing.[13]

That provision, though, does not reach Section 505(j). In short, any petition for rulemaking must be filed with the Secretary of Health and Human Services under 5 U.S.C. § 553(e) and not with the Commissioner under 21 C.F.R. § 10.30.

## CONCLUSION

While we recognize that the Petitioner is seeking a request based on a single set of facts, we respectfully urge FDA to reject the Petitioner's request to allow ANDA applicants seeking approval of generic versions to use a product that is not approved under 505(c) in establishing the required bioequivalence of a proposed generic drug. We believe that the policy argues against the Petitioner's request as consumers rely on the FDA to approve generic products that are compared to brand name products approved, listed and marketed in the United States. To approve the Petitioner's request is also contrary to the law and regulations and is not consistent with ensuring consumer confidence in the FDA approval process.

Sincerely yours,

Nancy E. Taylor

[13] FDCA § 701(e)(1).