

**Statement of William Vaughan
Senior Policy Analyst for Health at
Consumers Union, the independent, non-profit publisher of Consumer Reports**

**before the
U.S. House of Representatives'
Subcommittee on Health
Committee on Energy and Commerce
April 17, 2007**

Prescription Drug User Fee Act legislation

Mr. Chairman, Members of the Committee:

Thank you very much for inviting Consumers Union¹, the independent, non-profit publisher of Consumer Reports, to testify on PDUFA legislation.

**Why PDUFA is Bad Policy: The Long-Term Goal Should be General Treasury
Funding**

Who pays the piper, calls the tune.

We think there is great wisdom in that old folk saying, and that's why we oppose funding a vital consumer protection agency like the FDA out of industry-funded user fees. The FDA oversees the safety of about one-fifth of the U.S. economy. Its work in drugs, medical devices, and food is of life-and-death importance to each of us—and as we've just seen, to our pets. If there were ever a public function that should be funded out of the Treasury, this is it.

Instead, over half the FDA drug budget is funded by the industry it regulates. And those funds are essentially a tax on people who need to take medications, since fees are passed on substantially to consumers. It would be far, far better if the entire FDA budget were funded by the progressive tax system.

¹ Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance. Consumers Union's income is solely derived from the sale of Consumer Reports and ConsumerReports.org, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports and ConsumerReports.org, with approximately 6.5 million combined paid circulation, regularly carry articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support. EXPERT • INDEPENDENT • NONPROFIT®

Impact on Image, Morale, and Culture of FDA: The user fee system—with its incredibly detailed requirements from the pharmaceutical industry for the FDA to respond to requests from industry, to schedule meetings within X weeks of a request, etc., etc., etc.—is terribly damaging to the image, morale and public service culture of the FDA.

In late March, Consumers Reports National Research Center conducted a national poll that found the American public overwhelmingly wants stronger prescription drug safety protections. The survey found that 84 percent of consumers agree that drug companies have too much influence over the government officials who regulate them. Two-thirds (67 percent) are concerned that much of the FDA’s funding comes from the pharmaceutical industry, with more than half—54 percent—‘very concerned’ about the funding source.

A recent Union of Concerned Scientists survey found extensive FDA staff concern about the impact of PDUFA. Last year the UCS polled 5,918 FDA scientist/physicians with a 38 question survey, and received 997 responses (17 percent), with 503 providing some narrative commentary. The survey showed an agency with serious morale problems, and a frequent theme in the narratives was that PDUFA was placing pressures on employees to approve, too quickly, drugs that had unresolved safety issues. Following are typical staff comments for improving the FDA:

“Most important: Get rid of PDUFA and increase Federal base budget. Currently, we are dependant upon user fees and this is a huge conflict of interest. ‘The fox is guarding the henhouse.’”

“Less emphasis on adhering to PDUFA timelines and more emphasis on quality of reviews for reviewers.”

“Ending PDUFA funding for review work and the reduced & restrictive time lines.”

“Eliminating the User Fee arrangement. It is inherently impossible to regulate industry in an unbiased manner when they are paying our salaries and expenses.”

“Allowing the centers to do a thorough investigation of new drug applications. In my opinion, FDA scientists are pressured to approve new drugs in a short period of time, which in turn leads to adverse reactions.”

“...management is heavily influenced by industry. When I go to meetings with my upper management, I honestly prepare myself as though I were going to a meeting with an industry representative.”

Finally, on its face, the current system is not good government. Imagine what the public would say if Microsoft funded more than half the budget of the Department of Justice’s

Anti-trust Division or Boeing paid more than half the cost of the National Transportation Safety Board. The same perception problem exists with PhRMA funding of the FDA.

Budget Reality: Eliminate Distorting Performance Standards

Having said all this, the Federal budget situation—and the constraints of the Budget Resolution now in Conference—almost certainly require us to depend on user fees for at least another year, if the FDA is to be able to continue approving new drugs.

Therefore in lieu of public funding, the next best thing would be enacting legislation like HR 2090, sponsored in the 109th Congress by Rep. Maurice Hinchey. In addition to FDA post-market safety reforms, this bill put the amount of money raised by the user fees into the general Treasury, then transferred the same amount from the Treasury to the FDA, while repealing the tight performance goals that so control FDA operations. As last year's Institute of Medicine report stated about PDUFA and FDA funding:

“The [IOM] committee is not concerned about the existence of performance goals in principle, but finds the limitations or ‘strings’ that direct how CDER can use PDUFA funds the most troubling aspect of the arrangement.”

Removing these distorting performance goals is particularly important in light of concerns from a February 2007 study by Harvard Professor Daniel Carpenter and others entitled, “Deadline Effects in Regulatory Drug Review: A Methodological and Empirical Analysis.” The analysts found that

The rate at which drugs experience most-marketing regulatory events is appreciably higher for drugs approved in the months before the PDUFA clock deadlines, compared to other drugs, especially those approved in the months just following the elapsing of the deadline. For non-priority molecules, pre-deadline approvals are associated with three to five times the rate of safety-based withdrawal from the global market and Canadian markets. Pre-deadline approvals have two to three times ...labeling changes per year of marketing and, for drugs approved since FDAMA, over five times the rate of product discontinuations per year.

The Need for More Drug Safety Resources, including, Reluctantly, from User Fees

Ultimately, if legislation that breaks the ties and requirements that come with user fees is not possible, then we urge that post-market approval safety be given increased resources.

We do not want to take resources away from or in any way slow down the approval of possibly life-saving drugs. We see nothing in the various FDA reform bills—Grassley-Dodd, Enzi-Kennedy, or Waxman-Markey—that slows the approval of life-saving drugs. These bills do, however, give the FDA effective authority to ensure safety once such drugs come to market.

We are pleased that the final FY 2007 Congressional action singled out the FDA for increased appropriations, and that the President's budget request for FY 2008 also provides a noticeable increase for the agency, especially when compared to many other HHS agencies. But the amounts provided and requested do not make up for years of resource erosion, nor do they allow the FDA to do the job that a "gold standard" agency should be doing. More resources are needed, if not through the ideal of appropriations, then through increased user fees that give new emphasis to post-approval safety. As last September's Institute of Medicine report said,

Regardless of the source of the funds, the committee reiterates that the functioning of a drug safety system that assesses a drug's risks and benefits throughout its lifecycle is too important a public health need to continue to be under funded.

Under PDUFA, we have become one of the world's quickest approvers of new drug applications. Consumers Union supports rapidly bringing life-saving medicines to market. But now that we lead the world in rapid drug approvals, we also face a 'safety gap' in which Americans are at times being used as, if you will, "guinea pigs" for new, mass marketed medicines. We would like to see the same emphasis given to closing the safety gap as has been dedicated to closing the 1980's drug approval gap. We need to match the high speed of approvals with a high-speed, high-quality post-approval safety system.

The PDUFA IV agreement calls for an increase in safety issues of about \$29 million, and the proposal thankfully removes the limit on the period of time that PDUFA funds can be used for safety work on a particular drug. That's a start—but woefully inadequate. The IOM report called for far more than \$100 million (see discussion in its Chapter 7) in new safety and scientific resources.

Support Senate bill's increase in PDUFA safety money

Therefore, while we are working for further strengthening amendments, we congratulate Senators Kennedy and Enzi for the bill being marked-up tomorrow in the Senate HELP Committee, S. 1082. We believe—*though this needs confirmation*²—that this bill increases the PDUFA user fees dedicated to post-market approval safety by as much as \$70 million while ensuring that general appropriations will not be reduced. Further it dedicates that money

- (1) to the implementation of the Enzi-Kennedy Risk Evaluation and Mitigation Strategies (REMS) and
- (2) to an exciting new proposal to use huge medical databases—such as the Medicare data base—to conduct epidemiological studies to detect short and long-term safety problems.

² There may be a typo in the version we have; we assume the intent is to ensure that user fees for safety do not replace appropriations (as is the intent and the law with the pre-approval user fees).

It is worth elaborating on the database monitoring proposal. It is basically from a bill by Senators Gregg, Burr, and Coburn, S. 1024. I believe that bill comes in part from an idea by former FDA Commissioner and CMS Administrator Mark McClellan, MD, that we have long supported as an addition, not a substitute to a strong FDA reform bill. Let me repeat that—this proposal must be an addition, not a substitute to stronger authorities to enforce label changes, ensure the actual delivery of promised safety studies and trials, etc. Without giving the FDA new authority to enforce safety measures when problems are discovered in the post-market arena, increased database surveillance will mean nothing. As Dr. McClellan testified before the Senate HELP Committee on March 14, 2007:

- “...according to calculations by Richard Platt [Principal Investigator of the HMO Research Network CERT]...electronic and other data actually used to determine a significant association between Vioxx use and serious cardiovascular events took almost three years to detect a statistically significant association, based on the limited population data available for analysis at the time. If data from large health plans could have been pooled to provide more definitive evidence on this potential safety risk, as envisioned by this strategy [the language in S. 1082 and S. 1024], the significant association could potentially have been detected within just several months....”

House Should Provide Even More Specific Safety Resources

We believe additional, specific safety initiatives should be funded, ideally by increased appropriations, but if necessary, by further increases in user fees. Congress should spell out some specific, hard deliverables in the safety area under PDUFA. When you look at the user fees that go to pre-approvals and speeding approval, they are used to achieve very detailed, date specific deliverables. Yet we don't get the same treatment on the safety side. The entire tone and structure of the FDA's PDUFA safety provisions as presented to the Congress and the public are different. They are, frankly, very fuzzy, very academic, and very bland.

In general, the industry gets 90 percent of new drug applications decided within a certain number of days, and requests for meetings answered within two weeks.

What does the consumer public get? In the FDA five year PDUFA IV plan, we get sentences like

“...FDA would use these funds to continue to enhance and improve communication and coordination between pre- and postmarket review staff.”

Or

“Potential activities in this area might include integration of certain proposed recommendations made by the [IOM].”

We get

“a public workshop to identify best practices in this emerging field, ultimately developing a document that addresses epidemiology best practices...”

As someone once said, ‘where’s the beef?’

Safety Deliverables

As consumers, we would like to see some tough deliverables, just like PhRMA gets. The meetings and better communication described in the agreement may be necessary, but we need more resources for specific, “on-the-street” safety work. The following list is just illustrative of the kind of safety issues we hope this Subcommittee will consider, and assumes that legislation similar to HR 1561, the Waxman-Markey bill, is enacted.

--investigate all serious adverse event reports within 15 days, and conduct at least **XX** investigations per year into patterns or clusters of adverse event reports to determine if REMS³ action should be taken;

--make the adverse event reporting system more effective by considering pharmacist counseling and outreach programs or monitoring of AERs through personal health records;

--increase by 100 percent (that is, double) the percent of clinical trial data and Investigational Review Board applications audited to ensure the ethical treatment of enrollees, the experiments’ integrity, and the sponsor’s compliance with good scientific practice⁴. As one witness testified before this Committee on February 13th, the IRB process is ‘broken’ and patients are subject to needlessly dangerous, unscientific proposals. As for the quality of Randomized Clinical Trial data, how many more Keteks are ‘out there;’

--each year, identify **X** of the most commonly used off-label drugs and require a Phase IV trial to determine whether there is scientific basis to support the safe and effective use of those drugs for that off-label purpose. This proposal would in no way interfere with a physician’s right to prescribe or deny drugs to patients, but it would institutionalize a way of bringing some science to this area of pharmacology. A recent report estimated that 21 percent of 160 commonly prescribed drugs are prescribed off-label, and in 73 percent of the cases, there was little or no scientific support;

³ Risk Evaluation and Mitigation Strategies, a term used in S. 484 and S. 1082, bills by Senators Kenney and Enzi. The same framework is used in Waxman-Markey HR 1561.

⁴⁴ It is reported that the FDA is revising regulations allowing drugs used in a Phase 1 trial to be exempt from quality control manufacturing requirements. If this is accurate, there should be some system of sampling a certain percentage of these drugs for purity and safety. See Triangle Business Journal, Nov. 3, 2006, “Triangle scientists reticent about FDA shift.” Additional resources in this sector will be especially needed because of the growth in trials overseas. (“Up to Two-Thirds of Clinical Trials May be Done Abroad, Study Says,” Washington Drug Letter, January 8, 2007, p. 8.

--speed up the date from FY 2010 that a more diverse and 'richer' clinical trial population is used in the testing of new drugs. The current system of testing largely on healthier, middle age Caucasians masks a world of future adverse events and problems;

--increase by 100 percent the inspection of manufacturing (including compounding) facilities for compliance with FDCA laws;

--through active outreach and recruitment, develop and maintain a list of potential advisory committee specific experts who have no conflicts of interest and who have indicated a willingness to be appointed to future relevant advisory committee vacancies;

--assuming the FDA is given the legal authority, in addition to the clinical trial registry and results databases established by S. 1082 and HR 1561 for drug applications received after the enactment of this Act, develop over a phased-in four-year period ending in 2012 a similar registry of clinical trials and clinical trial results for those trials initiated or completed after 1997 and before the effective date of this Act.

--address the unapproved drugs problem. Currently about 2 percent of all prescriptions are 'unapproved' drugs, drugs which generally were on the market before 1962 and have not had to prove efficacy, or in some cases of drugs approved before 1938, have not even proved safety. The FDA has indicated that budget restraints prevent them from moving faster to determine the safety and efficacy of these drugs.⁵

Generics and Biogenics

We appreciate the budget effort to reduce the backlog of generic drugs. We hope that the budget and, if necessary, the PDUFA agreement, will be able to assist in the implementation of legislation such as the Waxman-Schumer biogenics legislation, once legislation like that is enacted. Biogeneric approval may be more resource intensive than traditional generic pharmaceuticals, and we will need more resources to make the promise of lower cost biogenics a reality.

DTC User Fees: Will They Work Unless Congress Gives the FDA Civil Monetary Penalty Authority?

⁵ See letter to Rep. Markey from the FDA, described in Inside Health Policy, January 9, 2007, "Markey Eyes Bill On Stronger Unapproved Drugs Enforcement."

We support pre-review of television and, frankly, all other advertisements for prescription drugs. Consumers Union's past investigations have found that companies repeatedly violate advertising standards, complete ad cycles before the FDA catches up with them, and escape without effective penalty for misleading the American public. For example, in our February 2003 Consumer Reports magazine, we noted that Claritin had received a total of 11 regulatory letters about problems with their ads. The FDA needs stronger authority in this area to stop the white lies and fibs that are found in so many ads.

We urge you to look very hard at the proposed voluntary DTC user fee proposal. We are not sure it works. If companies only get a slap on the wrist or receive a letter saying 'please stop running an ad' months and months after it has been off the air, why would they want to pay a user fee for pre-clearance? Perhaps the best way to clean up the advertising honesty mess would be to make it very clear legislatively that Civil Monetary Penalties will apply against ads that are deceptive and misleading—and that repeat violations are doubly or triply punished. That would ensure that companies submit ads for pre-review and pay the user fees necessary to support this new program.

Also, we are concerned that there are many other advertising formats—the Internet, continuing medical education forums, magazines, and pamphlets to doctors—where the adequacy and honesty of the information being provided should be audited. Clearly, in many ways, the companies repeatedly violate the rules against off-label promotion. The FDA needs to monitor more of those advertising modes—for which it will need additional resources.

Also, the definition of DTC advertisement in the draft PDUFA bill is an ad of less than 2 minutes. That would exclude from user fees the recent controversial infomercial on Celebrex, for which the company has been criticized for misleading comparisons. There is no reason to exempt any ad from the requirement of truthfulness and the 2 minute language should be adjusted.

PDUFA V: Patients and Consumers Should be at the Negotiating Table

We hope that you will include language requiring that when we consider PDUFA V in 2012, that consumers and patients get to participate in the real negotiations. Since PDUFA triggers taxpayer appropriations, and since some of the money is now being spent on consumer patient safety issues, that part of the public should be at the negotiating table, rather than just the current closed-door negotiations between PhRMA and the FDA.

Safety Legislation, like Waxman-Markey, must be part of the PDUFA package

Finally, it is absolutely essential that FDA drug safety reform legislation, like Waxman-Markey's HR 1561—which we strongly endorse and hope you all will co-sponsor-- be included in whatever PDUFA legislation you enact this year. Given this year's Federal budget situation, PDUFA is needed, must-pass legislation. If FDA reform legislation that

would save us from future Vioxx's and other drug disasters is not included in that must-pass package, we will miss the best chance in 5 years to protect the American public from unsafe drugs.

While we support the Enzi-Kennedy bill, we've been working for improvements to that bill. Many of those improvements are contained in the Waxman-Markey bill and we hope those improvements will be part of the final bill sent to the President. The Senate is joining PDUFA with Enzi-Kennedy FDA reforms. To go to Conference without a package of PDUFA and FDA reforms would put the House at a disadvantage, reduce your opportunities to participate in the safety debate, and eliminate chances to improve on the Enzi-Kennedy package.

Please don't let this once-in-a-five year opportunity to reform the FDA slip away.