The RX-TO-OTC Switch of Claritin, Allegra, and Zyrtec: An Unprecedented FDA Response to Petitioners and the Protection of Public Health

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THE RX-TO-OTC SWITCH OF CLARITIN,
ALLEGRA, AND ZYRTEC:
AN UNPRECEDENTED FDA RESPONSE TO
PETITIONERS AND THE PROTECTION OF
PUBLIC HEALTH

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B. The FDA Can Deny Wellpoint’s Petition and Reject the Switch

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INTRODUCTION

On May 11, 2001, the Nonprescription Drugs and Pulmonary-Allergy Drugs Advisory Committees (“committees”) of the Food and Drug Administration (“FDA”) approved a recommendation to the FDA that three allergy medications—Claritin, Allegra, and Zyrtec—be switched from prescription (“Rx”) to over-the-counter status (“OTC”). The joint committee hearing was held in response to a July 21, 1998, citizen petition filed by WellPoint Health Networks (“WellPoint”), the parent company of Blue Cross Blue Shield of California. After considering evidence of

1. See 21 C.F.R. § 14.5 (2001) (stating that advisory committees are utilized to conduct public hearings, to review issues of importance before the Food and Drug Administration (FDA), and to provide recommendations to the Commissioner of the FDA). Both the Nonprescription Drugs and Pulmonary-Allergy Drugs Advisory Committees are comprised of physicians, pharmacists, consumer representatives, and an industry liaison. See Transcript of the Joint Meeting of Nonprescription Drugs Advisory Committee and Pulmonary-Allergy Drugs Advisory Committee at 2 (No. 98P-0610) [hereinafter Transcript] (listing the names and titles of all members of the two committees).

2. See FDA Authority to Order Allergy Switch to OTC Status Questionable, DRUG MKTG., May 21, 2001, available at 2001 WL 15460210 [hereinafter FDA Authority] (stating that the non-binding advisory panel recommended FDA approval of Rx-to-OTC switch of Claritin, Allegra, and Zyrtec); see also Susan Warner, Should 3 Drugs for Allergies be Nonprescription?, PHILA. INQUIRER, May 6, 2001, at C1 (reporting on a 1998 petition filed by WellPoint, an insurance company seeking to make Claritin, Allegra, and Zyrtec available over the counter, and on action scheduled to be taken by advisory committees).

3. See 21 C.F.R. § 14.5 (2001) (indicating that the purpose of a hearing before an advisory committee is “to review issues involved, and to provide advice and recommendations to the Commissioner” of the FDA).

4. See 21 C.F.R. § 10.30 (2001) (allowing a person to submit a petition to FDA to request agency action).

5. See Letter from Robert C. Seidman, Vice-President, Blue Cross of California Pharmacy, to Dockets Management Branch, Food and Drug Administration (July 21, 1998) (on file with FDA Dockets Management Branch, No. 98P-0610, Vol. 1)
the drugs’ safety for consumers who might choose to self-medicate, the committee voted nineteen to four in the cases of Claritin and Zyrtec, and eighteen to five on Allegra, that the medicines are safe enough for consumers to use without consulting a physician. This vote is unprecedented and could impact future Rx-to-OTC switches, as it marks the first time the FDA committees have apparently approved a health insurer’s petition for an RX-to-OTC switch made without the drug manufacturers’ support.

As prescription drugs, Claritin, Allegra, and Zyrtec produce millions in revenue for their manufacturers each year. Such success rests, in part, on each brand’s convenient once-a-day formula and non-sedating effects. While arguing before the FDA advisory committees, WellPoint Health Networks, one of the nation’s largest health insurance providers, pointed to such non-sedating effects as an indication of the drugs’ safety, and further argued that the three medications are safer than the currently available OTC antihistamine medications that cause drowsiness as a side-effect. Somewhat undermining WellPoint’s safety argument is the fact that, by its own admission, an Rx-to-OTC switch would save the provider millions of dollars in prescription costs and co-payments, a savings which will,

[hereinafter Seidman Letter] (petitioning the FDA to switch three medications from Rx-to-OTC because medications are safer than currently available OTC allergy drugs and consumers can safely self-administer Claritin, Allegra, and Zyrtec).


7. See Dennis Cauchon, Why Allergy Drugs Cost So Much, USA TODAY, Apr. 12, 2000, at 1A (noting that WellPoint’s petition is unprecedented because the FDA has never moved a drug from Rx-to-OTC status unless the drug’s manufacturer made the request).

8. See FDA Authority, supra note 2 (noting that Claritin, Allegra, and Zyrtec are top-sellers among prescription antihistamines, generating millions each year for their manufacturers and accounting for a substantial part of manufacturers’ revenues).


11. See Seidman Letter, supra note 5 (identifying drowsiness as side effect of current OTC antihistamines, arguing that the three Rx drugs are safer because sedation and drowsiness are not side-effects, and linking prescription restrictions on Claritin, Allegra, and Zyrtec to deprivation of safe and quality care to consumers).

necessarily, become the consumer’s expense.\textsuperscript{15} Indeed, as long as the drugs retain patent protection, and therefore do not face the prospect of competitors offering similar drugs at lower prices,\textsuperscript{14} out-of-pocket cost to the consumer for all three medications will likely remain high.\textsuperscript{15} Weighing such concerns, the FDA must choose whether to follow the committees’ recommendation to switch the drugs from Rx to OTC status.\textsuperscript{16}

The Federal Food, Drug, and Cosmetic Act (“FDCA”) authorizes the FDA to classify medications by prescription if “the drug is habit-forming, or [if] because of its toxicity or other potential for harmful effect . . . [it] is not safe except under the supervision of a doctor.”\textsuperscript{17} The FDCA permits the FDA to assign medications over-the-counter status if a patient is able to self-diagnose safely or is able to understand usage requirements and restrictions, and if the drug itself does not cause any significant side effects.\textsuperscript{18} Once the FDA assigns a drug Rx status, three methods exist to remove the prescription restrictions and make an Rx-to-OTC switch, including the filing of a

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\textsuperscript{13} See Lisa Rapaport, \textit{Allergy Ease: At What Cost?}, SACRAMENTO BEE, May 11, 2001, at D3, available at 2001 WL 20965109 (“If you’ve got good drug coverage, you’re going to lose [with an OTC switch]. Instead of walking into [the pharmacy] and giving them your insurance card, you have to walk in and give them your wallet.”).

\textsuperscript{14} See 35 U.S.C. § 154(a)(1) (1994) (indicating that the holder of a patent has the right to exclude others from selling products made from the same patented process); see also Cauchon, supra note 7, at 5A (explaining that drug companies try to keep their products out of the “price-sensitive” OTC market until the patent expires, because once a drug has no patent protection, competitors enter the market and offer the same drug often for as much as 73% less than original price).

\textsuperscript{15} See SCHERING-PLOUGH RESEARCH INSTITUTE, BRIEFING BOOK, 18 (2001) [hereinafter BRIEFING BOOK] (noting that 70% of population has prescription drug coverage as part of their health insurance plan, and OTC switch would cause increase in out-of-pocket drug costs for 70% of the population).

\textsuperscript{16} See 21 C.F.R. § 14.5 (2001) (allowing the Commissioner discretion on action to be taken after advisory committee has reviewed issue and made recommendation); cf. FDA Overview of Issues for the Joint Nonprescription Drugs Advisory Committee and the Pulmonary-Allergy Drugs Advisory Committee, AGENDA, PLANNING AGENDA, BRIEFING INFORMATION OF JOINT MEETING OF THE NONPRESCRIPTION DRUGS ADVISORY COMMITTEE AND PULMONARY-ALLERGY DRUGS ADVISORY COMMITTEE, Pet. 98P-0610/CPI (Food and Drug Admin. May 11, 2001) [hereinafter FDA Overview] (noting that the FDA is not concerned with economic implications of Rx-to-OTC switch of Claritin, Allegra, and Zyrtec).

\textsuperscript{17} FOOD AND DRUG LAW 263 (Richard M. Cooper ed., Food and Drug Law Inst. 1991) [hereinafter Cooper]. See also 21 U.S.C. § 353(b) (1994) (providing conditions, such as methods for use and potential for dangerous effects, under which drug should be available only by prescription).

\textsuperscript{18} See 21 U.S.C. § 352(f) (1994) (requiring directions for use and warnings that appear on drug’s label to be easily understood by any layperson); see also Michael Dabrowa, \textit{Allergy Drugs May Exit Rx List}, ATLANTA J. & CONST., May 11, 2001, at 1A (stating the safety requirements for drug to be classified OTC).
citizen petition. Yet, because no health insurer or anyone other than the drug’s manufacturer has ever petitioned the FDA to make an Rx-to-OTC switch, the FDA’s authority to order a switch of Claritin, Allegra, and Zyrtec to non-prescription status is in question.

Drug manufacturers typically initiate Rx-to-OTC switches, so the petition filed by WellPoint, the nation’s fourth-largest health insurer, presents the FDA with new questions concerning how the agency should treat the insurer petition under current regulations. Specifically, the FDA must determine how to evaluate, or even if to consider, a Rx-to-OTC switch petition by a health insurer, rather
than the typical drug manufacturer petition. Drug manufacturers who seek to deregulate their own medications usually generate safety reports and clinical studies regarding the safety of the switch that the FDA traditionally relies upon to approve a switch. WellPoint, as a health insurer, cannot provide such data. Also, the FDA has never used the petition process to switch a drug to OTC status over a manufacturer’s objection. Without the manufacturer’s support to switch its own drug, the FDA risks removing prescription safeguards that protect the consumers’ health as well as infringing on the manufacturer’s statutory rights. Moreover, in the case of Claritin, the petition does not meet data requirements and should not be evaluated by the FDA. See supra Part IV.B (suggesting that the FDA has discretion to deny WellPoint’s petition because insurer did not submit usual safety and labeling data).

26. See Charles Ornstein, Over-the-Counter Drug Sales Urged: Allergy Medicine Manufacturers Object to Proposal by Insurer, DALLAS MORNING NEWS, Apr. 29, 2001, at 1A, available at 2001 WL 20289095 (stating that no person or entity other than drug manufacturers has ever petitioned FDA to make Rx-to-OTC switch).

27. See U.S. FDA Panels, supra note 24 (noting that manufacturers perform safety trial when seeking over-the-counter status); see also Press Release, Aventis Pharmaceuticals Inc., Aventis Pharmaceuticals Opposes Petition to Switch Rx Antihistamines to OTC (May 11, 2001), available at http://www.aventispharm-usa.com/pressreleases/05_11_01.html [hereinafter Aventis Opposes] (“Traditionally, an OTC switch is initiated by the manufacturer with the filing of a comprehensive NDA submission containing data from various studies, including actual use and labeling comprehension studies, together with proposed labeling.”).

28. The drug manufacturer usually petitions the FDA by supplementing its already approved new drug application that was initially filed when the drug was introduced. See 21 C.F.R. § 310.200(b) (2001) (providing that an Rx-to-OTC switch may be initiated by supplementing approved new drug application). Regulations governing new drug applications require a specific list of safety data, labeling data, and other information to accompany the application; however, regulations for the citizen petition do not specify any specific data that must be submitted. Compare 21 U.S.C. § 355(b)(1) (1994) (listing submission requirements for NDA), with 21 C.F.R. § 10.30 (2001) (describing exact form of citizen petition for filing). Because WellPoint filed a citizen petition for the switch of Claritin, Allegra, and Zyrtec, it did not submit safety or labeling data. See FDA Overview, supra note 16 (stating no information “supporting the OTC status” for Claritin, Allegra, or Zyrtec accompanied petition).

29. See U.S. FDA Panels, supra note 24 (emphasizing that an Rx-to-OTC switch without manufacturer’s support would constitute an unprecedented departure from previous FDA policy); Ornstein, supra note 26, at 14A (stating that no one, other than a drug manufacturer, has ever petitioned FDA for Rx-to-OTC switch); Robert M. Goldberg, Opinion, Over-the-Counter Allergy-Drug Plan is a Bad Idea, THE RECORD (Bergen County, NJ), May 21, 2001, available at 2001 WL 5252923 (discussing WellPoint’s petition as first for FDA consideration by non-manufacturer); Questions and Answers, supra note 12, at Question 10 (“This is the first petition requesting that the FDA convert a class of drugs . . . from prescription-only to over-the-counter status filed by someone other than the drug’s manufacturer.”).

30. The FDCA distinguishes between Rx and OTC drugs to protect consumer health. See 21 U.S.C. § 353(b) (1994) (requiring prescription restrictions when a drug’s toxicity, method of use, or side-effects necessitate physician instruction and supervision before a drug can be dispensed). Because the manufacturer usually petitions for a drug’s Rx-to-OTC switch by submitting safety and labeling data to the FDA, the agency can fully evaluate the potential effects on consumer health if the switch is made. See BRIEFING BOOK, supra note 15, at 3 (noting that safety and labeling
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where its manufacturer has filed a subsequent supplemental New Drug Application ("NDA") to switch the drug, the lack of complete data and the presence of other safety concerns raises continued questions about the consumer health and safety effects of any proposed switch.31

This Comment explores the issues WellPoint raises in its petition and considers the extent to which the FDA possesses authority to act on the proposed switch. Part I of this Comment surveys the allergy prescription drug market, discussing the revenue that drug manufacturers generate through prescription sales of Claritin, Allegra, and Zyrtec.32 Part II details the FDA’s authority, as it currently stands, to distinguish between Rx and OTC drugs and to switch a drug from Rx-to-OTC status.33 Part III addresses the safety and financial implications of the WellPoint petition and outlines the arguments in support of and against the petition—drawing a distinction between WellPoint’s push for safer and cheaper OTC antihistamines and the drug manufacturers’ desire that all three drugs remain under patent protection.34 Part IV explores the threshold question of whether WellPoint, at the outset, may even

31. See BRIEFING BOOK March 2002 Background Information 3, available at http://www.fda.gov/ohrms/dockets/ac/02/briefing/3850b1.htm (last visited Apr. 30, 2002) [hereinafter Briefing Book March 2002] (citing the Nonprescription Drugs Advisory Committee and Pulmonary-Allergy Drugs Advisory Committees’ recommendation as evidence that Claritin is safe to treat allergies over-the-counter and, thus, providing no safety or labeling data on the treatment of allergies); see also Claritin Link is Probed in Birth Defects; Records Review May Delay Over-the-Counter Sales Plan, THE RECORD (Bergen County, NJ), Apr. 30, 2002, at L04 [hereinafter Claritin Link is Probed in Birth Defects] (raising new concerns that Claritin could be responsible for a birth defect in fifteen baby boys born in Sweden).
32. See infra Part I (reviewing the markets for Claritin, Allegra, and Zyrtec).
33. See infra Part II (examining the statutory and regulatory authority of the FDA).
34. See infra Part III (focusing on WellPoint’s petition for the Rx-to-OTC switch).
submit a citizen petition to the FDA.  

Part V weighs the consequences of FDA acceptance or nonacceptance of the committees’ recommendation for the WellPoint petition, and, alternatively, the consequences of a decision to take no action on the recommendation.  

This Part suggests that the FDA should not take immediate action because the safety data usually relied on by the FDA to make Rx-to-OTC switches was not provided with the WellPoint petition. Moreover, to further support the argument that the FDA should delay its decision, this part considers the supplemental NDA filed by Schering-Plough in 2002 for the switch of Claritin, the partial safety and labeling data submitted, and the additional considerations available to the FDA with regard to both the supplemental NDA and the WellPoint petition.  

If the FDA delays the decision until more data is available, the FDA will be able to evaluate all safety and clinical studies, and ensure that the over-the-counter availability of Claritin, Allegra, and Zyrtec to all consumers will not endanger public health.  

To understand why the proposed switch of Claritin, Allegra, and Zyrtec has spawned considerable debate between the drugs’ manufacturers and the petitioner, it is necessary to consider the drugs’ purposes and effects and to appreciate the drugs’ dominance in the allergy prescription market.  

Given the success of the drugs in the prescription market, the manufacturers of Claritin, Allegra, and Zyrtec are in a position to lose significant revenue if the FDA approves the Rx-to-OTC switch.  

See infra Part IV (discussing the eligibility of WellPoint’s petition for the Rx-to-OTC switch).  

See infra Part V (exploring the consequences of FDA approval or rejection of WellPoint’s petition and the effects of Schering-Plough’s supplemental NDA on the switch of Claritin).  

See infra Part V (discussing the supplemental NDA filed by Schering-Plough to switch Claritin to OTC status, the subsequent hearing held by the Nonprescription Drugs Advisory Committee to recommend such a switch, and the options now available to the FDA).  

See infra notes 40-60 and accompanying text (citing sources for information on Claritin, Allegra, and Zyrtec).  

See infra note 69 (outlining the manufacturers’ arguments against proposed switch, which focus on safety and financial implications to consumers, but never mention the revenue that they would lose by selling Claritin, Allegra, and Zyrtec at OTC prices). Of particular importance, Schering-Plough soon will lose revenue when its Claritin patent expires in 2002, while other manufacturers—with a longer patent life—will likely enjoy a considerable return from their product with no competition, even though the price may lower to a more reasonable OTC price.  

Id. See also Herman Safilas & Bradley Worrell, Current Environment—Profit Growth May Slow As New Challenges Emerge, STANDARD & POOR’S INDUSTRY SURVEYS—HEALTHCARE: PHARMACEUTICALS, June 28, 2001, at 6 (predicting Schering-Plough has most to lose from OTC switch with nearly $3 billion in U.S. sales of Claritin in 2000).
I. THE MANUFACTURERS OF CLARITIN, ALLEGRA, AND ZYRTEC AND THE ALLERGY PRESCRIPTION DRUG MARKET

Claritin (loratadine), made by Schering-Plough Corporation; Allegra (fexofenadine), manufactured by Aventis; and Zyrtec (cetirizine), made by Pfizer, Inc., are medications developed to treat the symptoms of seasonal and year-round allergies. An allergy is a sensitivity to a substance, or allergen, that is usually harmless, but produces symptoms such as “sneezing, watery eyes, and a runny, stuffy, or itchy nose.”

Millions of people experience allergies, or at least the common symptoms of allergies. The manufacturers of Claritin, Allegra, and Zyrtec dominate the prescription market for allergy medications, and reap huge profits from prescription drug sales. In 2000, the sale of Claritin worldwide brought three billion dollars in revenue to Schering-Plough, a pharmaceutical company specializing in part in allergy medications. Such figures represent a nine percent increase over 1999 revenue amounts, and in the first quarter of 2001, Claritin

43. See Cox, supra note 6, at A1 (identifying the drug manufacturers of the three drugs); see also Lots of Allergies, supra note 42 (offering a general description of intended treatment of Zyrtec medication).
44. See What are Allergies?, available at http://www.claritin.com/allergy/about/what.html (last visited Feb. 8, 2002) (describing the symptoms of allergies and distinguishing between “seasonal allergic rhinitis”—allergies that change with seasons due to pollen from grasses, trees, and plants, and “perennial rhinitis”—reoccurring allergies caused by dust, mold, feathers, and pet dander).
45. See Cauchon, supra note 7, at IA (estimating that approximately fifty million people in the United States suffer from allergy symptoms).
46. See id. (reporting that Claritin, Allegra, and Zyrtec had $3.9 billion in U.S. sales in 1999, which accounted for nearly four percent of all prescription drug spending outside hospitals in this country).
49. See id. (referring to sales success of Claritin and revenue generated for its manufacturer).
generated $718 million in revenue.\(^5\) Similarly, Aventis Pharmaceuticals, which is the United States subsidiary of the global pharmaceutical company, Aventis Pharma AG,\(^5\) credits Allegra as one of its “top growth drivers” among its six product categories,\(^5\) accounting for 5.2% of Aventis’ revenue in 2000.\(^5\)

Pfizer, Inc., a combination of Pfizer Pharmaceutical Groups and Warner-Lambert, is also driven by prescription drug sales.\(^5\) While Zyrtec accounts for only 1.6% of Pfizer’s revenue, Zyrtec still “ranked second in U.S. sales among prescription allergy products,” and brought in $552 million for the company in 1999.\(^5\)

With such sales success, it is not surprising that the three manufacturers seek to maintain the prescription status of their products,\(^6\) which restricts the availability of Claritin, Allegra, and Zyrtec to allergy patients.\(^7\) All three drugs are currently protected under their patents, which guarantee the manufacturers exclusive rights to sales and profits from the drug.\(^8\) Patent protection excludes

\(^{50}\) See Product Sales, supra note 47 (charting the sale of Claritin per each business quarter, yearly worldwide, and separately within United States).


\(^{52}\) See id. (indicating strong sales performance potential of Allegra for Aventis due to the long length of its remaining patent life).

\(^{53}\) See FDA Authority, supra note 2 (listing the revenue percentages of three drugs for each manufacturer).

\(^{54}\) See Pfizer Inc.: On-line Media Kit—Pfizer Pharmaceutical Group, available at http://www.pfizermedia.com/pfizerpharm.html (last visited June 12, 2001) [hereinafter Pfizer Inc.] (providing a general introduction to company and its major therapeutic concentrations). Ninety percent of Pfizer’s total revenues come from prescription drugs, and nine of Pfizer’s medicines are at the top of their therapeutic categories in the United States. See id. (listing the nine top U.S medicines by category as: (1) Lipitor, to lower cholesterol; (2) Norvasc, to treat hypertension; (3) Aricept, for Alzheimer’s Disease; (4) Celbrinex, to relieve arthritis; (5) Zithromax, an anti-infective drug; (6) Viagra, to treat erectile dysfunction; (7) Diflucan, an anti-fungal drug; (8) Neurontin, to treat drug seizure disorders; and (9) Viracept, a protease inhibitor used by patients with HIV/AIDS).

\(^{55}\) See FDA Authority, supra note 2 (indicating the percentage of revenue Zyrtec provides for Pfizer); Pfizer Inc., supra note 54 (noting that Zyrtec is Pfizer’s major allergy prescription drug because of revenue generated by its sale).

\(^{56}\) See Schering-Plough Opposes Insurance Company’s Petition to Change Claritin (loratadine) Prescription Status, available at http://www.schering-plough.com/news/business/20010509_2.html (last visited Feb. 8, 2002) (stating Schering-Plough’s reasons for opposition to WellPoint’s petition, including lack of safety data and need for physician supervision); Aventis Opposes, supra note 27 (providing the reasons why Aventis disagrees with WellPoint’s petition, which largely reflect the reasons listed by Schering-Plough).

\(^{57}\) See 21 U.S.C. § 355(b)(1)(C) (1994) (directing that only professional licensed practitioners can dispense prescription drugs with a written prescription).

\(^{58}\) See 35 U.S.C. § 154(a)(1)(2) (1994) (stating that patents give “the right to exclude others from making, using, offering for sale, or selling” a product for life of patent, which is twenty years). For a drug manufacturer, this means that generic
any generic forms of the drugs from competing for sales and a portion of the allergy medication market. Although patent protection for the three drugs remains unaffected whether classified as Rx or OTC, a switch to OTC status could nevertheless force the drugs’ manufacturers to lower the prices to comparable OTC standards.

The loss of patent protection could significantly affect each of the manufacturers. Claritin accounts for about thirty-two percent of Schering-Plough’s revenue; yet with its patent scheduled to expire in 2002, Schering-Plough realizes that the loss of patent protection for Claritin in 2002, and the likely market competition that will result, will significantly impact its revenue. Aventis, however, will have longer patent protection on its major products and faces a lesser threat from generic competition, putting it in the best position of the three drug companies to maintain its prescription revenue. Specifically, Aventis’ Allegra protection extends longer than five years, at which point both Claritin and Zyrtec will have lost patent protection, and thus, the company will enjoy patent exclusivity until 2013.

Likewise, Pfizer will benefit from several more years of sales success because the company enjoys the exclusivity of the ingredient cetirizine in Zyrtec until 2007, when its patent is set to expire.

See also Warner, supra note 2, at A1 (noting that drug manufacturers usually are eager to switch their own products to OTC status so as to extend brand dominance once generic competition is allowed). When a prescription drug loses its patent protection, its price will fall as much as eighty percent. Id.


60. See Joseph Brown, New Twist on Switches, Med. Advertising News, Aug. 1, 2001, available at 2001 WL 26968806 (noting health-care analysts predict the price of Claritin, Allegra, and Zyrtec could drop eighty percent if switched to OTC status, which would be comparable to other OTC antihistamines and also similar to the amount that insured consumers already pay in co-payments). Such a drop would be the result of the OTC market itself and not because generic brands enter the market.

61. See FDA Authority, supra note 2 (summarizing the percentages of revenue earned for Claritin, Allegra, and Zyrtec).

62. See Schering-Plough Annual Report, supra note 48, at ¶ 2-3 (predicting loss of revenue when Claritin and other allergy drugs lose patent protection, based on current sales of Schering-Plough’s allergy medications).

63. See Fact Sheet, supra note 51 (noting the long life of patents retained by Aventis on many of its prescription drug products, including the Allegra patent, which lasts until 2013).

64. See Ornstein, supra note 26, at 1A (indicating that with the patent for fexofenadine, an active ingredient in Allegra, set to expire in 2013, it will be years before allergy drug costs will drop).

65. See id. (suggesting that although Zyrtec’s patent life, expiring in 2007, is half that of Allegra, the cost of Zyrtec will remain high for several years).
Zyrtec represents only a small part of Pfizer’s product base, Pfizer expects its revenues from Zyrtec to continue to increase during its period of exclusivity, a prediction based on the one-third sales increase that occurred in 1999.\(^6^6\) The drug’s growth is fueled by the fact that it is the only leading prescription allergy medication approved to treat both year-round indoor and outdoor allergies.\(^6^7\)

Schering-Plough, Aventis, and Pfizer are likely to generate millions of dollars in revenue if their drugs remain classified as prescription drugs.\(^6^8\) These companies admit that any loss of Rx status for Claritin, Allegra, and Zyrtec could seriously impact each company’s success, and that their influence on the allergy medication marketplace may impact the decision-making process of the FDA.\(^6^9\)

\(^6^6\) See Pfizer Inc., supra note 54 (reporting that after Zyrtec’s sales increased by one-third in 1999, it ranked second in U.S. sales among all allergy products).

\(^6^7\) See Pfizer Inc., supra note 54 (noting the unique effects of Zyrtec to treat year-round indoor and outdoor allergies rather than seasonal allergies).

\(^6^8\) See Cauchon, supra note 7, at 1A (reporting that prescription allergy medications produce considerably more revenue than when the drugs enter OTC status because the price for the same drug is sold for as much as 73% less than the original price).

\(^6^9\) See Aventis Opposes, supra note 27 (discussing how the manufacturers do not publicly admit they will lose money from the potential switch of Claritin, Allegra, and Zyrtec, nor do they use their loss of revenue as an argument in their opposition to the switch). There is, however, a general understanding that patent exclusivity and the sales success of the three drugs will increase revenue. See Cauchon, supra note 7, at A1 (stating that a switch to OTC status would lower the price of the medications).

Schering-Plough, in its annual report, has publicly recognized that the expiration of the patent on Claritin could have a significant impact on revenue. See Schering-Plough Annual Report, supra note 48 (reporting projections that suggest that a loss of patent exclusivity will negatively impact future sales). The drug manufacturers’ silence as to the switch’s financial effects stands in contrast to the petitioner’s claim, which makes it clear that financial savings is a part of WellPoint’s motivation in pursuing the switch. See Brown, supra note 60 (reporting that WellPoint would save $45 million a year if the allergy medications were granted OTC status). Dr. Michael Nichol, speaking on behalf of Blue Cross of California, presented a cost-effectiveness model to the Nonprescription Drugs and Pulmonary-Allergy Drugs Advisory Committee during the public hearing on May 11, 2001, which concluded that “the conversion from Rx to OTC would actually be cost saving to society.” Transcript, supra note 1, at 36.

Dr. Francois Nader, representing Aventis, built upon the petitioner’s representations and stressed to the committees that “Blue Cross has publicly stated its desire to save 18 million dollars, which represents less than one percent of their operating expenses, by eliminating reimbursement for non-sedating antihistamine prescriptions and related doctor visits.” Id. at 71. With such a statement, Allegra’s manufacturer noted that the company does not believe “that helping an insurer improve its bottom line by 30 percent through shifting costs . . . is a valid enough reason to turn a proven OTC process upside down.” Id. Interestingly, those who spoke on behalf of WellPoint and Blue Cross never mentioned the revenue generated by the three drugs for their manufacturers. The cost-effectiveness model focused on the amount society would save from automobile injury costs when drivers use drugs that are less-sedating than the current OTC antihistamines, rather than focusing on the money that the manufacturers stand to gain. Id. at 33. Such financial arguments were made despite the fact that the committees instructed the presenters that the “cost of therapy and health insurer reimbursement” were not
II. THE STATUTORY AND REGULATORY AUTHORITY OF THE FDA

The FDCA\(^{70}\) gives the FDA statutory authority to regulate drugs.\(^{71}\) In general, drugs are to be available to all consumers over-the-counter,\(^{72}\) as long as the drugs receive appropriate FDA approval.\(^{73}\) However, Congress recognized that in order to protect the public health and safety, some drugs must not be available over-the-counter.\(^{74}\) Thus, consumer access to certain drugs is only allowable with a physician prescription.\(^{75}\) Due to this physician supervision, such prescription drugs are exempted from the extensive labeling requirements demanded of OTC drugs.\(^{76}\)

A. Distinction Between OTC and Rx Drugs

1. OTC drugs

Before a drug can be marketed to a consumer over-the-counter, it must be adequately labeled.\(^{77}\) Based on § 352 of the FDCA, the “FDA has the authority to control certain aspects of the label, to enforce the requirement of truthful and nonmisleading label representations, and to ensure that the label contains adequate directions for use and

factors in the agency’s decisions. Id. at 15. Nevertheless, the fact that both the petitioner and manufacturers continue to draw attention to the financial implications of the switch indicates that this evidence is a powerful tool that both sides are using to influence the FDA. Id. at 71.

71. See 21 U.S.C. § 393(b)(2)(B) (1994) (“The [Food and Drug] Administration shall . . . with respect to such products, protect the public health by ensuring that . . . human and veterinary drugs are safe and effective . . . .”); see also 21 U.S.C. § 371(a) (1994) (stating that the Secretary of the FDA has authority to disseminate regulations to effectively enforce Act); Weinberger v. Hynson, Wescott & Dunning, Inc., 412 U.S. 609, 624 (1973) (holding that Congress selected the FDA to administer FDCA, which cannot be done “intelligently and rationally” without authority); Nat’l Nutritional Foods Ass’n v. Weinberger, 512 F.2d 688, 699 (2d Cir. 1975) (“Congress intended the FDA to exercise its rule-making powers under 701(a) [or §371(a)] in order to ‘enforce’ the statute.”).
73. See id. § 355(a) (requiring that new drugs receive approval through an application filed with FDA before it can be introduced and sold in prescription drug market).
74. See id. § 353 (providing that certain drugs having potentially harmful effects require a physician’s prescription).
75. See id. § 353(b)(1) (creating exemption for drugs “not safe for use except under the supervision of a practitioner licensed by law to administer such drug,” otherwise known as prescription drugs).
76. See id. § 355(b)(2) (exempting drugs dispensed by prescription from the labeling requirements of section 352 of Title 21).
77. See id. § 352(f) (requiring directions for use and warnings on labels in order not to be considered misbranded).
appropriate safety warnings.\footnote{78} In administering this legislative directive for labeling, FDA regulations adopt a strict standard for the level of information manufacturers must provide for OTC drugs.\footnote{79} In essence, a drug label must describe in plain language all information necessary to instruct the consumer, at a standard level of comprehension, how to self-medicate while being conscious of all effects and possible adverse reactions.\footnote{80} While OTC drugs are by definition available for any consumer to purchase and use,\footnote{81} the FDA attempts, through labeling regulations, to limit and deter misuse of OTC drugs with prominent warnings and instructions designed to educate consumers.\footnote{82}

\footnote{78} Cooper, \textit{supra} note 17, at 288.

A drug or device shall be deemed to be misbranded . . . unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or applications, in such manner and form, as are necessary for the protection of users . . . .

\textit{See} 21 U.S.C. § 352(f) \textit{(identifying labeling requirements that ensure OTC drugs are safe for consumer use); see also United States v. Articles of Drug, 625 F.2d 665, 672 (5th Cir. 1980) \textit{(noting that the FDCA's legislative history regarding misbranding reveals that Congress' purpose in requiring proper labeling on drugs was to aid consumers with safe self-medication, rather than to restrict availability of OTC drugs).}

\footnote{79} \textit{See} 21 C.F.R. § 330.10(a)(4)(v) (2001) \textit{("Labeling shall be clear and truthful in all respects"); see also \textit{Articles of Drugs}, 625 F.2d at 673 \textit{(emphasizing that Congress' purpose was to give consumers information to self-medicate safely, and the FDA's interpretation of the statute furthers that purpose through regulations requiring adequate directions for lay persons).}

\footnote{80} \textit{See} 21 C.F.R. § 330.10(a)(4)(v) \textit{(defining adequate directions and warnings).}

\textit{The Code of Federal Regulations states:}

the intended uses and results of the product; adequate directions for proper use; and warning against unsafe use, side effects, and adverse reactions in such terms as to render them likely to be read and understood by the ordinary individual, including individuals of low comprehension, under customary conditions of purchase and use.

\textit{Id. \textit{\textit{See also United States v. Various Quantities of Articles of Drug Labeled in Part: 'Instant Alberty Food', 85 F. Supp. 882, 885 (D.D.C. 1949) \textit{(holding that adequate directions for use means that the label must list every illness for which the drug is held out as remedy, and the user instructions describing quantity and frequency of dosage recommended for every possible illness); United States v. Vitafine Formula M, 226 F. Supp. 266, 278 (D.N.J. 1964) \textit{("Adequate directions for use requires that the labeling of a drug contain directions under which the layman can use a drug safely, intelligently, and effectively and for the purpose for which it is intended . . . .")}.}}}

\footnote{81} \textit{See U.S. Food and Drug Admin. Ctr. for Food Safety and Applied Nutrition Office of Cosmetics and Colors, \textit{Fact Sheet} (Apr. 10, 2000), \textit{available at} http://vm.cfsan.fda.gov/ndms/cos-218.html \textit{(defining "OTC" as drugs that can be purchased without a prescription).}

\footnote{82} \textit{Cf.} Levitt, \textit{supra} note 19, at 124 (indicating that OTC drugs must be deemed generally safe and effective \textit{("GRAS/GRAE")} in order to avoid being regulated as and limited to prescription drug status). To obtain GRAS/GRAE status: (1) scientific experts must recognize that the drug is safe for consumer use by the ingredients it contains and the directions for use given on the label, (2) safety data must support the expert recommendation, and (3) the drug has to have been used \textit{"to a material...}
To further protect consumers and ensure that they are able to make educated choices about OTC drugs, regulations require drug labels, in certain product categories, to contain specific warnings and word-for-word indications of use. For example, the labeling of OTC antihistamine drug products should identify the product as an antihistamine and indicate that the drug is “for the temporary relief of runny nose, sneezing, itching of the nose or throat, and itchy, watery eyes due to hay fever . . . or other respiratory allergies.” Based on the ingredients of the drug, the regulations mandate the inclusion of further warnings for drowsiness and require that clear directions for use are provided.

To be sold to consumers over the counter, FDA regulations also require that the drug meet certain safety and effectiveness standards. To make such a determination, an advisory panel of qualified experts, appointed by the Commissioner, considers both published marketing studies of actual use and clinical investigations to determine if the drug is safe and effective under the prescribed, recommended, or suggested conditions of use. Without reviewing such data, an advisory panel cannot weigh the benefits and risks to consumers who will self-administer the drug—a balancing approach that becomes important for classifying drugs as safe and effective when releasing them to the consumer market for OTC sale.

extent” and “for a material time” under the labeled conditions as evidence that consumers can self-administer the drug safely. See id. 83. See, e.g., 21 C.F.R. § 341.72 (2001) (listing words and phrases to appear on drug’s label when containing certain antihistamine ingredients). 84. Id. 85. See id. (requiring warnings of drowsiness and vehicle operation and also limits on dosage for antihistamine drugs with certain ingredients); id. § 330.10(a)(4) (establishing standards for safety, effectiveness, and labeling to determine generally whether a category of OTC drugs is safe and effective and not misbranded). 86. See id. § 330.10(a)(4)(i) (defining “safety” for drugs sold OTC as a low incidence of adverse reactions or side effects, under both adequate directions for use and warnings against unsafe use). The term also encompasses a low potential for harm, which may result from abuse under conditions of widespread availability. Id. “Effectiveness” means that, in a major part of the target population, there is a reasonable expectation that the pharmacological effect of the drug will provide substantial clinical relief of the type claimed, provided the drug is taken according to adequate directions for use and the consumer heeds warnings against unsafe use. See id. § 330.10(a)(4)(ii) (defining effectiveness for drugs sold OTC). 87. See id. § 330.10(a)(1) (“A single advisory review panel shall be established for each designated category of OTC drug and every OTC drug category will be considered by a panel. The members of a panel shall be qualified experts.”). 88. See id. § 330.10(a)(4)(i)-(ii) (identifying the standards of proof required for the advisory panel to find that a drug is safe and effective as defined in FDA regulations). 89. See id. § 330.10(a)(4)(iii) (determining that safety and effectiveness requires considering a drug’s benefit-to-risk ratio). 90. See id. § 330.10(a)(2) (requiring that advisory panels, made of qualified
2. **Prescription drugs**

The FDA assiduously seeks to protect consumers choosing drugs for their ailments. In making distinctions between drugs, it recognizes that certain medications are too difficult for consumers to administer without special guidance and are too dangerous for consumers to take without supervision. As a result, Congress allows the FDA to restrict certain drugs to prescription status and exempt drugs from OTC requirements. According to Title 21, § 353(b)(1)(A) of the United States Code, if a drug has a toxicity level or other potential for harmful effect, or if a specific method of use or additional collateral measures are necessary to use the drug safely, a licensed physician is required to supervise the use of the drug and to dispense the drug only by a written prescription. In other words, if a drug poses a safety risk, as defined in the statute, to a consumer who would self-administer the drug, then the drug must be available only by prescription.

Because prescription status requires the guidance of a licensed physician, labeling requirements for prescription drugs are also exempt from the strict standards applicable to OTC medications. An OTC drug is considered misbranded when the labeling is misleading and fails to reveal facts or potential consequences resulting from use of the drug. Consequently, to avoid being

experts, review data and information submitted for category of drugs). To consider and evaluate all sides of an issue, the panel can consist of experts representing professional, consumer, and industry interests. Id.

91. See id. § 330.10 (establishing extensive procedures to be followed in order to classify OTC drugs as GRAS/GRAE, including advisory review panels and labeling—or monograph—studies).

92. See Cooper, *supra* note 17, at 263 (noting that the FDCA draws distinctions between drugs based on level of toxicity, whether a drug is habit-forming, its potential for harmful effect, and the method of use, and also requires a physician’s prescription to dispense a drug having these characteristics to consumers).

93. See 21 U.S.C. § 353(b) (1994) (establishing exemptions from labeling and prescription requirements); see also United States v. Articles of Drug, 625 F.2d 665, 673 (5th Cir. 1980) (stating that “[s]ince a prescription drug . . . can be used only under a physician’s supervision, . . . such a drug must qualify for a regulatory exemption created by FDA. By providing for such exemptions, Congress apparently anticipated that certain classes of drugs might be unable to meet an adequate directions for lay use requirement.”).

94. See 21 U.S.C. § 353(b)(1)(A) (requiring prescription by physician when a drug is difficult to use or potentially harmful if used without supervision).

95. See id. (limiting the disbursement of unsafe drugs except under directives of a physician).

96. See id. § 352(f) (providing that when labeling and directions for use are not necessary for the protection of the public health, the Secretary shall exempt that drug from labeling requirements through regulations); see also id. § 353(b)(2) (exempting prescription drugs from labeling requirements of section 352).

97. See id. § 321 (1994) (defining misbranded to mean an “article” that has labeling or advertising that is misleading, and providing factors to be considered in
deemed misbranded, adequate directions for use and adequate warnings must be provided on the label of an OTC drug.\(^98\) On the other hand, it will suffice for the label of a Rx drug to contain the name and address of the dispenser, the serial number and date of the prescription, the name of the prescribing physician, directions for use, and any warnings stated in the prescription.\(^99\) At minimum, a prescription drug, to avoid being considered misbranded, must also bear a label with the symbol “Rx only.”\(^100\)

Although a prescription drug label does not have to provide adequate directions for consumer use, it still must provide full disclosure to the person licensed by law to administer the drug, including “information about indications, effects, dosages, routes, methods, frequency and duration of administration, and any relevant warnings, hazards, contraindication, side effects, and precautions.”\(^101\) In addition, the prescription package shipped to pharmacists and administering physicians must include information for the practitioner regarding the proper directions for use and any warnings.\(^102\) With such requirements, the FDA seeks to ensure that the practitioner selects the proper drug for the patient and safely instructs the patient on its use.\(^103\)

### B. FDA Procedure to Switch Drugs from Rx to OTC

The FDA has the authority to classify drugs for OTC sale through advisory panels and expert opinions.\(^104\) The FDA excludes drugs from determining whether labeling or advertising is misleading).

98. See id. § 352(f) (establishing that a drug is misbranded unless its labeling has adequate directions for use and adequate warnings against dangerous conditions, dosage methods, and duration of drug administration); see also 21 C.F.R. § 330.10 (2001) (defining procedures for classifying OTC drugs as GRAS/GRAE, and therefore, not misbranded).


100. See id. § 353(b)(4)(A) (requiring no specific labeling warnings, except that a prescription drug will be deemed misbranded if its label does not include the “Rx only” symbol).

101. Cooper, supra note 17, at 289; see also 21 C.F.R. § 201.100 (2001) (exempting prescription drugs from labeling that provides adequate directions for use but requiring a statement to pharmacist); 21 C.F.R. § 201.56 (2001) (establishing general requirements on content and format of labeling for human prescription drugs).

102. See Cooper, supra note 17, at 289 (expounding on information physicians and pharmacists must be provided with prescription drugs); see also 21 C.F.R. § 201.100(c)(1) (requiring that the contents of the package or the labeling on the package, from which the drug is to be dispensed, bear adequate information for its use).

103. See Cooper, supra note 17, at 289 (arguing that because prescription drugs cannot be used safely by consumers for self-medication and cannot be labeled with adequate directions for use, labeling exemptions are conditioned upon full disclosure of information to physicians and pharmacists).

104. See supra note 88 and accompanying text (noting the role of FDA advisory
OTC sale when the toxicity, potential for harmful effect, or method of use makes the drug unsafe for consumer use without supervision of a licensed practitioner.\footnote{105} Once a drug is classified as a prescription drug, however, the FDA has the authority, under § 353(b)(3) of the FDCA, to switch a drug from Rx-to-OTC status.\footnote{106}

The FDA regulates the Rx-to-OTC process by designating the grounds upon which the switch can be made and the proper parties to initiate the switch.\footnote{107} First, any drug requiring a prescription for use can be exempted from prescription-dispensing requirements when the FDA Commissioner\footnote{108} finds that prescription status is not necessary for protection of the public health and that the drug is safe and effective for self-medication as directed in the proposed labeling.\footnote{109} Thus, if there is proof that the drug is safe and effective, and if the labeling provides clear, comprehensible, and adequate directions for use and warnings, then the FDA holds the authority to make the drug available over-the-counter.\footnote{110}

Second, there are two additional ways to accomplish a switch from Rx-to-OTC status.\footnote{111} While a Commissioner may initiate a proposal to remove prescription restrictions, the process may also be spurred by (1) any person interested in the Rx-to-OTC switch who files a petition or (2) any interested person filing a supplemental to an approved new drug application, which is initially filed to gain approval of a prescription drug.\footnote{112} WellPoint, as an “interested person,” used the citizen petition method authorized under § 310.200 of the Code of panels, made up of experts, in deciding a Rx-to-OTC switch).\footnote{105} See 21 U.S.C. §§ 352, 353(b)(1) (1994) (classifying drugs in general and defining those drugs requiring a prescription); see also 21 C.F.R. § 330.10(a)(4)(vi) (stating that drug must be sold OTC unless its toxicity or harmful effects require prescription to be used safely).\footnote{106} See 21 U.S.C. § 353(b)(3) (allowing the Secretary of the FDA to remove, by regulation, prescription drugs approved with NDA application from prescription status when such restrictions are not necessary for the protection of public health).\footnote{107} See 21 C.F.R. § 310.200(b) (outlining the prescription-exemption procedure for drugs limited by a new drug application, or those already requiring prescription).\footnote{108} See 21 U.S.C. § 393(d)(2) (requiring the Secretary, who is appointed by the President with the advice and consent of the Senate, to be responsible for administering the FDCA through the Commissioner).\footnote{109} See 21 C.F.R. § 310.200(b) (describing the prescription exemption procedures for approved prescription drugs).\footnote{110} See id. § 330.10 (outlining the procedures, including labeling, for classifying OTC drugs as generally recognized as being safe and effective and not misbranded).\footnote{111} See id. § 310.200(b) (“A proposal to exempt a drug from the prescription-dispensing requirements of section 503(b)(1)(C) of the act may be initiated by the Commissioner or by any interested person,” either by petition or by filing “a [supplement] to an approved new drug application.”).\footnote{112} See id. (identifying persons or methods that can initiate an Rx-to-OTC switch).
Federal Regulations. Courts recognize and uphold the binding authority of the FDA to promulgate these regulations and define the Rx-to-OTC process, as seen, for example, in the Second Circuit’s decision in National Nutritional Foods Ass’n v. Weinberger. Considering the regulations and judicial affirmations of the FDCA, it appears that the FDA has clear authority to make determinations about drugs in order to protect consumer health and safety, as well as the authority to switch a drug from Rx-to-OTC status. However, drug manufacturers more commonly initiate the switch, and expert advisory panels and the public play important informational roles in the FDA’s decision-making process. Although the FDA submitted WellPoint’s petition to the Nonprescription Drugs and the Pulmonary-Allergy Drugs Advisory Committees for consideration and held a public hearing, the WellPoint petition lacks safety and labeling data that likely would have been included if the manufacturers of Claritin, Allegra, and Zyrtec had initiated the switch. As a result,

113. Id. § 310.200(b). See also id. § 10.30 (allowing any person to submit a citizen petition to FDA); Seidman Letter, supra note 5 (citing § 10.30 as authority allowing WellPoint to petition FDA for drug switch).

114. 512 F.2d 688 (2d Cir. 1975). Vitamin manufacturers brought suit against the Commissioner of the FDA to challenge regulations that classified variations of Vitamin A and D as prescription drugs. Id. The manufacturers claimed the FDA had no power under section 701(a), (now section 371(a)), of the FDCA to issue binding regulations and that the vitamins were improperly restricted. Id. at 691. The Second Circuit acknowledged that Congress did not expressly spell out the authoritative effect of regulations under section 371(a). Id. at 695. Yet, the court cited the Supreme Court’s decision in Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973), which interpreted section 371(a) as giving the FDA the power to promulgate regulations that have the binding force of law. Id. at 696-97. As a result, the court remanded the case to determine whether the Commissioner acted rationally in restricting Vitamins A and D to prescription status. Id. at 704. If the Commissioner acted rationally, then the regulations should be upheld. See id. (discussing the FDA’s authority to issue binding regulations).

115. See U.S. FDA Panels, supra note 24 (discussing the usual role of manufacturers in switch procedure and in conducting safety tests to gather safety data of drug under OTC-use conditions).

116. See Issue Paper, FDA Petition for Prescription to Over-the-Counter Switch for Claritin, Allegra, and Zyrtec, available at http://www.wellpoint.com/fda/issue.htm (last visited Oct. 16, 2001) [hereinafter Issue Paper] (summarizing the FDA authority and regulatory scheme for OTC and prescription drugs and noting that advisory panels apply regulatory standards to determine if a drug can be generally recognized as safe and effective). The FDA set precedent for initiating an Rx-to-OTC switch with the asthma drug, Alupent. Id. Yet, the FDA did not seek input from advisory panels or the public before making the switch and subsequently received comments and public criticism for allowing Alupent to be marketed OTC without consulting the public. Id. As a result of the criticism received and also safety complications that later arose, the FDA switched Alupent back to an Rx drug. Id. The Agency now regularly seeks the input of drug manufacturers and the public—who provide usage, safety information, clinical data and expert panels in order to determine that the drug is safe and can be adequately labeled for non-prescription use. Id.

117. See Aventis Opposes, supra note 27 (noting that drug manufacturers generally submit data from actual use and labeling comprehension studies, as well as proposed
WellPoint Health Networks and the drugs’ manufacturers are divided over what action the FDA should take.

III. WELLPOINT’S SAFETY AND ECONOMIC ARGUMENTS IN SUPPORT OF THE PETITION AND THE DRUG MANUFACTURERS’ ARGUMENTS IN OPPOSITION TO THE PETITION

When adequate data demonstrates that a drug is safe if used without professional supervision, prescription drugs can be switched to OTC status. Both WellPoint and the drug manufacturers of Claritin, Allegra, and Zyrtec use safety data to support and oppose the proposed switch. In each argument, however, financial considerations are important, both to the insurance company paying millions for such widely prescribed medications and to the manufacturers who enjoy substantial revenue from the products. Regardless, the FDA maintains that it is concerned only that Claritin, Allegra, and Zyrtec can be used safely by consumers, when given appropriate directions and warnings and without the supervision of a physician.

labeling, along with a petition for an Rx-to-OTC switch).

118. See Stan Stringer, What Has Been Happening with Over-the-Counter Drug Regulation, 53 FOOD & DRUG L.J. 633, 634 (1998) (noting that an approved prescription drug can be switched to OTC status where adequate data demonstrate its safety when used without physician supervision); Linda M. Katz, Prescription to Over-the-Counter Drug Switches, 48 FOOD & DRUG L.J. 567, 569 (1993) (suggesting that the criteria for OTC approvability includes: likelihood of beneficial effects, likelihood of harmful effect, and effectiveness of communicating necessary information about proper use to lay consumer).

119. In previous OTC switches, drug sponsors have been required to demonstrate the drug’s safety through a large body of data, including both clinical trial use and actual use studies. See BRIEFING BOOK, supra note 15, at 9 (defining safety for drugs sold OTC). Updated scientific information, developed since the time of initial NDA approval, is also required to provide a more current understanding of the underlying disease, the current medical practice, and the pharmacology of the drug. Id.

120. See Question and Answers, supra note 12, at Question 2 (discussing WellPoint’s overall position for initiating the Rx-to-OTC switch and noting safety data used to support their position); BRIEFING BOOK, supra note 15, at 1-4 (outlining Schering-Plough’s arguments, including rejection of WellPoint’s safety data); see generally Executive Summary on Risk Issues, AGENDA, PLANNING AGENDA, BRIEFING INFORMATION OF JOINT MEETING OF THE NONPRESCRIPTION DRUGS ADVISORY COMMITTEE AND PULMONARY-ALLERGY DRUGS ADVISORY COMMITTEE, Pet. 98P-0610/CPI (reviewing the active ingredients of three drugs—loratadine, fexofenadine, and cetirizine—and the studies conducted on their side effects and other potential risks).

121. See Questions and Answers, supra note 12, at Question 6 (indicating that WellPoint expects to save $45 million on allergy prescription drug costs).


123. See FDA Overview, supra note 16 (“The committees should be cognizant that the FDA is NOT seeking advice on economic considerations of a switch (as these are not the purview of the FDA) nor are we seeking debate on the regulatory and
A. **WellPoint Argues that the Drugs’ Safety Demands an Rx-to-OTC Switch**

To support its push for an Rx-to-OTC switch, WellPoint argues that Claritin, Allegra, and Zyrtec are “less sedating and exhibit a lower level of side effects than the antihistamine products that are currently available OTC.” WellPoint conducted its own research, which concluded that the toxicity-induced sedation of first-generation antihistamines, or OTC allergy drugs, makes second-generation antihistamines, or those available only by prescription, the preferable treatment for allergies because Rx allergy drugs are equally effective but less sedating than similar OTC allergy drugs. WellPoint points to the fact that allergy patients know how to use the many antihistamines already available over the counter, and therefore, they should have access to a safer alternative—namely the drugs currently restricted to prescription status. As evidence, WellPoint points to the fact that Claritin has been safely sold OTC for twelve years in

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124. *FDA Advisory Panel Overwhelmingly Supports WellPoint Petition to Switch Claritin, Allegra and Zyrtec From Prescription to Over-the-Counter Status (May 11, 2001)*, available at [http://www.wellpoint.com/VPR/press/press2001/may1101.htm](http://www.wellpoint.com/VPR/press/press2001/may1101.htm). See Cauchon, *supra* note 7, at 4A (stating that the old OTC drugs and new drugs are equally effective, but chemicals of old drugs enter brain and cause sleepiness, slowed reactions, and impaired coordination, whereas Claritin, Allegra, and Zyrtec do not have side effects because they are composed of larger molecules that do not enter brain easily); see also Transcript, *supra* note 1, at 49 (reemphasizing WellPoint’s argument that Claritin, Allegra, and Zyrtec are safe for OTC use by pointing out that the FDA approved direct-to-consumer advertising notifying consumers that these drugs have side effects similar to those of a sugar pill). But see Transcript, *supra* note 1, at 96 (reporting Schering-Plough’s opposition to petition). Schering-Plough argues that there are significant differences in the way current OTC drugs and Rx allergy drugs are used, which affects how safely Claritin, Allegra, and Zyrtec could be used OTC. *Id.* Current OTC drugs are used for relief of colds, whereas Rx drugs are part of a chronic disease management approach to allergies. *Id.*

125. *See Cauchon, supra* note 7, at 4A (comparing the sedative effect from the recommended doses of older OTC drugs to that of being legally drunk).*

126. *See Questions and Answers, supra* note 12, at Question 18 (indicating that Rx allergy drugs are preferable). The conclusions of the study commissioned by WellPoint and conducted at the University of Southern California are as follows: (1) the important side effects associated with antihistamines are sedation, driving impairment, and life-threatening cardiac arrhythmias; (2) the occurrence of these side effects is significantly higher with current antihistamines available OTC, or the first-generation antihistamines, than Claritin, Allegra, and Zyrtec, the second-generation antihistamines; (3) the efficacy of the OTC and Rx antihistamines for the treatment of allergic rhinitis is comparable; and (4) because Claritin, Allegra, and Zyrtec, the second-generation antihistamines, are less toxic and equally effective as current OTC antihistamines, the second-generation antihistamines are the preferred antihistamine treatment for allergic rhinitis. *Id.*

127. See Transcript, *supra* note 1, at 18, 20 (summarizing WellPoint’s overall safety argument). “We know, because of the precedent of many over-the-counter antihistamines being available today, that patients can readily diagnose their condition; that patients can successfully self-treat; that patients can use these safely in an over-the-counter environment.” *Id.* at 20 (emphasis added).
Canada with an “exemplary” record.\textsuperscript{128} WellPoint’s argument is supported further by accident investigations conducted by the National Transportation Safety Board (“NTSB”).\textsuperscript{129} Referring to an April 2000 study published in \textit{USA Today},\textsuperscript{130} WellPoint notes that when sedating antihistamines are determined to be a cause of death, these deaths most often resulted from traffic accidents.\textsuperscript{131} The NTSB has linked the sedating ingredient in Benadryl with causing at least one fatal bus accident in 1998 and possibly another in 1999.\textsuperscript{132} Other statistics compare the sedating effects of OTC antihistamines to alcohol,\textsuperscript{133} and also explore the greater side effects of these drugs during air travel.\textsuperscript{134} WellPoint claims Claritin, Allegra, and Zyrtec do not pose the same risks.

Although WellPoint advances the safety of the prescription drugs as its strongest argument for an OTC switch, it also advocates the switch

\textsuperscript{128} Transcript, supra note 1, at 20. But see id. at 69 (citing the counter-argument by Aventis concerning sale of Claritin in Canada). Aventis’ representatives note in their presentation that Claritin, Allegra, and Zyrtec are sold OTC in Canada as “Schedule 3” drugs. Id. at 69. “Schedule 3” means that the drugs can only be sold under the supervision of a pharmacist, rather than directly to the consumer. Id. at 70.

\textsuperscript{129} See National Transportation Safety Board Safety Recommendation, FDA DOCKET MGMT. BRANCH, No. 98P-0610, Vol. 1, 1-2 [hereinafter NTSB Safety Recommendation] (citing Benadryl and other medications as the cause of traffic accidents, and recommending that the FDA require labels for medications stating that medications could impair a person’s ability to operate a vehicle).

\textsuperscript{130} See Cauchon, supra note 7, at 1A (reviewing 150 medical studies of antihistamines, interviewing more than a dozen allergy researchers, and reviewing price and sales data to conclude that Claritin, Allegra, and Zyrtec are safer than current OTC drugs); Questions and Answers, supra note 12, at Question 11 (citing the \textit{USA Today} study in a list of chronological events that have occurred since WellPoint’s filing of the petition for OTC status for Claritin, Allegra, and Zyrtec).

\textsuperscript{131} See Cauchon, supra note 7, at 4A (emphasizing the danger of current, sedating OTC allergy drugs by noting that such antihistamines have been linked to an average of 600 traffic-related deaths and 47,750 traffic-related injuries each year).

\textsuperscript{132} See Cauchon, supra note 7, at 1A (noting that traces of Benadryl were attributed to a bus driver falling asleep and crashing a bus on the Pennsylvania Turnpike in 1998 and that Benadryl may have contributed to another fatal bus crash in New Orleans in 1999); NTSB Safety Recommendation, supra note 129, at 2-3 (linking an ingredient in Benadryl to the 1998 crash).

\textsuperscript{133} See Cauchon, supra note 7, at 1A (“[A] single dose of Benadryl is equivalent to a blood-alcohol content of .09—higher than the .08 level that makes a driver legally drunk in many states.”); Ornstein, supra note 26, at 1A (noting that WellPoint refers to an Aventis study showing that Benadryl-takers scored lower on driving tests than those driving while legally drunk); Transcript, supra note 1, at 29 (comparing the sedation effects of Rx and OTC antihistamines and noting that impairment of driving by current Rx antihistamines is “minimal to none”).

\textsuperscript{134} See Cauchon, supra note 7, at 4A (reporting that “sedating antihistamines have been found in the blood of more than 100 pilots involved in fatal plane crashes since 1987” and that “high altitude exaggerates the sedating effect of the old antihistamines, which is one reason the FAA forbids pilots to fly under the influence of these drugs”); Ornstein, supra note 26, at 1A (noting that the FAA requires pilots to wait 48 hours after taking OTC antihistamines before flying, but requires no such time restriction for pilots taking Claritin and Allegra).
as a cost-saving directive for patients, who increasingly desire to direct their own healthcare, and for the healthcare system, which is facing “a growing financial burden” as a result of rising prescription costs. On the consumer-savings front, WellPoint argues that once the switch to OTC is made, the price of the drugs will decrease, making them more easily accessible to all consumers, regardless of health insurance coverage. With regard to healthcare system savings, WellPoint estimates that the switch will save the company a total of $90 million: $45 million from prescription costs and $45 million from prescription co-pays. In sum, a switch will provide better quality healthcare to all consumers.

B. Manufacturers of Claritin, Allegra, and Zyrtec Argue that More Safety Data Must Be Collected and the Drugs Require Continued Physician Supervision

As the sponsors of Claritin, Allegra, and Zyrtec—and as those who research and study drugs—the drug manufacturers base their safety argument on two main points: (1) the usual safety studies, which are used to demonstrate that the drugs can be used safely and effectively on a non-Rx basis, have not been conducted, and (2) OTC status would eliminate the role of the physician, causing delays in diagnosis and treatment of more serious chronic diseases that are sometimes masked by symptoms similar to allergies.

135. See Seidman Letter, supra note 5 (stating that “patients are seeking great ownership of their health care and often prefer to self-medicate when feasible”).
136. See Questions and Answers, supra note 12, at Question 2 (linking the amount of prescription money spent on “direct-to-consumer (DTC) symptom relief drugs,” like Claritin, Allegra and Zyrtec, to the growing financial burden on the healthcare industry).
137. See Questions and Answers, supra note 12, at Question 15 (noting that, based on historic market trends, drug prices go down when drugs go OTC and that consumers will have ready access to safer OTC drugs).
138. See Questions and Answers, supra note 12, at Question 6 (estimating the savings for WellPoint if the switch is made to OTC status).
139. See Seidman Letter, supra note 5 (arguing that most people are deprived of quality drug treatment, because Claritin, Allegra, and Zyrtec are restricted to prescription-access only).
140. See Transcript, supra note 1, at 78 (stating that Pfizer was invited to participate in public hearings but declined the opportunity). Hereinafter, “manufacturers’ arguments” refers to those arguments made by Schering-Plough and Aventis.
141. See Aventis Opposes, supra note 27 (indicating that Aventis has not had time to gather the safety data usually accompanying petition to switch from Rx-to-OTC); Briefing Book, supra note 15, at 2 (noting that the petition lacks the rigorous data required to support the Rx-to-OTC switch).
142. See Aventis Opposes, supra note 27 (arguing that a physician prescription is necessary to use Allegra); Briefing Book, supra note 15, at 3 (stating that physician supervision is critical to protect against misuse of Claritin).
A drug manufacturer usually initiates an OTC switch by filing a comprehensive supplemental NDA submission containing the proposed labeling for the OTC drug and data from actual use and labeling comprehension studies. In this case, however, the manufacturers argue that they have not filed a supplemental NDA and have not conducted actual OTC use or labeling comprehension studies, and therefore, it cannot assure that an OTC switch will not adversely impact consumers' health. They argue that the OTC drug's impact should be assessed in the OTC setting rather than under its prescription use requirements. Noting that WellPoint's citizen petition is unprecedented, the drug manufacturers stress that without rigorous studies to produce the appropriate safety data, a switch in this case would be inconsistent with previous FDA switches and scientifically unwise.

In the alternative, the manufacturers argue that physician supervision is necessary for the proper diagnosis and treatment of allergies, and that other diseases can often be masked by allergic symptoms. Asthma, for example, is one condition that shares...
similar symptoms with allergies. Manufacturers argue that a patient with undiagnosed asthma will treat its symptoms with the easily accessible OTC drug, rather than see a doctor, and thus leave a potentially dangerous condition untreated.

Manufacturers counter the financial argument of WellPoint by arguing that insured patients of WellPoint and all other insurance companies will shoulder the greatest financial burden. While Claritin, Allegra, and Zyrtec are usually covered under insurance premiums, OTC status would shift this cost directly to the consumers, who would then be forced to pay out-of-pocket for the expensive medication. Accordingly, manufacturers argue that consumption of the products might be reduced if consumers cannot afford to pay the OTC price without insurance reimbursement.

Although both parties present credible information in support of their arguments, the advisory committees rejected the manufacturers' concerns. However, WellPoint has not yet won the battle. Almost one year after the committees considered the WellPoint petition, Schering-Plough filed its own supplemental NDA to switch all formulations and indications of prescription Claritin to OTC status. Facing the patent expiration for Claritin at the end of 2002, Schering-Plough called its new filing a "strategic business and medical

149. See Briefing Book, supra note 15, at 13 (stating that allergies are now recognized as frequently associated with serious comorbid diseases, such as asthma).
150. See Aventis Opposes, supra note 27 (noting that the lack of a physician's supervision over patients who think they have allergies could cause delays in the diagnosis and treatment of more serious chronic diseases).
151. See Briefing Book, supra note 15, at 4 (stating that the cost shifting will have a major impact on allergy sufferers); Aventis Opposes, supra note 27 (stressing that drug costs would shift from Blue Cross of California directly to consumers if the Rx-to-OTC switch is approved).
152. See Briefing Book, supra note 15, at 18 (predicting that consumers will face a decrease in insurance coverage and increases in out-of-pocket drug costs); Transcript, supra note 1, at 94 (arguing that those patients who currently have insurance will begin to make poor medical decisions based on out-of-pocket expenses, rather than what is the best medical treatment).
153. See Dabrowa, supra note 18, at 1A ("[T]he reclassification might have the opposite effect [from lowering prices] and limit the medicines to only those who can afford them.").
154. See Cox, supra note 6, at A1 (providing the vote counts from advisory committees, which recommended nineteen-to-four that Claritin and Zyrtec go OTC and eighteen-to-five that Allegra also be switched).
decision' to introduce a safe antihistamine into the OTC market, while also clearing the path for its new allergy prescription drug, Clarinex, to dominate the allergy prescription market. This supplemental NDA calls for Claritin’s OTC status for the relief of symptoms of allergic rhinitis and chronic idiopathic urticaria (CIU),

156. Id. But see BRIEFING BOOK March 2002, supra note 31, at 3-4 (noting that Schering-Plough raised safety concerns about the switch of Claritin at the May 11, 2001 meeting of the committees, but “[t]he vote of the Advisory Committees as well as FDA’s strong support of a switch of loratadine, has led [them] to re-examine [their] position” and argue that the issues previously raised by them, such as the need for physician oversight and management for chronic conditions and other related illnesses, should not preclude a switch of Claritin to OTC status); Gardiner Harris, FDA Panel’s Vote Puts Claritin on Solid Mass-Market Footing, WALL ST. J., Apr. 23, 2002, at D4 (noting that a Schering-Plough executive made a passionate plea for approval in the April 22, 2002 hearing, to which Dr. Donal Uden, a committee member, “rolled his eyes” and commented, “Eleven months ago, these drugs weren’t safe enough to be OTC (according to Schering-Plough) and now they are.”).

157. See FDA Panel Backs OTC Use of Schering-Plough’s Claritin for Hives, MARKETLETTER, Apr. 29, 2002, available at 2002 WL 7179045, at #2 [hereinafter FDA Panel Backs OTC Use] (noting that Clarinex, which is a single-isomer version of Claritin, was introduced to the prescription market in January 2002 and is being marketed as a better option to Claritin because it is approved for both indoor and outdoor allergies). But see ABC News: World News Tonight (ABC television broadcast, Apr. 22, 2002) (quoting Robert Seidman, Chief Pharmacy Officer at WellPoint Health Networks, to say, “Clarinex is an attempt by Schering-Plough to protect the market,” which, in other words, means that Clarinex is Claritin in disguise, an effective copycat drug). Because of such perceived similarities, WellPoint has filed an additional petition with the FDA to expedite an OTC approval for Clarinex (desloratadine). See Letter from Robert C. Seidman, Chief Pharmacy Officer, WellPoint Health Networks, to Food and Drug Administration, Center for Drug Evaluation and Research (Apr. 15, 2002) (on file with author) (citing the Schering-Plough comparison of the comparable safety features of Clarinex to Claritin as reason to make Clarinex also available to consumers in an OTC setting to give them better access to safer drugs). However, Clarinex was only introduced in January 2002 and despite criticism that Clarinex and Claritin are identical and have the same effects, WellPoint’s new petition is unlikely to be taken seriously. See M. Alexander Otto, The Old Switcheroo—New Prescription Allergy Drug Clarinex Looks a lot Like Claritin, Which Will Soon be Available More Cheaply Over the Counter, PITT. POST-GAZETTE, Apr. 23, 2002, at D1 (stating that the FDA approved Claritin on December 21, 2001 based on studies proving that it worked better against allergies than a placebo; however, studies conducted in Europe, where Clarinex has been for sale for months, concluded that Clarinex is “probably not superior” to Claritin).

158. See Schering-Plough Aims to Make Claritin Premier Brand, supra note 155 (“With the market introduction of Clarinex as the first and only prescription non-sedating antihistamine approved for the treatment of indoor and outdoor allergies, moving Claritin to OTC status would give Schering-Plough an opportunity to establish brand leadership in both the prescription and OTC categories.”) (quoting Richard W. Zahn, president of Schering Laboratories); see also Gardiner Harris, Merck Report Earnings that Ease Wall Street’s Concerns, WALL ST. J., Apr. 19, 2002, at A17 (noting that sales of Clarinex rose to $85 million in its first quarter on the market as sales of Claritin dropped eight percent as users were switched to Clarinex); Adrian Michaels, Schering Awaits Decision on Drug, FIN. TIMES, Apr. 22, 2002, at P31 (suggesting the sales of Clarinex would be undermined if doctors were able to prescribe a cheaper, generic form of Claritin, which could be the case if the FDA decided Claritin should not become OTC).
or recurring hives. Because the WellPoint petition and the May 11, 2001 joint meeting of the committees only focused on the allergic rhinitis indication of Claritin, the Nonprescription Drugs Advisory Committee held another hearing, on April 22, 2002, to consider Schering-Plough’s proposal to market Claritin for the treatment of CIU in an OTC setting. The committee voted unanimously to recommend approval of Claritin to treat CIU over-the-counter, and also recommended broadening the OTC use of the drug to include general hives. Taking into account the committee’s recommendations supporting both the WellPoint petition and Schering-Plough’s supplemental NDA, the FDA will issue its final decision, pursuant to and guided by the agency’s statutory and regulatory authority.

IV. THE QUESTION OF WELLPOINT’S RIGHT TO PETITION THE FDA

Before considering the options available to the FDA in response to the WellPoint petition and supplemental NDA, it makes sense to explore the question of whether WellPoint, at the outset, may act as a petitioner for an Rx-to-OTC switch. Under the Code of Federal Regulations, “any interested person” may file a citizen petition with the FDA to initiate the Rx-to-OTC process when prescription restrictions are no longer needed to protect public health.

160. See Memorandum from Charles E. Lee, MD, Medical Officer, Division of Pulmonary and Allergy Drug Products, to the Members of the Nonprescription Drugs Advisory Committee, selected members of the Pulmonary-Allergy Drugs Advisory Committee, and invited consultants, 1 (Mar. 26, 2002) (on file with FDA at http://www.fda.gov/ohrms/dockets/ac/acmenu.htm) (noting that Schering-Plough’s supplemental NDA targets the indications for OTC use of Claritin as “hay fever and other respiratory allergies,” and “itching and rash due to recurring or chronic hives of an unknown source”).

161. Id. at 2.


163. FDA Panel Backs OTC Use, supra note 158, at *2. The Committee also noted that patients should be monitored by a physician before taking Claritin to exclude the existence of potentially more serious allergic reactions. Id.

164. See 21 C.F.R. § 14.5(b) (2001) (giving the FDA Commissioner sole discretion to accept or reject advisory committees’ recommendation).

165. See id. § 310.200(b) (allowing “any interested person” to initiate Rx-to-OTC switch by filing a citizen petition pursuant to 21 C.F.R. §§ 10.1-10.206 or by supplementing an approved NDA application of the drug when the Commissioner of the FDA finds prescription restrictions are not necessary for protection of public health).
Given the statute’s plain language and considering the safety arguments WellPoint advances in support of its petition, WellPoint appears empowered to bring a citizen petition. WellPoint’s petition, however, lacks the OTC safety and labeling data that usually accompany Rx-to-OTC switch proposals. But, even if the FDA was willing to overlook this lack of safety and labeling data, it remains questionable whether WellPoint petitioned the FDA out of the required concern for public health, and not out of pure economic self-interest. Coupled with the possibility that WellPoint cannot provide the required safety data, WellPoint’s right to petition the FDA is suspect.

FDA regulations only require an “interested person” to submit an Rx-to-OTC petition. WellPoint asserts two legitimate interests in the switch of Claritin, Allegra, and Zyrtec. First, WellPoint maintains that the switch will provide consumers with better access to safer antihistamines. Second, WellPoint stresses that a switch will save it millions in prescription costs each year. By advocating the switch in the apparent interest of consumer health, WellPoint’s asserted claims are sufficient to satisfy the “interested” petitioner.

In addition to having to meet the “interest person” requirement, WellPoint must qualify as a “person.” Both the regulations governing the Rx-to-OTC switch process and the submission of a citizen petition define “person” to include an individual, partnership, corporation, or an association. WellPoint is organized as a

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166. See Kaashaar, supra note 25, at 243 (suggesting that the FDA requires clinical and label comprehension studies to approve an OTC switch because the FDA has relied on such studies in the past).

167. See Questions and Answers, supra note 12, at Questions 1-2 (identifying the protection of public health as basis for initiating the Rx-to-OTC switch, and yet citing the growing percentage of dollars spent on prescription allergy drugs as reasons for WellPoint’s petition).

168. See 21 C.F.R. § 310.200(b) (permitting the FDA Commissioner or “any interested person” to initiate proposal for Rx-to-OTC switch).

169. See Seidman Letter, supra note 5 (suggesting that maintaining Claritin, Allegra, and Zyrtec as prescription drugs deprives the majority of consumers access to quality drugs, and instead exposes consumers to greater incidences of side effects associated with current OTC antihistamines available).

170. See Questions and Answers, supra note 12, at Question 6 (anticipating a total of $90 million in savings from prescription costs and co-payments if Claritin, Allegra, and Zyrtec are switched to OTC status).

171. See id. at Question 6 (discussing WellPoint’s savings if the three drugs are switched, and also the savings to the consumer paying an OTC price).

172. See 21 C.F.R. § 310.200(b) (allowing “any interested person” to initiate Rx-to-OTC switch) (emphasis added).

173. See 21 C.F.R. §§ 10.3(a) & 310.3(c) (including corporation within the definition of “person” for purposes of Rx-to-OTC switch). Both definitions are identical, except for the inclusion of “other legal entity” in the definition of “person” for a citizen petition under 21 C.F.R. § 10.30. See 21 C.F.R. § 10.3(a) (defining
corporation, and therefore, falls within the regulatory definition of “person.” Given that WellPoint, for purposes of the Rx-to-OTC regulations, functions as a person, the company appears to possess a firm right to petition for a switch of Claritin, Allegra, and Zyrtec to OTC drug status.

While WellPoint’s right to petition the FDA appears to be unquestionable, the FDA has never before considered an Rx-to-OTC citizen petition submitted by a third-party corporation. Drug manufacturers have proposed all previous Rx-to-OTC switches that the FDA considered and approved. In filing supplemental NDAs, drug manufacturers have always submitted OTC safety and labeling data for their drugs, establishing a pattern of data on which the FDA relied before approving an Rx-to-OTC switch. Such manufacturers invested resources to conduct marketing and clinical studies of their own drugs in an OTC setting before pursuing a switch. Without access to these resources and the specific results of the studies, it remains difficult for someone other than the manufacturer to present the required OTC safety and labeling data for any drug. Although WellPoint conducted its own study to determine the effects

“person” to include “an individual, partnership, corporation, association, or other legal entity”).


175. See 21 C.F.R. § 310.200(b) (setting out requirements for initiating an Rx-to-OTC switch). If the FDA Commissioner determines prescription restrictions on a drug are no longer required to protect public health and that the drug is safe and effective for OTC use, then “any interested person” can propose an Rx-to-OTC switch of a drug. Id. Outside of these requirements, the FDA regulations do not provide any limits on the petitioning process.

176. See Brown, supra note 60 (noting that the WellPoint petition marks the first time someone other than a drug’s manufacturer has proposed a Rx-to-OTC switch).

177. See Brown, supra note 60 (noting that drug manufacturers propose Rx-to-OTC switch of their drugs when the drug is about to lose patent protection, in attempt to save sales of drug).

178. See Aventis Opposes, supra note 27 (stating that when drug manufacturers initiate Rx-to-OTC switches by filing a supplemental NDA, a manufacturer must submit actual use and labeling comprehension studies to support the proposed switch).

179. See Levitt, supra note 19, at 126 (noting that when a drug manufacturer files a supplemental NDA to switch its own drug to OTC status, it must convince the FDA that the data supporting the switch is “new,” “clinical,” and “conducted or sponsored by [the manufacturer]”).

180. See Brown, supra note 60 (quoting drug industry representatives who suggest that health insurers do not have same clinical expertise as drug manufacturers and cannot properly evaluate whether on OTC switch would be premature and risk public health). Manufacturers are in the best position, due to their comprehensive and detailed knowledge of their drugs, to decide whether to invest resources in research and data in support of an Rx-to-OTC switch and at what rate and how long this investment should take place. Id.
of Claritin, Allegra, and Zyrtec, WellPoint will not likely have access to the extensive research results Schering-Plough, Aventis, and Pfizer have compiled while monitoring their approved drugs.\textsuperscript{181} WellPoint did not submit any OTC safety and labeling data with its petition, which may render the petition inadequate for FDA consideration or cause the FDA to reject the WellPoint petition.\textsuperscript{182}

FDA regulations further allow an Rx-to-OTC switch when prescription restrictions are no longer needed to protect public health.\textsuperscript{183} While WellPoint argues that Claritin, Allegra, and Zyrtec are safer than current OTC antihistamines, the company also emphasizes the estimated $90 million in prescription costs it will save each year.\textsuperscript{184} The WellPoint petition specifically states Claritin, Allegra, and Zyrtec have a less sedating effect than those antihistamines currently available OTC, and therefore, should be exempted from prescription restrictions in order to make safer allergy drugs available OTC.\textsuperscript{185} Yet, WellPoint acknowledged in its presentation before the FDA committees that maintaining Claritin, Allegra, and Zyrtec as prescription drugs places a significant cost and financial burden on the healthcare system.\textsuperscript{186}

\begin{itemize}
\item \textsuperscript{181} See Transcript, supra note 1, at 21-31 (citing the results from WellPoint’s independent study of safety and effectiveness of Claritin, Allegra, and Zyrtec compared to the current OTC antihistamines and concluding that Claritin, Allegra, and Zyrtec are just as effective as current OTC drugs for treating allergies, but are safer for consumers because they pose no sedation side effects). WellPoint conducted this study by relying on thirty-six already-performed controlled studies to perform a meta-analysis for the three drugs. See id. at 22 (describing the study’s methodology). With the active ingredients of each of the three drugs under patent protection, WellPoint could not have access to the protected processes in order to test OTC suitability. But cf. 35 U.S.C. § 271(e) (1994 & Supp. 1999) (excluding companies who use patented inventions for FDA approval purposes once the patent expires from patent infringement).
\item \textsuperscript{182} See supra Part V.B and accompanying notes (suggesting that the FDA could deny WellPoint petition because it fails to provide OTC safety and labeling data, which the FDA requires for any Rx-to-OTC switch).
\item \textsuperscript{183} See 21 C.F.R. § 310.200(b) (permitting an Rx-to-OTC switch when the Commissioner of the FDA determines that a drug is safe and effective for use in OTC market).
\item \textsuperscript{184} See Questions and Answers, supra note 12, at Question 6 (noting $90 million in savings to WellPoint will be used to control the double-digit increases in all prescription drug costs that WellPoint passes on to its insured). The $90 million in savings to WellPoint is representative of the approximately $45 million the company would save in actual prescription costs and another $45 million saved in prescription co-payments. Id.
\item \textsuperscript{185} See Seidman Letter, supra note 5 (stating that the safest antihistamine drugs are currently available only by prescription, meaning OTC antihistamines are more sedative and dangerous to consumers).
\item \textsuperscript{186} See Transcript, supra note 1, at 18-19 (describing current increases in prescription drug costs as “unaffordable and unsustainable” and suggesting that maintaining Claritin, Allegra, and Zyrtec as prescription drugs significantly burdens the public and private healthcare system by requiring providers to pay for drugs that are safe enough to be sold directly to consumers in the OTC market).
\end{itemize}
At first blush the financial benefits WellPoint stands to gain from an Rx-to-OTC switch appear to cloud any safety argument it makes in support of its petition.\textsuperscript{187} Savings to health insurers, however, seem to be a natural consequence of any Rx-to-OTC switch when prescription co-payments are no longer a cost to the company.\textsuperscript{188} As a result, the FDA should not solely rely on WellPoint’s potential cost-savings without also considering whether WellPoint’s safety argument is motivated by the protection of public health. Although WellPoint did not submit the usual safety and labeling data required for an Rx-to-OTC switch, it concluded, through its own study of the effects of the three prescription drugs and current OTC antihistamines, that public health will be best protected by consumer access to Claritin, Allegra, and Zyrtec in the OTC market.\textsuperscript{189} Because the WellPoint petition satisfies the “interested person” requirement and appears to comply with the concern for public health requirement, the FDA should consider the petition.\textsuperscript{190}

Regardless of the above discussion, the FDA submitted the WellPoint petition to the advisory committees for their consideration and recommendation, suggesting that the agency view it as a valid petition.\textsuperscript{191} Part V of this Comment, therefore, analyzes the FDA’s options in response to the petition, relying on the assumption that WellPoint is a proper petitioner and that the agency possesses the authority to consider WellPoint’s proposed Rx-to-OTC switch of

\textsuperscript{187}. See supra note 69 and accompanying text (noting, in arguments for and against the petition, that drug manufacturers never discuss their potential financial losses from the possible switch of Claritin, Allegra, and Zyrtec, yet WellPoint openly admits switch would save the health care company millions).

\textsuperscript{188}. See Questions and Answers, supra note 12, at Question 6 (discussing WellPoint’s anticipated savings between actual prescription costs and prescription co-payments pursuant to a switch from Rx-to-OTC). When a drug is switched to OTC status, the consumer pays out-of-pocket for the costs of the drug. Because the physician is no longer necessary to dispense the drug, any health insurance coverage of a drug ceases when it becomes available to all consumers OTC. In this case, WellPoint anticipates that it will save $90 million in costs for Claritin, Allegra, and Zyrtec if the drugs are switched to OTC status. Id.

\textsuperscript{189}. See Transcript, supra note 1, at 21-31 (presenting its own findings that Claritin, Allegra, and Zyrtec are safer and equally as effective as current OTC antihistamines, in terms of such activities as driving and flying).

\textsuperscript{190}. See 21 C.F.R. § 310.200(b) (2001) (allowing the FDA to switch a drug from Rx-to-OTC when the Commissioner determines such a drug is safe and effective and that prescription restrictions on the drug are no longer necessary to protect public health, and also permitting the Commissioner or “any interested person” to initiate Rx-to-OTC switch).

\textsuperscript{191}. See Transcript, supra note 1, at 14 (instructing the FDA advisory committees in consideration of WellPoint petition and noting that “there is no need to discuss the legal authority of FDA to initiate a prescription to OTC switch. We are bringing this issue before the committee for their scientific expertise and not for their legal expertise.”). Such a statement suggests that the FDA understands that WellPoint’s right to submit a citizen petition in this case is questionable.
Claritin, Allegra, and Zyrtec.

V. THE FDA CAN RESPOND TO THE WELLPOINT PETITION IN THREE WAYS, BUT SHOULD NOT TAKE ACTION

Under current regulations, as long as a drug can be labeled adequately to make it safe and effective for consumer self-use and the Commissioner finds that prescription restrictions are not necessary to protect public health, a switch to OTC status is permitted.\footnote{See 21 C.F.R. § 310.200(b) (providing prescription-dispensing exemptions). The Code of Federal Regulations specifically states that "[a]ny drug . . . shall be exempted from prescription-dispensing requirements when the Commissioner finds such requirements are not necessary for the protection of the public health . . . and he finds that the drug is safe and effective for use in self-medication as directed in proposed labeling." \textit{Id.}}\footnote{See \textit{id.} § 14.5(b) (giving the Commissioner the sole discretion on the appropriate action and policy approach to be taken on any matter considered by an advisory committee).} FDA advisory committees already have found that Claritin, Allegra, and Zyrtec meet safety standards and recommended that the drugs should be available to consumers over the counter.\footnote{Compare \textit{Transcript}, \textit{supra} note 1, at 31 (providing safety conclusions from University of Southern California study funded by WellPoint, which stated that the three prescription drugs were safer and as effective as current OTC antihistamines), \textit{with Transcript, id. at 89 (stating that Schering-Plough knows Claritin is safe when used as prescription, but does not know “what its profile will look like in a U.S. OTC setting”). See \textit{Seidman Letter, supra} note 5 (identifying WellPoint’s argument that Claritin, Allegra, and Zyrtec should be sold OTC because the prescription drugs are safer and as effective as current OTC antihistamines); see also \textit{Transcript, supra} note 1, at 70-71, 83-84 (noting that both Aventis and Schering-Plough are concerned that the lack of safety data and labeling comprehension data raises safety issues for consumers).}\footnote{See 21 C.F.R. § 14.5(b) (giving the FDA Commissioner sole discretion to accept or reject the recommendation of the advisory committees). \textit{But see Over-the-Counter Status for Claritin Considered to Treat Hives (Apr. 23, 2002), available at http://www.cnn.com/2002/HEALTH/conditions/04/23/lda.claritin/index.html (last visited May 10, 2002) [hereinafter Over-the-Counter Status] (noting that even though the FDA is not required to accept the recommendation of its advisory committees, it usually follows the recommendations).} Without the drug manufacturers’ support behind the switch and without the safety and labeling data that manufacturers usually provide when initiating a switch, it remains uncertain whether the committees’ safety conclusions truly reflect the drugs’ actual OTC safety.\footnote{See \textit{id.} § 14.5(b) (giving the FDA Commissioner sole discretion to accept or reject the recommendation of the advisory committees). \textit{But see Over-the-Counter Status for Claritin Considered to Treat Hives (Apr. 23, 2002), available at http://www.cnn.com/2002/HEALTH/conditions/04/23/lda.claritin/index.html (last visited May 10, 2002) [hereinafter Over-the-Counter Status] (noting that even though the FDA is not required to accept the recommendation of its advisory committees, it usually follows the recommendations).}

Similarly, with Schering-Plough’s supplemental NDA and the committees’ most recent recommendation to treat CIU with Claritin over-the-counter, the FDA still must decide whether to accept the committees’ recommendations and approve Claritin for OTC use.\footnote{See \textit{id.} § 14.5(b) (giving the FDA Commissioner sole discretion to accept or reject the recommendation of the advisory committees). \textit{But see Over-the-Counter Status for Claritin Considered to Treat Hives (Apr. 23, 2002), available at http://www.cnn.com/2002/HEALTH/conditions/04/23/lda.claritin/index.html (last visited May 10, 2002) [hereinafter Over-the-Counter Status] (noting that even though the FDA is not required to accept the recommendation of its advisory committees, it usually follows the recommendations).} WellPoint’s petition to switch Claritin to OTC status for the treatment of allergies did not include the safety and labeling data traditionally
relied upon by the FDA to establish a drug’s safety for OTC use. As anticipated with the supplemental NDA filed by Schering-Plough, the company provided safety data and labeling comprehension studies, but only to support Claritin’s use to treat CIU in an OTC setting. Schering-Plough noted that because the committee already reviewed the efficacy and safety of Claritin for the over-the-counter treatment of allergic rhinitis and recommended its use, the company did not provide information on the safe treatment of allergies. Thus, the safety and labeling data usually considered by the FDA with a supplemental NDA is still not available to evaluate the safety of Claritin to treat allergies in the OTC market. As a result, the FDA should require Schering-Plough to prove the efficacy and safety of its drug for all of its intended uses before it approves the Rx-to-OTC switch.

Given these safety concerns and the FDA’s historically cautious approach to drug switches, the FDA, as a practical matter, will likely respond to the WellPoint petition in one of the following three ways. First, the agency could assert its authority to approve the petition and switch Claritin, Allegra, and Zyrtec to OTC status, implementing the

196. See Kraushaar, supra note 25, at 243 (emphasizing that past FDA reliance on safety data and labeling comprehension studies requires the same data for every Rx-to-OTC switch proposed).

197. See Briefing Book March 2002, supra note 31, at 2 (listing three new studies conducted by Schering-Plough to support the following contentions: (1) CIU is not associated or confused with more serious conditions, (2) CIU is currently managed by consumers as a self-treated condition, (3) Claritin is a very safe therapy in the treatment of CIU, (4) physicians are comfortable with consumers’ ability to self-recognize recurring episodes of CIU, and (5) adequate and understandable labeling can be developed for appropriate self-selection and safe and effective use of Claritin for CIU in an OTC setting). The studies included a physician practices study to determine their opinions of CIU, a consumer habits study to evaluate self-management of CIU, and a consumer self-recognition study conducted in conjunction with a label comprehension study. Id. None of these studies considered Claritin’s use for treating allergic rhinitis.

198. See id. at 3 (relying on the committee’s May 11, 2001 determination that Claritin is safe to treat allergies over-the-counter and, thus, providing no efficacy or safety information on the treatment of allergies).

199. See 21 C.F.R. § 314.71(b) (requiring a supplement to new drug applications to include the “appropriate technical sections, samples, and labeling” according to 21 C.F.R. § 314.50(d)(3) and (c), which requires the submission of clinical data and proposed labeling).

200. See Dennis Cauchon, ‘Complex Issues’ Require Much Study Before Action, FDA Says Administration’s Decision on Allergy Drugs Could Have Wide Repercussions, USA TODAY, Apr. 12, 2000, at A5 [hereinafter Complex Issues] (opining that “one reason the FDA has never initiated moving a drug over the counter is that the agency is overworked and over cautious.”); see generally Susan Lisovicz & Elizabeth Cohen, Allergy Medicines Over the Counter, May 8, 2001, available at 2001 WL 19258709 (discussing the results when the FDA switched Seldane—a revolutionary, safe, non-drowsy prescription allergy medication—to OTC status, but then pulled it from the market in 1998 after the drug was linked to seven deaths).
advisory committees’ recommendation. Second, to protect consumer health, the FDA could deny the petition on the grounds that it lacks the safety and labeling data required to demonstrate safe OTC use. Finally, the FDA could elect not to take any immediate action on the WellPoint petition, and wait instead for the manufacturers to initiate their own Rx-to-OTC switches of the drugs.

Claritin’s upcoming patent expiration prompted Schering-Plough to submit a supplemental NDA, but it contained only the attendant safety data for Claritin’s treatment of chronic hives. Because the FDA is better positioned to reevaluate the WellPoint petition in light of safety information for all uses of Claritin, this Comment suggests that the FDA should reconsider its options with the WellPoint petition, but wait for Schering-Plough to conduct the necessary research and file the attendant safety data for uses of Claritin beyond the treatment of CIU. The agency can then assess the complete required OTC safety and labeling data, ensuring an Rx-to-OTC switch will protect consumer health.

Regardless of the action the FDA takes, it is imperative that the agency anticipate future citizen petitions, consider how FDA regulations could be changed to avoid pitting insurance companies against drug manufacturers and ensure the protection of public health.

201. See infra notes 208-19 and accompanying text (discussing FDA’s option to approve the WellPoint petition and possible implications from such an approval).
202. See infra notes 220-32 and accompanying text (discussing FDA’s option to deny the WellPoint petition and possible implications from such a decision).
203. See infra notes 233-53 and accompanying text (discussing Schering-Plough’s filing of a supplemental NDA, the safety and labeling data yet to be fully provided for the FDA’s consideration, and FDA’s discretion to proceed on both the WellPoint petition and the supplemental NDA with caution).
204. See Briefing Book March 2002, supra note 31, at 2-3 (describing the studies conducted by Schering-Plough to prove the efficacy of Claritin to treat CIU over-the-counter, but relying on the advisory committees’ determination that Claritin is safe for the treatment of allergies and, thus, omitting any such allergy data).
205. See infra notes 233-253 and accompanying text (discussing the Schering-Plough supplemental NDA for Claritin, the data accompanying that supplement, and the data yet to be submitted, thereby providing FDA with the OTC safety and labeling data necessary to act in the public’s best interest).
206. See supra notes 151-153 and accompanying text (discussing the financial implications of an Rx-to-OTC switch, noting that such a switch could seriously reduce the market price for these drugs, creating significant savings for managed care companies, but also creating heavy losses for current drug manufacturers).
207. See 21 U.S.C. § 353(b)(3) (1994) (allowing the Commissioner to remove prescription requirements “when such requirements are not necessary for the protection of the public health.”); see also FDA Overview, supra note 16 (stressing that economic considerations are outside the purview of the FDA when considering a potential Rx-to-OTC switch).
A. The FDA Can Approve WellPoint’s Petition and Make the Switch

While drug manufacturers opposed to the WellPoint petition have questioned the FDA’s authority to act on a petition filed by a health insurer, a strict reading of the Act and FDA regulations allow WellPoint to petition the FDA and direct FDA advisory committees to consider the issue, hold a public hearing, and ultimately make a recommendation. The FDA Commissioner is then permitted to consider the recommendation of the committees and act in the best interest of public health, regardless of the committees’ recommendation. Thus, if the FDA decides to accept the committees’ recommendation, it can do so under the law and approve the Rx-to-OTC switch of Claritin, Allegra, and Zyrtec.

However, in making a decision to approve the switch, precedent in previous drug switches should inform the FDA’s choice. Arguably, since a drug manufacturer has initiated every Rx-to-OTC switch before this one, the FDA has, in effect, adopted a policy of requiring a manufacturer supplemental NDA. While this policy is not codified in the federal regulations, it remains true that past safety data and clinical investigations submitted by manufacturers have become the standard for drug switches. If the FDA expects to ensure the protection of public health by considering the rigorous data that the drug’s manufacturer usually compiles and submits, the

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208. See Today’s Debate: Prescription Costs, USA TODAY, May 29, 2001, at 11A, available at 2001 WL 5463542 (indicating that the FDA has “no clear authority” to order the switch, but usually leaves the initiation of such switches to the drugmakers).


210. See id. § 14.5 (stating that “[a]n advisory committee is utilized to conduct public hearings on matters of importance that come before the FDA, to review the issues involved, and to provide advice and recommendations to the Commissioner.”).

211. See id. § 14.5(b) (stating that “[t]he Commissioner has sole discretion concerning action to be taken and policy to be exposed on any matter to be considered by an advisory committee.”).

212. See id. (charging the Commissioner with the sole responsibility for accepting or rejecting the committee recommendation); see also id. § 10.30(e)(2)(i) (2000) (directing the Commissioner to respond to a citizen petition in one of three ways, including approval of petition and followed by appropriate action implementing approval). But see Saftlas & Worrell, supra note 39, at 6 (“Although the FDA generally follows the recommendation of its advisory panels, we believe this case is likely to be an exception because of the many patent and legal issues that surround it.”).

213. See Transcript, supra note 1, at 12-13 (suggesting that, although citizen petitions are used frequently with drug issues, this is the first instance where a citizen petition addresses products that are marketed under NDAs, i.e., are restricted to prescription status); see also Complex Issues, supra note 200, at A5 (noting that the FDA has switched over 600 Rx drugs to OTC since 1976, all coming at manufacturers’ request).

214. See Kraushaar, supra note 25, at 244 (noting that, in addition to clinical trials, “FDA’s heavy reliance on label comprehension studies in approving OTC switch candidates qualifies such studies as ‘essential’ to the switch approval”).
agency must decide whether it will require all petitioners to conduct and submit the usual type of data or restrict potential petitioners to drug manufacturers.\textsuperscript{215} The FDA will have to propose any such petitioner restriction to the public, noting that such a restriction would be prospective in effect.\textsuperscript{216}

\textsuperscript{215} See 21 C.F.R. § 10.30(b) (2001) (containing a section by section description of the information that must appear in a citizen petition). Section 10.30 does not specify any particular data that must accompany a citizen petition. \textit{Id.} However, the drug manufacturer, qualifying as an interested person, will likely supplement its already-approved new drug application in order to propose a switch. See \textit{id.} § 310.200(b) (providing that a Rx-to-OTC switch may be initiated by any interested person through citizen petition or by \textit{supplementing an approved new drug application}). Regulations governing new drug applications require a specific list of safety data, labeling data, and other information to accompany the application. See 21 U.S.C. § 355(b)(1) (1994) (requiring, \textit{inter alia}, (1) full reports of investigations to show whether drug is safe for use and will be effective; and (2) specimens of labeling proposed to be used for drug). Because a citizen petition has never been successfully used to make an Rx-to-OTC switch, the gap left between citizen petitions requiring no data and an NDA's required list of safety and labeling data has never been an issue. See Cauchon, \textit{supra} note 7, at 1A (noting that an Rx-to-OTC switch has never been made unless a drug manufacturer was the petitioner). It is undisputed that the usual safety and labeling data does not accompany the WellPoint petition and that the advisory committees that considered the petition voted to make the switch, which appears to be in accordance with the no-data requirement of the citizen petition. In fact, Dr. Charles Ganley, of the FDA, opened the May 11 public hearing by stating the petition characterizes Claritin, Allegra, and Zyrtec as dangerous, but does not provide data to support this characterization. See Transcript, \textit{supra} note 1, at 16 (noting the lack of data associated with WellPoint petition, whereas the current OTC antihistamines were recognized safe and effective). Yet, in response to the committees’ action, Dr. Randy Juhl, a former chairman of the Nonprescription Drugs Advisory Committee, stated that "the FDA has established a standard that has to be met in terms of understanding how the drug will be used in an OTC setting, [and] the WellPoint petition did not really come close to meeting [this standard]." See Michael Johnsen, \textit{FDA-Forced Switch: Does It Make Cents?}, \textit{DRUG STORE NEWS}, June 25, 2001, at 128 (citing quotes from former committee members and other Rx-to-OTC drug switch experts). As a result, switch expert, Steve Francesco, says that "there is absolutely no teeth to [the citizen’s petition].” \textit{Id.} The initiation of such a petition is not productive because the third party will never have access to the clinical trial work that the drug manufacturers have. \textit{Id.}

\textsuperscript{216} See 21 C.F.R. § 310.200(b) (noting that any interested person can petition through a citizen petition or supplemental NDA); \textit{see also Nat’l Family Planning v. Sullivan}, 970 F.2d 227, 236 (D.C. Cir. 1992) (defining the interpretive rules as those that clarify or remind parties of the statutory and regulatory duties) (citing Alcaraz v. Block, 746 F.2d 593, 613 (9th Cir. 1984)). The FDA can issue an interpretive rule, which can clarify regulatory terms or requirements. \textit{Id.} at 277. But, if a rule will change the meaning of the standing regulation and does more than simply clarify a term or process, then the rule is considered a legislative rule, and as such, must follow notice and comment procedures prescribed by the Administrative Procedure Act. \textit{Id.} at 235. If the second rule “repeudiates or is irreconcilable with” a prior regulation, then the second rule amends the first, and any amendment is itself legislative. \textit{Id.} \textit{see also} 5 U.S.C. § 553(b)(3)(A) (1994) (exempting interpretive rules from the requirement that notice of proposed rule must be published in Federal Register). An amendment to current regulations, which would restrict petitioners to drug manufacturers or require all petitioners to submit specific data, would change the meaning of the regulation as it now stands. As a result, any such amendment must follow the rulemaking procedures of the Administrative Procedure Act and provide notice to the public of the proposed change and give the public an
In making such an evaluation, the FDA could require citizen petitioners to submit clinical and labeling data—a choice that could raise accessibility questions. The data that manufacturers compile while researching their drugs contain information that a manufacturer is not likely to provide freely to a person or company seeking to deregulate the manufacturer’s drug. Further, departing from precedent and accepting lesser safety data to approve a switch seems to be against the FDA’s cautious nature and arguably in violation of its legislative directive to protect public health.

As a result, approving WellPoint’s petition would depart from the agency’s usual requirement of safety and labeling data, and could possibly open the door for future unsubstantiated citizen petitions. Before lowering the standard for acceptable data, the FDA should first consider the overall impact that approving drugs without evaluating the safety and labeling data, which until now a drug’s manufacturer provided, could have on consumer health. The FDA would face a greater risk of consumers experiencing dangerous side effects and complications if it did not require and evaluate such data, compared with a switch based on an informed assessment of the safety and consumer comprehension studies that the manufacturer conducts and presents when seeking to switch its own drugs. With

opportunity to respond to such changes. See generally id. § 553(b), (c) (requiring a proposed rule to be published in Federal Register to provide notice, and once notice is given, interested persons must be given an opportunity to participate through submission of written comments).

217. See Levitt, supra note 19, at 109-12 (noting that the responsibilities of drug manufacturer do not end with approval of NDA and discussing various post-marketing requirements, including adverse reaction monitoring and reporting and Phase IV studies—which obtain additional safety and efficacy data, detect new uses for or abuses of drug, and determine effectiveness of labeled indications under various conditions of use).

218. See 21 U.S.C. § 353(b)(3) (requiring the Commissioner to act and evaluate prescription restrictions based on what will protect public health); 21 C.F.R. § 310.200(b) (allowing the Commissioner to follow prescription-exemption procedures when restrictions are not necessary to protect public health). Compare Complex Issues, supra note 200, at A5 (citing a statement made by Robert DeLap, a physician who heads the OTC drug review at FDA: “[i]f we see that the public health is affected, we try to make the right thing happen. If we’re persuaded that a product can be used appropriately and has a good safety margin, we want to make it available.”), with Ornstein, supra note 26, at 1A (suggesting that the FDA trusts consumers to use Claritin, Allegra, and Zyrtec as OTC drugs, like Benadryl and Chlor-Trimeton, which are now self-administered, and does not plan to require additional surveys or clinical studies to show whether consumers could follow labeling directions properly). “We feel that consumers have a long history of successfully self-diagnosing allergic rhinitis and self-treating with antihistamines.” Id. (quoting Dr. John Jenkins, director of FDA’s Office of Drug Evaluation II).

219. See Transcript, supra note 1, at 69 (emphasizing that on one occasion where FDA approved a Rx-to-OTC switch without the drug manufacturer’s support and usual data, the drug Alupent had to be switched back to prescription status shortly
this in mind, the FDA should not approve the WellPoint petition.

B. The FDA Can Deny WellPoint’s Petition and Reject the Switch

The agency could approve the WellPoint petition if certain safety data were provided, but the FDA Commissioner also has complete discretion to deny the WellPoint petition regardless of the recommendation of the advisory committees and as long as the decision is made with the objective of protecting consumer health.\(^{220}\)

In light of the implications resulting from the lack of usual safety and labeling data, WellPoint’s petition raises significant safety issues that the FDA should consider before it begins to approve Rx-to-OTC switches proposed by anyone other than the drug’s manufacturer. Because the FDA’s congressional mandate gives it the responsibility to protect public health,\(^{221}\) making an Rx-to-OTC switch without evaluating all clinical safety studies and label comprehension studies conducted for the drug undermines the FDA’s ability to recommend a drug for safe consumer self-use.\(^{222}\)

As a result, to protect public health, the FDA can reject the recommendation of the committees and deny the petition because WellPoint has not presented the usual safety and labeling data with its petition, which has become the standard in Rx-to-OTC switches.\(^{223}\)

While denying the petition for lack of safety data, and in the name of protecting public health, is procedurally permissible under the law,\(^{224}\) it may not be in the FDA’s best interests to make such a

\(^{220}\) See 21 C.F.R. §§ 10.30(e)(2)(ii), 14.5(b) (allowing the Commissioner of the FDA discretion to take action, including denying this citizen petition); see also 21 U.S.C. § 353(b)(3) (permitting the Secretary of FDA to remove drugs from prescription restriction if it is determined that such restrictions are not necessary for the protection of public health).

\(^{221}\) See supra note 144 (describing the complications arising from the switch of Seldane and Allegra from Rx-to-OTC); 21 U.S.C. § 353(b) (requiring prescription limitations to remain in effect unless the limitations are unnecessary to protect public health).

\(^{222}\) See U.S. FDA Panels, supra note 24 (containing the Consumer Healthcare Product Association’s position that switches initiated by the manufacturer ensure careful review of complete data sets of the highest quality, and also the Associations concerns for whether the drug has had sufficient time on market for such data to be gathered). Without such data, consumers could be exposed to risks not yet determined by the manufacturer’s study.

\(^{223}\) See 21 C.F.R. § 10.30(c) (indicating that the FDA has discretion to approve or deny the petition, or provide reasons why decisions cannot be sufficiently reached when citizen petition is filed).

\(^{224}\) See 21 U.S.C. § 353(b) (requiring prescription restrictions if necessary to protect public health when drug is toxic and dangerous to use without physician supervision). Previous FDA Rx-to-OTC switches indicate that safety and labeling data are required for determining that the drug will be safe and effective when used over the counter. Thus, if the FDA determines that public health must continue to be
decision.\textsuperscript{225} For this particular petition, the FDA sought the advice of two different advisory committees—composed of physicians, pharmacists, and consumer representatives—\textsuperscript{226} and those committees voted to recommend that the FDA switch Claritin, Allegra, and Zyrtec from Rx-to-OTC.\textsuperscript{227} Considering the drowsiness side-effect associated with current OTC antihistamines, a side effect Claritin and Allegra do not cause,\textsuperscript{228} and the third-party safety studies WellPoint had cited,\textsuperscript{229} an Rx-to-OTC switch of Claritin, Allegra, and Zyrtec remains a good idea because it will provide consumers with greater access to the drugs.\textsuperscript{230} Before the switch can be approved, however, the drug manufacturers or other petitioners should submit the usual safety and labeling data so that the FDA can make the most informed decision about public health.\textsuperscript{231} As a result, the FDA should explore the possibility of obtaining this data before denying the petition.\textsuperscript{232}

\textsuperscript{225} See Seidman Letter, supra note 5 (emphasizing the public health benefits of the Rx-to-OTC switch because the three medications are safer than the current OTC antihistamines available, and also suggesting that denial of the switch would deprive consumers access to such quality drugs).

\textsuperscript{226} See Transcript, supra note 1, at 2 (listing names and professional titles of all members of Nonprescription Drugs and Pulmonary-Allergy Drugs Advisory Committees, which conducted the public hearing on WellPoint’s petition).

\textsuperscript{227} See Cox, supra note 6, at A1 (noting that the committees voted nineteen-to-four to switch Claritin and Zyrtec and eighteen-to-five to switch Allegra).

\textsuperscript{228} See Cauchon, supra note 7, at 1A (stating that the old OTC drugs and new drugs are equally effective, but that the old drugs cause sleepiness, slowed reactions, and impaired coordination, whereas Claritin, Allegra, and Zyrtec do not).

\textsuperscript{229} See Transcript, supra note 1, at 26-27 (summarizing the study conducted at University of Southern California, where current OTC antihistamines were found to be as effective as Claritin, Allegra, and Zyrtec but have a greater incidence of sedation than the three prescription drugs).

\textsuperscript{230} See Seidman Letter, supra note 5 (noting that Americans are four times as likely to purchase OTC drugs as they are to consult a physician, and many uninsured consumers cannot afford to pay for doctor visits and prescription costs out-of-pocket). As a result, WellPoint argues consumers are denied access to drugs that are safer as compared to the OTC drugs currently available. \textit{Id.}

\textsuperscript{231} See Issue Paper, supra note 117 (indicating that in determining whether a particular drug is safe for public self-use, the FDA recognizes the importance of getting input from expert panels, the public and the drug manufacturer, who can provide safety and clinical data).

\textsuperscript{232} See Briefing Book, supra note 15, at 2, 10 (stating that safety and labeling studies should be conducted before a drug is switched from Rx-to-OTC because public self-care may be inappropriate in light of the complexity of proper allergy treatment and the risk of overuse).
C. The FDA Can Take No Action on the Petition and Should Wait for Schering-Plough to Submit Complete Safety and Labeling Data for the Switch of Claritin

To ensure that proper safety and labeling data are obtained and evaluated before making a switch, the FDA possesses great discretion to study the concerns presented before issuing a final decision. Public health concerns require the FDA to act with caution, and the FDA has already indicated that safety is its sole focus in considering the WellPoint petition. Rx-to-OTC standards require safety data and labeling comprehension studies to be submitted to demonstrate the drug’s performance and compatibility in the OTC setting. Because such data is not available with WellPoint’s petition, the FDA should not issue a decision on the petition before evaluating safety and labeling data. As scheduled, Schering-Plough’s patent on Claritin will expire in 2002, which has prompted the company to file its own supplemental NDA for the switch of Claritin. The supplemental NDA, however, contained incomplete safety data, which supports the argument that the FDA should opt to do nothing with WellPoint’s petition at this time.

Schering-Plough submitted its own supplemental NDA for the Claritin switch in order to gain OTC market exclusivity and to avoid losing significant revenue from generic drugs that could enter the

233. See 21 C.F.R. § 10.30(e)(2)(iii) (2001) (allowing an agency to provide a tentative response to a citizen petition and citing the existence of other agency priorities and the need for additional information as reasons for not a reaching decision).

234. See Transcript, supra note 1, at 67 (comparing the switch of three drugs to the switch of Seldane, another non-sedating drug, which was thought to have no significant safety issues after ten years on the prescription market, yet Seldane was withdrawn from OTC market after serious drug-drug interactions were discovered).

235. See FDA Overview, supra note 16 (stating that the FDA is concerned with safety issues and not economics).

236. See Kraushaar, supra note 25, at 244 (suggesting that the FDA’s reliance on clinical trials and labeling comprehension studies qualifies such studies as requirements for switch approval).

237. See id. at 233-34 (describing the FDA studies that focus on consumer-friendly labeling and consumer usage patterns).

238. See Schering-Plough Aims to Make Claritin Premier Brand, supra note 155 (announcing Schering-Plough’s filing of a supplemental NDA for the Rx-to-OTC switch of Claritin, which represents a strategy to make Claritin a leader in the OTC market).

239. See Complex Issues, supra note 200, at A5 (asserting that the FDA has no incentive to initiate an Rx-to-OTC switch because “the FDA doesn’t want to take the blame if something goes wrong”); see also Briefing Book March 2002, supra note 31, at 3 (indicating that Schering-Plough did not file safety or labeling data for Claritin’s use to treat allergies because FDA advisory committees had already determined its safety).
market. Claritin generated $3 billion in revenue for Schering-Plough in 2000, and the company already anticipates significant revenue losses when it loses patent protection on Claritin and competing drugs enter the market. Because the FDA will guarantee three additional years of exclusivity in the OTC market to a drug manufacturer initiating the Rx-to-OTC switch, Schering-Plough can continue to shield Claritin from competing generic brands by switching Claritin to an OTC drug. Although Claritin’s price would be lower in the OTC market, it would likely be sold as a premium brand, which would continue to generate millions in revenue for the company. With the filing of a supplemental NDA in 2002, accompanied by the usual safety and labeling data for the treatment of CIU, the FDA can begin to weigh such data before making the Rx-to-OTC switch, but with the expectation that complete safety and labeling data for all uses of Claritin will be filed and considered before reaching a decision.

240. See Kraushaar, supra note 25, at 243 (stating that, in exchange for safety data, the FDA will give drug manufacturers initiating a switch three more years of exclusivity, thereby stifling generic competition); FDA Overview, supra note 16 (emphasizing that the Rx-to-OTC switch, before the patent expiration, would give Claritin three years of OTC exclusivity just as a generic alternative is being introduced by Andrx, which now holds tentative approval); see also Schering-Plough Aims to Make Claritin Premier Brand, supra note 153 (indicating Schering-Plough’s introduction of prescription Clarinex is designed to allow the company to switch Claritin to OTC status and dominate both the prescription and OTC markets).

241. See Schering-Plough Annual Report, supra note 48 (reporting that a 9% increase in the sale of Claritin from $2.6 billion in 1999 to $3 billion in 2000, which Schering-Plough acknowledges accounts for a material portion of the company’s 2000 revenues, could be negatively affected when Claritin loses patent protection).

242. See Levitt, supra note 19, at 125 (noting that if a drug manufacturer seeks a Rx-to-OTC switch through supplemental NDA and that supplemental involves a change to a drug supported by “new clinical investigations conducted or sponsored by [the applicant]” and are “essential to the [supplemental’s] approval,” the manufacturer will gain three years of marketing exclusivity for OTC product).

243. See Warner, supra note 2, at C1 (stating that when a prescription drug loses its patent protection, its price will fall as much as eighty percent). Such a reduction in price, usually from generic brands entering the market, gives the drug manufacturer incentive to switch its own drug with a supplemental NDA, in order to gain three years of OTC market exclusivity and avoid such a drastic reduction in price. Id.

244. See Rapaport, supra note 13, at D3 (quoting a spokesperson for Schering-Plough who predicts that Claritin would be priced as premium brand if it is switched to OTC).

245. See Schering-Plough Annual Report, supra note 48 (emphasizing that loss of patent protection on Schering-Plough’s major products, including Claritin, could significantly impact revenues); see generally Cauchon, supra note 7, at IA (noting that Claritin, “the world’s top-selling allergy drug,” is sold OTC in most industrialized countries, including Canada and Australia).

246. See Aventis Opposes, supra note 27 (providing that the usual data for Rx-to-OTC switches reflect actual use and labeling comprehension studies). Schering-Plough filed both types of studies for Claritin’s use to treat CIU. See Briefing Book March 2002, supra note 31, at 2 (listing each study conducted by Schering-Plough and submitted with its supplemental NDA for Claritin).
Once the usual data is submitted and evaluated, the FDA will likely follow the committees’ recommendation and approve the switch of Claritin.247 As a result of the switch and because Claritin is the most often prescribed of the three drugs,248 WellPoint and other health insurers will likely recognize a significant savings in prescription costs as projected, though not at the levels otherwise obtained from switching all three drugs to OTC status.249 Schering-Plough would only submit data for Claritin to initiate a Rx-to-OTC switch, and if Allegra and Zyrtec remain at prescription status,250 WellPoint could still continue to pay millions each year in prescription costs for Allegra and Zyrtec. Nevertheless, all consumers, whether insured or not, will gain access to an allergy drug that is demonstrably safer than the allergy antihistamines already sold over the counter.251 Although Claritin, with additional OTC exclusivity, would be sold as a high-end OTC drug with its price higher than those OTC antihistamines currently available, the out-of-pocket expense to uninsured consumers would be less than if the drug were available only by prescription.252 Finally, Schering-Plough, by filing the supplemental

247. In considering why the committees recommended the Rx-to-OTC switch of Claritin, Allegra, and Zyrtec, it is important to note that the drug manufacturers oppose the WellPoint petition not because they believe their own drugs to be unsafe for consumer self-use, but because the safety of the three drugs in the OTC market cannot be determined without the safety and labeling comprehension data usually compiled and presented by the drug manufacturer in a proposed switch. See Transcript, supra note 1, at 70-71, 83-84 (noting that both Aventis and Schering-Plough are concerned that lack of safety data and labeling comprehension studies to determine drugs’ use in an OTC setting raises safety issues for consumers). In fact, Schering-Plough states that it “knows” loratadine (Claritin) is a very effective and safe prescription product. See id. at 89 (emphasizing that Claritin is safe when used as a prescription drug, but its safety profile is unknown for an OTC setting). Aventis is also quick to point out that the company has no safety concerns about Allegra’s performance in the prescription market. See id. at 67 (arguing that the time spent on market is an important factor in evaluating patient exposure and that Allegra’s five-year exposure is not enough time, considering Seldane had to be withdrawn from the market even after it had been available to consumers for ten years). It appears, then, the safety of the drug is not a concern of the manufacturer, as long as it can determine the OTC safety of its own drug.

248. See Kim Roller, Pharmaceutical Sales Continue Strong Growth Momentum, Drug Store News, Aug. 28, 2000, at 36 (listing Claritin, at $24 million in revenue, as the sixth most-prescribed drug of all prescription categories in the United States).

249. See Questions and Answers, supra note 12, at Question 6 (noting that WellPoint spends $90 million on prescription antihistamines each year and expects to save this amount if Claritin, Allegra, and Zyrtec are switched to OTC drugs).

250. See supra Part IV.C (discussing the FDA’s option to also switch of Allegra and Zyrtec to OTC status based on WellPoint’s petition, even if Schering-Plough files its own petition for the switch of Claritin).

251. See Transcript, supra note 1, at 38 (noting that Claritin, Allegra and Zyrtec are equally as effective as current OTC antihistamines, have low incidence of side effects, and the Rx-to-OTC switch of the three drugs will make safer products accessible to the public).

252. See Rapaport, supra note 13, at D3 (stating that uninsured consumers, who
NDA, will gain additional market exclusivity, also allowing the OTC price to remain higher than it likely would be if OTC generic drugs were sold as Claritin’s competitors. 253 As such, Aventis and Pfizer, if still limited to prescription status, would be unaffected and would continue to enjoy the revenue Allegra and Zyrtec generate at prescription prices.

1. The effects of a Schering-Plough supplemental NDA on the WellPoint petition

The preceding discussion assumes that the FDA will approve a switch of Claritin based on Schering-Plough’s submission of its own supplemental NDA. Such a switch, however, ignores the Allegra and Zyrtec components of WellPoint’s petition. Considering that the advisory committees had recommended switching all three drugs, the FDA could still, without a supplemental NDA from Aventis or Pfizer or the safety and labeling data pertaining specifically to Allegra and Zyrtec, decide to switch Allegra and Zyrtec to OTC status after evaluating the safety and labeling data for Claritin. 254

pay as much as $85 for a month’s supply of Claritin, would save money with a Rx-to-OTC switch). However, insured consumers are likely to see allergy drug costs rise when they are used to paying prescription co-payments of $10-20 for brand-name drugs. Id. A spokesperson for Schering-Plough estimates that Claritin “would probably be priced as a premium product and costs to consumers would probably be higher than their co-payments,” if Claritin or the other two drugs switch to OTC. Id. Increased cost to insured consumers is likely to be temporary and will be reduced when competing drugs enter the OTC marketplace. See Cauchon, supra note 7, at 1A (noting that when competitors for a particular drug enter the market, the same drug can be offered for seventy-three percent less than the original price). Nevertheless, it is interesting to consider what OTC antihistamines cost the consumer now and if insured consumers would really be disadvantaged. A box of 24-tablet Benadryl could cost the consumer as much as $56 a month if it were taken at the maximum recommended dosage. See Rapaport, supra note 13, at D3 (emphasizing the high cost of Benadryl if taken as directed, but noting that consumers usually take only one or two doses a day, which lowers their monthly cost to $28). Even priced as a premium drug, Claritin would likely not exceed $56 a month. See Cauchon, supra note 7, at 4A (charting the daily costs of nonsedating antihistamines and their effectiveness). Considering that fifty-six percent of allergy sufferers choose OTC drugs to treat their symptoms and already absorb the cost of Benadryl and other OTC antihistamines, Claritin is likely to become another alternative treatment for allergies without a large emphasis on cost. See Cauchon, supra note 7, at 5A (noting the percentage of consumers who treat allergies with OTC drugs as opposed to prescription drugs, and also noting that the revenue generated by sale of Benadryl in the United States was $148 million in 1999 compared to only $9 million in the rest of world).

253. See Kraushaar, supra note 25, at 243 (suggesting that the FDA will give drug manufacturers initiating a switch three more years of exclusivity when safety and labeling data accompanies a petition, which will stifle generic competition and give the manufacturer more control over price).

254. See 21 C.F.R. § 14.5(b) (2001) (giving the FDA Commissioner discretion to take any action regardless of advisory committee recommendation and not prescribing time frame in which to make such decision); see also Transcript, supra note
When considering the WellPoint petition, the FDA urged the advisory committees to consider Claritin, Allegra, and Zyrtec separately. However, even though each of the drugs has different active ingredients, evaluation of the common side-effects found in both the initial NDA approval data and the adverse-effects reports filed since the approval of the three drugs reveal that Claritin, Allegra, and Zyrtec all have extensive and favorable safety profiles, all have comparable reporting rates for cardiac events and seizures, and all reportedly cause similar adverse effects.

Because the FDA reports similar NDA safety evaluations for Claritin, Allegra, and Zyrtec in the prescription market, the agency could reasonably anticipate similar performance for Allegra and Zyrtec in an OTC setting after it considers OTC safety and labeling data for Claritin. Consequently, the FDA could then approve the Rx-to-OTC switch of Allegra and Zyrtec by granting WellPoint’s petition to switch Allegra and Zyrtec in addition to Schering-Plough’s supplemental NDA to switch Claritin. However, Aventis and Pfizer are likely to oppose any Rx-to-OTC switch of Allegra and Zyrtec, which still have several years of patent protection, arguing that the lack of OTC safety and labeling data for Allegra and Zyrtec precludes

1, at 162, 164, 166, 170 (identifying that the adverse effects for Claritin, Allegra, and Zyrtec are all similar and all three drugs are considered effective). With advisory committee approval behind the switch of all three drugs and evidence of common effects, the FDA could assume Allegra and Zyrtec would perform similarly to Claritin in the OTC market without specific proof. Id. at 169-71. 255. See Transcript, supra note 1, at 171 (reporting the comments of Dr. Robert Meyer of the FDA at a public hearing that “[t]his [WellPoint petition] is not an all or none package.”). 256. See Seidman Letter, supra note 5 (identifying loratadine as the active ingredient of Claritin, fexofenodine as the active ingredient of Allegra, and cetirizine as the active ingredient of Zyrtec). 257. See Transcript, supra note 1, at 170-71 (revealing clinical tests’ findings that Claritin, Allegra, and Zyrtec are safe for use). 258. See Transcript, supra note 1, at 169 (discussing the comparable side effects reported for Claritin, Allegra, and Zyrtec). 259. See id. at 162, 164, 166, 170 (noting that all three drugs have received similar adverse effects reports, including drug ineffectiveness, headache, and sedation). Adverse effects are adverse experiences associated with the human use of drugs that the manufacturer receives once its drug is marketed to consumers. See also Levitt, supra note 19, at 110 (defining adverse reactions or effects and the manufacturer’s responsibility to review these reports). Such effects must be reported to the FDA four times a year for three years after the drug’s approval and only annually thereafter. Id. 260. See supra note 259 (discussing common side effects among Claritin, Allegra, and Zyrtec). The similarities in the effects on consumers could lead the FDA to treat these drugs similarly after considering safety and labeling data for only Claritin. Id. 261. See Ornstein, supra note 26, at 1A (listing patent expiration date for Claritin as 2002, Allegra as 2013, and Zyrtec as 2007); see also Cauchon, supra note 7, at 1A (suggesting that once a drug’s patent expires, the drug then “becomes vulnerable to competition from low-priced generic prescription drugs”).
the agency from making an Rx-to-OTC switch.\footnote{See Transcript, supra note 1, at 70, 83 (identifying that the primary argument of Aventis and Schering-Plough against the WellPoint petition for the Rx-to-OTC switch of Claritin and Allegra as the fact that the WellPoint petition lacks the necessary safety and labeling data that usually accompanies switch petitions).}

2. \textit{The FDA should evaluate the effects of future citizen petitions}

Regardless of the action the FDA elects, the issue of whether to switch a drug over its manufacturer’s objections will recur as other third-party petitions for an Rx-to-OTC switch arise.\footnote{See Complex Issues, supra note 200, at A5 (predicting that the FDA’s action on WellPoint’s petition will set precedent and have repercussions far beyond antihistamines because forty other drugs could soon be candidates for the switch to OTC).} Consumers more often request particular prescription drugs, mainly as a reaction to direct-to-consumer advertising,\footnote{See Drug Companies Claim Side-Effect Warnings Bog Down Ads, The J. R. (Oklahoma City, OK), Nov. 17, 1999, available at 1999 WL 9849785 (stating that drug companies spend $908 million on direct-to-consumer prescription drug ads and that “sixty percent of consumers knew Claritin, the most advertised drug, treats allergies”).} consequently giving manufacturers an incentive to maintain their high-cost prescription products. As a result of increased demand, the insurance needed to cover the cost of prescription drugs continues to rise.\footnote{See Rapaport, supra note 13, at D3 (noting that insurers blame direct-to-consumer advertising for recent increases in pharmacy costs, even where drug manufacturers spend billions in advertising campaigns and pass the expenses along in the form of higher drug prices). Insurance companies argue that these higher costs make it difficult to offer affordable drugs, a fact which ultimately leads to higher co-payments and more restrictions on the prescription drugs covered under the health plan. Id.} Taking more time to consider WellPoint’s petition will allow the FDA to review the Rx-to-OTC switch process and decide if new restrictions are necessary in the petitioning process or if a minimum standard of safety data must accompany all petitions.\footnote{See 21 C.F.R. § 310.200(b) (suggesting that regulations governing citizen petitions do not require that specific data be submitted). However, other requirements specify safety and labeling data necessary to the FDA for the classification of OTC drugs as safe and effective. Id. § 330.10(a). Because WellPoint meets the general requirements, the FDA must decide whether it also meets the specific guidelines, and ultimately, determine whether future petitions should be subjected to stricter standards.} By creating a new standard to ensure that the usual safety data is produced with every new Rx-to-OTC switch petition, the safety debate that citizen petitions have caused will likely end, and, consequently, no decision will be made without assurances from the industry that consumers can safely self-diagnose and self-medicate. For now, Claritin, Allegra, and Zyrtec will likely remain prescription drugs, or at least until Claritin loses its patent...
protection in 2002 at which point the FDA should reevaluate the switch issue.

3. **Schering-Plough’s supplemental NDA for Claritin recharacterizes the FDA’s options for treatment of the WellPoint petition, but the FDA should still be cautious before any approval**

In light of the committees’ recommendation for approval of the WellPoint petition and Schering-Plough’s reliance on this recommendation, the FDA must weigh additional considerations for the treatment of Claritin and Schering-Plough’s supplemental NDA. First, in keeping with the requirement that clinical safety and consumer labeling comprehension data accompany any supplemental NDA or other petition for a Rx-to-OTC switch, the FDA could approve Claritin for over-the-counter treatment of CIU after considering the requisite safety and labeling data submitted, but deny the WellPoint petition because it lacks any such data to support either Claritin’s treatment of allergies in an OTC setting or the over-the-counter use of Allegra and Zyrtec. Such an option is dangerous, however, because the FDA cannot expect consumers to refrain from purchasing Claritin in an OTC setting and using it to treat their allergies when it is approved only to treat CIU. In fact, the labeling study conducted by Schering-Plough indicated that of the consumers in the general population who should not use Claritin over-the-counter, one-third of consumers will select the drug anyway. Thus, the FDA should be cautious that any approval of

267. See U.S. Federal Drug Administration, *FDA Overview,* supra note 16 (suggesting that, despite the economic consequences that may arise upon the occurrence of a switch, the FDA’s inquiry will focus on the safety of the drugs at issue).

268. See supra notes 213-15 and accompanying text (suggesting that the safety and labeling comprehension studies have accompanied all Rx-to-OTC switches in the past and such data should inform any FDA decision to switch Claritin, Allegra, and Zyrtec).

269. See *Over-the-Counter Status,* supra note 195 (stating that the same dosage of Claritin is used to treat both allergies and hives, making it impossible to stop consumers, in an OTC setting, from purchasing and taking the drug as an allergy remedy).

270. See U.S. Federal Drug Administration, *OTC Evaluation on Label and Self Recognition of CIU and Label Comprehension Study,* supra note 9 (Mar. 26, 2002), available at [http://www.fda.gov/ohrms/dockets/ac/02/briefing/3850b1.htm](http://www.fda.gov/ohrms/dockets/ac/02/briefing/3850b1.htm) (last visited May 8, 2002) [hereinafter *Label Comprehension Study*] (reviewing the results of the labeling comprehension study submitted by Schering-Plough). In the study, consumers were asked a series of questions intended to evaluate whether they could understand the uses, directions and warnings based on reading the label and whether they could accurately and appropriately select Claritin for their own use. *Id.* at 1. In response to the question, “[c]onsidering everything on the package label, is this product intended for you, personally, to take home and start using?,” thirty percent of the general population test group gave incorrect responses. *Id.* at 8. An incorrect response was measured by each participant’s personal history of hives, as well as their current medications and
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Claritin to treat hives over-the-counter will expose consumers to a drug that may not be safe for the over-the-counter treatment of allergies.\textsuperscript{271} Second, the FDA could approve both Schering-Plough’s supplemental NDA for Claritin’s over-the-counter treatment of CIU and WellPoint’s general petition for over-the-counter treatment of allergies.\textsuperscript{272} Schering-Plough’s supplemental NDA is accompanied by the safety and labeling data usually required by the FDA, and the Nonprescription Drugs Advisory Committee has approved Claritin for OTC treatment of CIU.\textsuperscript{273} Further, although the WellPoint petition is lacking the usual safety data, both the Nonprescription Drugs Committee and the Pulmonary-Allergy Drugs Advisory Committee still approved Claritin’s treatment of allergies in the OTC setting.\textsuperscript{274} Again, however, the FDA should exercise caution before taking action on the WellPoint petition without evaluating the requisite safety data for Claritin’s use in an OTC setting.\textsuperscript{275} In addition, approving the whole WellPoint petition would make Allegra and Zyrtec available OTC, when the FDA received no safety and labeling data to support even a limited OTC switch of these drugs.\textsuperscript{276}

\begin{itemize}
\item medical conditions. \textit{Id.} Based on their medical history, the consumer was classified as belonging to one of the following categories: “OK to use,” “Ask a doctor first,” and “Do not use.” \textit{Id.} The majority of the general population fell in the “Do not use” category. \textit{Id.}
\item \textsuperscript{271} See Memorandum from Charles E. Lee, MD, to Members of the Nonprescription Drugs Advisory Committee, \textit{supra} note 160, at 3 (“It is important to recognize that approval of [Claritin] for treatment of urticaria in an OTC setting would impact not only the intended population of patients with CIU, but would also be likely to impact patients who have other conditions in which efficacy and safety has not been studied.”).
\item \textsuperscript{272} See \textit{supra} notes 208-12, 245-47 and accompanying text (suggesting that with the FDA’s discretion, the WellPoint petition could be approved and with the usual safety and labeling data that accompanies a drug manufacturer’s supplemental NDA, the FDA can also approve the manufacturer-initiated switch).
\item \textsuperscript{273} See FDA Executive Summary, 1, available at http://www.fda.gov/ohrms/dockets/ac/02/briefing/3850b1.htm (last visited May 8, 2002) (stating that Schering-Plough provided data from a consumer survey, a physician survey, a label comprehension study, and a recommendation from a panel of expert consultants to support Claritin’s OTC use for CIU).
\item \textsuperscript{274} See \textit{supra} notes 1-7 and accompanying text (noting that the advisory committees recommended switching Claritin, Allegra, and Zyrtec to OTC status even though the WellPoint petition was an unprecedented departure from usual drug manufacturer proposals).
\item \textsuperscript{275} See \textit{supra} notes 218-19 and accompanying text (suggesting that the FDA must balance its objective to protect consumer health with the assertion that consumers are safely able to self-administer other antihistamine drugs in order to reach the best classification for Claritin, Allegra, and Zyrtec).
\item \textsuperscript{276} See \textit{supra} notes 254-62 and accompanying text (discussing the effects of a Schering-Plough supplemental NDA on the WellPoint petition and indicating the FDA has discretion to approve the switch of all three drugs based on the anticipated data for Claritin, without safety data for Allegra and Zyrtec).
\end{itemize}
result, the FDA should cautiously consider any blanket approval of the WellPoint petition.

Third, the FDA could deny both Schering-Plough’s supplemental NDA and the WellPoint petition for a lack of efficacy and safety. As suggested previously, no safety and labeling data is available with the WellPoint petition, and the FDA can expect that any OTC approval of Claritin for CIU will lead to consumer use outside the scope of the approval for the treatment of allergies. In addition to these concerns over available safety data, the FDA must consider recent reports suggesting that Claritin is linked to a birth defect in fifteen baby boys born to Swedish mothers who took the drug while pregnant. The FDA has already indicated that it will take several weeks to review Swedish reports of over two thousand births and other studies of the drug conducted on mice. Such new concerns over the safety of Claritin make the usual safety and labeling data even more necessary to ensure consumer health will be protected if used in the OTC setting. As a result, the FDA could deny both petitions until it is determined that Claritin is safe for consumer use.

277. See supra notes 220-23 and accompanying text (indicating that a lack of safety and labeling data should lead the FDA to deny a Rx-to-OTC switch to maintain and protect consumer health); see also Briefing Book March 2002, supra note 31, at 3 (noting that Schering-Plough filed the supplemental NDA for the OTC use of Claritin for both allergies and CIU, but provides information and data only for CIU).

278. See FDA Overview, supra note 16 (stating that no data or information supports a switch of Claritin, Allegra, or Zyrtec in the WellPoint petition). See also Label Comprehension Study, supra note 270, at 8-9 (suggesting that consumers in the general population who do not suffer from CIU will incorrectly select Claritin for OTC use if the drug is approved only for OTC treatment of CIU).

279. See Claritin Link is Probed in Birth Defects, supra note 31 (noting The European Agency for the Evaluation of Medicinal Products is probing reports that fifteen boys were born with misplaced urethral tubes, or hypospadias, to mothers in Sweden who had taken either Claritin or Clarinex during their pregnancy). Swedish officials have said the defects are not life-threatening and can be corrected with surgery. Id. Schering-Plough has reacted to the reports by saying Swedish concerns result from “a flawed analysis.” Id.

280. See id. (stating that an FDA official said the agency would take at least six weeks to study the reports in Sweden, where the drug has been on the market long enough that any link to birth defects would have surfaced); see also U.S. Probes Claritin Link to Birth Defects, L.A. TIMES, Apr. 27, 2002, at C3 (noting that an FDA official said the agency was not aware of any reports of the similar birth defect in the United States, but is reviewing previous animal studies and birth registries in the United States).

281. See U.S. Probes Claritin Link to Birth Defects, supra note 31 (stating that European authorities announced Thursday, April 25, 2002, three days after the latest advisory committee hearing, that they were launching a safety investigation into the reported link between Claritin and a birth defect in several Swedish newborn boys). Such information was not available both times the FDA advisory committees voted to recommend a Rx-to-OTC switch of Claritin, making the evaluation of safety data for the drug even more imperative.

282. See 21 C.F.R. § 14.5(b) (2001) (allowing the FDA Commissioner to accept or
A better alternative available to the FDA, rather than denying both Schering-Plough’s supplemental NDA and the WellPoint petition, is to abandon its tentative decision date and wait for sufficient research to be conducted and submitted that tends to show that Claritin is safe for OTC use for all of its indications and that it does not cause any adverse defects or side-effects. The need for such data for Claritin suggests that the FDA should now be more cautious in evaluating the WellPoint petition to switch Claritin, Allegra, and Zyrtec. These new concerns suggest otherwise and support the notion that the FDA should consider the usual safety and labeling data for all drugs before approving a Rx-to-OTC switch. As a result, the FDA should consider Schering-Plough’s supplemental NDA for OTC use of Claritin independent of the WellPoint petition to avoid any premature approval of Allegra and Zyrtec without proof of their safety, and should further refrain from taking action on the WellPoint petition until it can consider safety data for all three drugs.

CONCLUSION

The FDA’s Nonprescription Drugs and Pulmonary-Allergy Drugs Advisory Committees made an unprecedented recommendation to the agency to switch Claritin, Allegra, and Zyrtec from Rx-to-OTC status. Such a recommendation was given although petitioner WellPoint and the drugs’ manufacturers disagree over the appropriate status of the three drugs. Both WellPoint and the

283. See Schering-Plough Announces, supra note 162 (stating that Schering-Plough’s supplemental NDA was assigned a “standard review” by the FDA, which should result in a decision by November 28, 2002); see also supra note 232 and accompanying text (suggesting that safety and labeling data should be considered before any switch is made to ensure consumers will use the drug properly and safely).

284. See supra note 222 and accompanying text (noting that it is imperative for the FDA to fully consider all data and safety implications for a drug to ensure protection to public health).

285. See supra notes 278-82 and accompanying text (suggesting that waiting for more data and refraining from any Rx-to-OTC approval will allow the FDA time to more fully evaluate the drugs and their effects). The FDA will have to closely monitor reports on the effects of Claritin on consumers in the United States and around the world in order to confidently reach a decision on the appropriate use of Claritin.

286. See Cauchon, supra note 7, at 1A (suggesting that the committees’ vote to switch Claritin, Allegra, and Zyrtec is unprecedented because FDA has never made an Rx-to-OTC switch without the manufacturer’s proposal).

287. See Question & Answers, supra note 12, at Question 3 (discussing WellPoint’s overall position for initiating an OTC switch as founded on the fact that Claritin, Allegra, and Zyrtec are safer for consumer use than current OTC drugs which cause drowsiness); BRIEFING BOOK, supra note 15, at 1-4 (outlining Schering-Plough’s arguments—including the insufficiency of WellPoint’s safety data and the necessity
drugs’ manufacturers agree that safety should remain the agency’s primary focus in considering the petition.288 The groups disagree, however, as to how safe it will be to market Claritin, Allegra, and Zyrtec over the counter.289 This disagreement has taken a new turn with Schering-Plough’s filing of a supplemental NDA, now advocating that Claritin is safe to be sold over-the-counter.290

The FDA clearly has the statutory and regulatory authority to decide the WellPoint petition.291 However, because the FDA has never switched a Rx drug to OTC status over its manufacturer’s objections,292 or without OTC safety and labeling comprehension data,293 approving the petition would risk removing prescription restrictions that protect consumer health294 and could force the drug’s manufacturer to sell its product unwillingly in the OTC market.295 In light of this risk, the FDA should not approve the

of further studies— which suggest prescription restrictions are still necessary). 288. See Seidman Letter, supra note 5 (noting that an Rx-to-OTC switch is appropriate when the prescription restrictions are no longer necessary to protect public health, and arguing that public health will be protected if Claritin, Allegra, and Zyrtec are changed to OTC by giving consumers access to safer drugs). But see, e.g., BRIEFING BOOK, supra note 15, at 1-4 (citing the same standard as WellPoint that a switch is appropriate when prescription restrictions are not necessary to protect consumers, and arguing that public health will be jeopardized unless FDA considers usual OTC safety and labeling data).

289. See Questions and Answers, supra note 12, at Question 18 (citing a self-sponsored study conducted at the University of Southern California, which concluded that “Claritin, Allegra, and Zyrtec are safer and as effective as antihistamines currently available OTC”); see, e.g., Aventis Opposes, supra note 27 (arguing that a FDA switch would be unsafe without usual OTC safety and labeling data and that physician supervision is critical to avoid the misuse of the three drugs).

290. See Briefing Book March 2002, supra note 31, at 3-4 (noting that Schering-Plough previously raised safety concerns about the switch of Claritin, but has since been convinced by the committees’ recommendation for a switch that the drug is safe to be used in an OTC setting).

291. See 21 C.F.R. § 10.30(e) (2001) (stating that when a citizen petition is filed, the FDA can approve or deny the petition, or provide reasons why decision cannot be adequately reached).

292. See Cauchon, supra note 7, at 1A (noting that, unlike other countries which maintain similar drug regulation laws, the FDA has only switched drugs to OTC status when a request was made by the drug’s manufacturer).

293. See Kraushaar, supra note 25, at 244 (stating that, in addition to the necessity of clinical trials, the FDA’s evolving reliance on label comprehension studies in approving OTC switches has resulted in such studies becoming essential to switch approval).

294. See 21 U.S.C. § 353(b) (1994) (requiring a drug to be dispensed by prescription when its toxicity, dangerous methods of use, or side effects make that drug unsafe unless supervised by a physician). Safety and labeling data usually submitted by the drug’s manufacturer reflect the drug’s safety under OTC conditions rather than as a prescription. See BRIEFING BOOK, supra note 15, at 10 (noting the rigorous data that the FDA required to make an Rx-to-OTC switch). Without such data, the FDA cannot determine whether the toxicity of the drug, methods for use, and side-effects of the drug—all reasons why the drug was initially classified as a prescription drug— will continue to pose a risk to consumer health.

295. Because Claritin, Allegra, and Zyrtec are all currently protected by patents,
WellPoint petition until OTC safety and labeling data is submitted for each drug and evaluated by the agency.

By delaying a decision on the WellPoint petition, the FDA can also reasonably require Schering-Plough to file complete safety and labeling data to accompany its own supplemental NDA to switch Claritin from Rx-to-OTC. Because Schering-Plough recognizes that a loss of revenue is imminent with the loss of Claritin’s patent protection, the company has an incentive to seek a switch of its own drug to OTC status. Just as drug manufacturers in the past have always provided safety and labeling comprehension data with Rx-to-OTC petitions, the FDA can expect and use such data to properly consider the Rx-to-OTC petition.

Once the FDA evaluates the safety and labeling data for Claritin, the agency can then approve an OTC switch of the drug if that switch would continue to protect public health. With its supplemental

the manufacturers are not at risk to lose revenue from generic competition. See 35 U.S.C. § 154(a)(1)(2) (1994) (giving manufacturers the exclusive right to make and to sell a particular product for the life of a patent). However, a forced OTC switch will inevitably lower the price of the three drugs to meet the prices of similar OTC antihistamines, a result which could affect the manufacturers’ return. See Warner, supra note 2, at C1 (noting that when a prescription drug loses its patent protection, its price can fall as much as 80%). More importantly, if the FDA approves the WellPoint petition, the manufacturers stand to lose the additional market exclusivity granted when a drug’s manufacturer submits its own Rx-to-OTC supplemental NDA. See Levitt, supra note 19, at 125 (suggesting that a drug manufacturer will file a supplemental NDA to initiate Rx-to-OTC switch because such route allows manufacturer to obtain three additional years of market exclusivity for the switched drug). Such exclusivity shields the drug from generic OTC competition and effectively ensures the manufacturer greater revenue from OTC sales. Id. If any switch is made based on the WellPoint petition, the drugs’ manufacturers are likely to challenge the FDA’s action on the ground they have been denied the opportunity to seek additional market exclusivity. Id.

296. See supra notes 233-39 and accompanying text (suggesting the FDA should consider all requisite safety and labeling data before making a decision on the WellPoint petition or Schering-Plough’s supplemental NDA to adequately protect consumer health).

297. See Schering-Plough Annual Report, supra note 48, Part I (reporting the billions of dollars of revenue generated by Claritin, which Schering-Plough acknowledges could be impacted when Claritin loses patent protection).

298. See Levitt, supra note 19, at 125 (noting that if a drug manufacturer seeks an Rx-to-OTC switch by filing supplemental NDA, then the manufacturer will gain three years of marketing exclusivity for OTC product).

299. See, e.g., Aventis Opposes, supra note 27 (noting that the traditional OTC switch is made by manufacturers who file NDA submissions containing results from actual use and labeling comprehension studies).

300. The FDA’s statutory mandate requires the agency to distinguish between Rx and OTC drugs when necessary to protect public health. See 21 U.S.C. § 355(b) (1994) (allowing prescription exemptions when dangerous effects of drugs require them to protect public health). Once the FDA determines that public health will not be jeopardized by an Rx-to-OTC switch, then it can issue a decision on the citizen petition in one of three ways prescribed by citizen petition regulations. See 21 C.F.R. § 10.30(c) (permitting the FDA to respond to a citizen petition by (1) approving it,
NDA, however, Schering-Plough only submitted safety and labeling data to support a switch of Claritin to treat CIU over the counter. The lack of data to prove the safety of Claritin to treat allergies over the counter continues to raise the question of whether a Rx-to-OTC switch of Claritin is best for consumers. The switch of Claritin, however, would only be a partial response to the WellPoint petition because it would not affect the prescription classifications of Allegra and Zyrtec. As a result of both the WellPoint petition and Schering-Plough’s supplemental NDA, the FDA still needs to decide whether the safety and labeling data for Claritin is enough to approve the switch of Claritin for both allergies and CIU, as well as the switch of Allegra and Zyrtec, or if it will continue to require the same data to be submitted for every drug.

The WellPoint petition presents the FDA with different alternatives in the Rx-to-OTC switch process that could affect the data submitted with future petitions or even whether data will be required to be presented at all. For now and in light of Schering-Plough’s supplemental NDA, the FDA should continue to require the usual safety and labeling data before making an Rx-to-OTC switch and wait for better data before ruling on the OTC safety of Claritin, Allegra, and Zyrtec.

(2) denying it, (3) or giving petitioner reasons why the agency cannot make a decision.

301. See Briefing Book March 2002, supra note 31, at 3 (stating that the company does not present information on the use of Claritin to treat allergic rhinitis because its use for such purposes was already recommended by the advisory committees, and instead focuses on the use of Claritin to treat CIU, or chronic hives, which was previously not considered by the committees).

302. See supra notes 213-32 and accompanying text (discussing the options available to the FDA considering safety and labeling data is still not available in evaluating whether Claritin is safe enough to be sold to and used by consumers in an OTC setting).

303. See Seidman Letter, supra note 5 (stressing that the benefit to consumers of making antihistamine decongestants more readily available will be maximized by a switch of Allegra and Zyrtec in addition to a switch of Claritin).

304. See supra notes 254-62 and accompanying text (identifying the possibility that, after a consideration and approval of Claritin, the FDA could approve a switch of Allegra and Zyrtec, anticipating similar performance of those drugs). However, the FDA should not respond to Allegra and Zyrtec in this manner and, in order to be consistent with drug regulations, should either require safety and labeling data to accompany each Rx-to-OTC petition or restrict petitioners to only drug manufacturers. See 21 U.S.C. § 355 (detailing the exemptions and considerations for certain drugs).

305. See supra notes 215-16 and accompanying text (discussing how the FDA must reevaluate the implications arising from an insurer’s submission of a Rx-to-OTC switch rather than a drug manufacturer, and also to determine whether restrictions are needed to ensure proper labeling).