February 28, 2020

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

VIA ELECTRONIC MAIL.

Re: OSC File No. DI-20-0372

Dear Secretary Azar:

Pursuant to my responsibilities as Special Counsel, I am referring to you for investigation whistleblower disclosures regarding the Food and Drug Administration (FDA) Center for Tobacco Products (CTP) Office of Science (OS) Division of Nonclinical Science (DNCS). I have determined that there is a substantial likelihood that the allegations disclose a substantial and specific danger to public health and safety, as well as a potential abuse of authority and violation of law, rule, or regulation. A report of your investigation, including any remedial actions, if warranted, is due to the U.S. Office of Special Counsel (OSC) by April 28, 2020.

The whistleblower, [redacted], alleges that DNCS leadership has relaxed its standards in an effort to speed up reviews of new tobacco product applications. As a result it has allowed potentially more harmful products to enter the market. Specifically, according to the whistleblower, in early 2019, DNCS directed its toxicology reviewers—the scientists who are responsible for calculating the health risks posed by new tobacco products—to use a “qualitative or semi-qualitative” approach, rather than the more scientifically appropriate and rigorous quantitative one, when measuring and comparing harmful and potentially harmful chemical compounds in new versus old tobacco products (substantial equivalence (SE) product applications). This approach, according to the whistleblower, is not based on the best available science and can result in arbitrary decisions on SE tobacco product applications, including allowing more harmful products to enter the market. Allegations to be investigated include:

1. [redacted] consented to the release of [redacted] name.
2. See Memorandum from [redacted], Deputy Director, OS DNCS, to file, through [redacted], Director, OS DNCS, dated February 21, 2019, “Harmful and potentially harmful constituent (HPHC) comparison and evaluation procedure for comparing two tobacco products in the substantial equivalent [SE] report” (“HPHC Memorandum”).
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- The “qualitative or semi-qualitative” approach, as outlined in the HPHC Memorandum, is not based on the best available science.
- This “qualitative or semi-qualitative” approach can yield entirely different results than the quantitative approach, i.e., one approach might result in a product being approved for market while the other approach would not.
- After several toxicology scientists, including the whistleblower, complained to CTP OS leadership about the issues outlined in this letter, DNCS leadership stopped sending those scientists SE product applications entirely.
- DNCS’s actions have effectively prevented those concerned toxicology scientists, including the whistleblower, from being able to invoke FDA’s scientific integrity dispute process to raise, and possibly resolve, these issues internally.

The Federal Food, Drug and Cosmetic Act (FD&C) requires new or modified tobacco products to obtain premarket authorization from the FDA before going to market. To be approved, a new proposed tobacco product essentially must not be more harmful to public health than a product already on the market (i.e., there must be SE). Nearly all the premarket tobacco product applications that the FDA reviews are SE Reports by applicants seeking to demonstrate that their new product is SE to a predicate product. If the applicant meets its burden, the FDA issues an SE order allowing that product to go to market. If the applicant fails, or does not otherwise qualify for an exemption, FDA issues a ‘not substantially equivalent’ or NSE order making it illegal to sell, distribute, or import the product in the United States.

In late 2018, the whistleblower alleges that DNCS management became concerned about an anticipated increase in e-cigarette premarket authorization applications. As a result, DNCS management allegedly began pushing scientists to adopt a faster, and less rigorous, ‘qualitative or semi-qualitative’ approach to reviewing SE applications. Under this approach, generally speaking, according to the whistleblower, scientists ask whether a certain HPHC increase in a new product can be offset by another HPHC decrease in that product and, if it can, then that product can be determined SE without assessing additional quantitative data. This approach to review, according to the whistleblower, is more akin to ‘eyeballing it.’

The whistleblower reviewed these tobacco premarket authorization applications and, from 2013 to early 2020, oversaw a team of toxicology reviewer scientists who did

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7 Id.
the same. According to the whistleblower, prior to the late 2018 change in procedures, these scientists used a quantitative approach to measure the harmful and potentially harmful constituents (HPHCs), or chemical compounds, when comparing tobacco products on SE applications. Under this approach, according to the whistleblower, the reviewing scientist quantified the specific concentration and toxicity level of each HPHC, like formaldehyde or acetaldehyde, for example, using mathematical equations to evaluate cancer risks and noncancer hazards, like respiratory illness, for both the new and predicate tobacco product. This approach, the whistleblower explains, is based on the best available science and consistent with other federal regulatory agencies’, including other components within the FDA’s, approach to measuring the human health risks created by tobacco products and the chemical compounds found therein. Using this information, the agency decided whether the new and predicate products were SE or NSE.

Following the change of the late 2018 review procedures, several toxicology review scientists raised concerns to DNCS management about using this qualitative approach on SE applications, and some asked to write ‘non-concur’ opinions when they did not feel the approach was appropriate. DCNS management declined these requests and, on February 21, 2019, issued the HPHC Memorandum, essentially directing reviewers to use the qualitative or semi-qualitative approach whenever possible in lieu of the quantitative approach.

The whistleblower notes that the IHPH Memorandum cites no scientific sources or bases for using this approach, in contrast to the established and scientifically supported quantitative approach. The whistleblower also explained that he and several other scientists tested the quantitative and qualitative (as outlined in the HPHC Memorandum) approaches on several SE applications and found that the two approaches yielded different results for the same application. One new product, for example, was found to be SE using the qualitative approach—meaning it was safe enough to go to market—but was found to be NSE using the quantitative approach. Another product, when tested with both approaches, resulted in the inverse.

The whistleblower alleges that, after the whistleblower and several other toxicology reviewer scientists raised concerns directly to DNCS management and to CTP OS leadership about the new approach and the manner in which the agency effectuated the new approach, management stopped routing any SE evaluations requiring risk assessments to the whistleblower and the other concerned scientists entirely. This, the whistleblower explained, functionally prevented the whistleblower and his colleagues from being able to dispute management’s decision to use the qualitative approach on any

8 The scientists alleged that the HPHC Memorandum equates to a guidance document that was not developed in accordance with the FD&C Act and FDA’s Good Guidance Practices
specific reviews, thereby preventing them from invoking the FDA’s internal scientific dispute processes.  

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses a substantial and specific danger to public health and safety and possibly abuse of authority and violation of law, rule, or regulation. Please note that specific allegations and references to specific violations of law, rule, or regulation, or other enumerated wrongdoing, are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC. As previously noted, FDA must investigate these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the report, along with the whistleblower’s comments and any comments or recommendations I may have, to the President and congressional oversight committees, and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the Appendix. If your investigators have questions regarding the statutory process or the report required under section 1213, please contact [name], Chief of the Retaliation and Disclosure Unit, at [contact info] for assistance. I am also available for any questions you may have.

As discussed above, your investigative report, including any remedial actions, if warranted, is due to OSC by April 28, 2020.

Sincerely,

Henry J. Kerner
Special Counsel

Enclosure

cc: Christi A. Grimm, Principal Deputy Inspector General, U.S. Department of Health and Human Services

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9 The whistleblower states he and his colleagues attempted to work with the agency’s Ombudsman but were ultimately informed, for the reasons outlined above, they did not have standing to invoke the FDA’s internal scientific dispute process.
APPENDIX
AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here: https://osc.gov/PublicFiles. Please refer to our file number in any correspondence on this matter.

RETRIAL AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

- OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).