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{York Stenographic Services, Inc.}

HIF085.020

HEARING ON INSTITUTIONAL REVIEW BOARDS THAT OVERSEE EXPERIMENTAL HUMAN TESTING FOR PROFIT

THURSDAY, MARCH 26, 2009

House of Representatives,

Subcommittee on Oversight and Investigations

Committee on Energy and Commerce

Washington, D.C.

The subcommittee met, pursuant to call, at 10:03 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Bart Stupak (chairman) presiding.

Members present: Representatives Stupak, Markey, DeGette, Christensen, Green, Waxman (ex officio), Walden, Burgess, Gingrey, Barton (ex officio), and Blunt.

Staff present: Karen Lightfoot, Communications Director, Senior Policy Advisor; David Rapallo, General Counsel; Theodore Chuang, Chief Oversight Counsel; Dave Leviss, Deputy

Chief Investigative Counsel; Scott Schloegel, Investigator, Oversight & Investigations; Stacia Cardille, Counsel; Erik Jones, Counsel; Ali Golden, Investigator; Jennifer Owens, Special Assistant; Caren Auchman, Communications Associate; Paul Jung, Public Health Service Detailee; Kenneth Marty, Detailee; Karen Christian, Counsel; Alan Slobodin, Chief Counsel; and Peter Kielty, Legislative Analyst.

Mr. {Stupak.} This meeting will come to order. Today we have a hearing entitled Institutional Review Boards that Oversee Experimental Human Testing for Profit. The chair and ranking member and chairman emeritus will be recognized for 5 minutes for opening statements. All other members of the subcommittee will be recognized for 3-minute opening statements. I will begin. Experimental medical testing on human beings has a troubling history. From the atrocities perpetrated by the Nazis in World War II to the famous Tuskegee study in the 1970's when subjects were denied treatment for syphilis, we have learned that we need strong controls in place to protect the health and safety of people who participate in medical experiments.

Under current federal law, medical testing of human subjects that is federally funded or relates to federally regulated drugs or medical devices cannot proceed without the approval of an Institutional Review Board, a panel of doctors, scientists, and non-scientists charged with ensuring the health and safety of the people participating in the study. Our committee began investigating IRBs in 2007. We learned that Copernicus IRB allowed the study of an antibiotic Ketek to continue without examining reports of fraud it had received. As part of our continued

investigation, we asked the Government Accountability Office, GAO, to conduct undercover testing of the IRB review process. We wanted to know whether IRBs are rubberstamping research studies, whether clinical researchers are IRB shopping or choosing IRBs based on how quickly and how inexpensively they approve studies, and whether government oversight of IRBs is adequate.

Today we will hear the results of GAO's investigation, and they are not reassuring. GAO will explain how Coast IRB, a for-profit company, approved a fictitious study led by a fictitious doctor and submitted by a fictitious company. It called for a full liter of a fictitious product, in fact, the same amount in this bottle here, to be poured into a woman's abdomen cavity after surgery supposedly to help healing. GAO's fake protocol was based on an actual high risk study for a product that the FDA ultimately withdrew from the market because of deaths and infections among patients. Besides Coast IRB, GAO also sent its fictitious study to two other IRBs that they both rejected our proposal out of hand.

Here are some of the things that two other IRBs said after reviewing the fake GAO study. The experimental design was the most complicated thing that I have ever seen. During a surgery, a major operation on a patient, a mystery guy walks in and dumps the solution in the body. Where is the

safety for the patient? It appeared that people were just going to go out and start injecting. We realized it was a terrible risk for the patient. It is the worse thing I have ever seen. But Coast IRB approved the protocol unanimously 7 to nothing.

The doctor with primary responsibility for reviewing the study told other board members that the protocol looks fine, and that the substance to be injected in the abdominal cavity was probably very safe. Nobody at Coast IRB ever reviewed any of the data cited in the proposal to support those claims. If they had, they would have discovered it did not exist. A doctor who reviewed the study did raise a question about the study's claim was accurate and that the substance had been approved previously by the FDA, but no one ever followed up with the FDA to answer this question, and in an e-mail to the rest of the board members, the doctor stated it would not have made any difference, that he would have approved the study anyway and that the lack of FDA approval won't affect my recommendation.

The board chair told us she relied on this recommendation and voted to approve the study even though she did not read the full protocol. Why was this review so shoddy? The evidence suggests that Coast was more concerned with its financial bottom line than protecting the lives of

patients. According to Coast's CEO, who will testify today, Coast had a practice of voting on research protocols within 48 hours of the board receiving them. One of the testimonials that Coast sent to prospective customers reads thank you very much. You guys are the quickest IRB I ever worked with, and I have done this 7 years. Coast even sent a coupon offering to give free IRB review so researchers could coast through your next study.

After this committee wrote to Coast IRB requesting documents associated with their approval of this fictitious study, Coast officials took pride in that they were able to discover the study was bogus, but this was 5 months after they approved it. Coast CEO, Mr. Dueber, told our staff within seconds they were able to determine that this was not an actual medical device, and within 4 to 5 hours they determined that this was a sham. Had any of the staff done the research before they approved our bogus protocol 5 months ago, Coast IRB would not be testifying today. GAO's investigation also exposed other problems with the IRB system. GAO was able to create a fictitious IRB that it registered with the U.S. Department of Health and Human Services, HHS, with no questions asked.

The president of this fake IRB was this dog, Trooper, who is, sadly, now deceased. Trooper didn't know anything

about protecting human testing, but for a three-legged dog he sure could catch a Frisbee. GAO created a fake web site for Trooper's IRB called Maryland House. It received real inquiries from real researchers and actually had one research protocol submitted for review. When asked why it selected GAO's fake IRB and Trooper to conduct its study, a research coordinator stated that it was because of the low price and the quick turnaround time.

GAO's findings raise serious questions, not only about specific IRBs involved in this investigation, but with the entire system for approving experimental testing on human beings. As a society, we have a moral obligation to ensure that human testing is done in the most responsible and ethical manner. I look forward to the testimony today, and I hope we can discuss ways for both government and industry to fulfill its obligation. That concludes my opening statement.

[The prepared statement of Mr. Stupak follows:]

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Mr. {Stupak.} I next go to the ranking member, my friend, Mr. Walden, for his opening statement, please.

Mr. {Walden.} Thank you, Mr. Chairman, for convening this hearing. It is another example of the kind of investigative work that is possible when we work together in a bipartisan manner as we most always do. The subject of this hearing, the oversight of human subjects in clinical trials by Institutional Review Boards or IRBs, grew out of a drug safety investigation in the last Congress. Working together we identified what we thought might be problems in IRB oversight of clinical trials. We made a joint request to the Government Accountability Office, the GAO, to take a closer look into what was going on. Now we are here today to learn about the results of that investigation.

As we meet today, literally millions of Americans are engaged in clinical trials taking place in more than 350,000 locations across America. Right now people who have volunteered for these trials are walking into a doctor's office or a hospital or some other setting, and they are taking experimental medicines or allowing new devices to be used on their bodies so that scientists and doctors can determine whether and how a new treatment will work. Without their willingness to volunteer for a trial, all of us would

not benefit from the new drugs or devices to treat illness and disease. But they volunteer believing that an independent government-sanctioned process is reviewing the protocols and products to maximize their safety.

And I have to tell you that after reading the report of the GAO that explains how easy it was for the undercover investigators to fake their backgrounds and get approval for human trials and create their own fake IRB something is horribly wrong. Mr. Dueber, I have read your testimony for today, and I find it to be the most pathetic example of trying to spin your way out of taking responsibility for a serious approval error I have ever seen. The fact that your board unanimously approved this fake company to turn fake tests using a witches' brew recipe for a gel that doesn't exist, I find to be outrageous. Two other IRBs rightfully rejected the application saying the plan was awful, a piece of junk, and the riskiest thing I have ever seen on this board.

So why did your company unanimously approve it? And would you want your family members to participate in a trial using this gel? No, rather than discuss how your board reached unanimous approval and said the gel is probably very safe and that a risk assessment is not required, you chose to attack the investigators and even called this oversight

effort tyranny. Well, sir, your approach is misguided. It reminds me of the old ruse used by parents on their children to draw their attention away going, look, bright shiny object. I don't care how many bright, shiny objects you tell us to look at, your PR firm and your lawyers, to draw attention away from the real issue, your company still has to answer for this decision that would have allowed patients to spend 5 months taking a fake and potentially lethal product from a fake company with a fake doctor.

And to HHS, what in the devil is going on in your agency that allows you to think you can ignore the law and regulations regarding adequacy of IRBs and simply enter whatever is e-mailed your way and put the U.S. Government stamp of approval on an IRB? You have three federal employees signing up 300 new IRBs a month, according to the GAO, and the leadership of this agency says it is not important to follow the federal rules regarding a test of adequacy? Nobody picked up on names like Phake Medical Devices, April Phuls, Timothy Wittless, and Alan Ruse, or the town of Chetesville, Arizona? This didn't raise a flag? And yet you give out the HHS stamp of approval. It is unbelievable. Moreover, it could be lethal.

Is it any wonder the GAO says this system is vulnerable to manipulation? I understand that more than 10 years after

the Inspector General's report, FDA recently announced a final rule with respect to the IRB registry system that will go into effect this summer. I am curious whether our witnesses believe this new rule will address any of the problems we will hear about today. It is our solemn duty to ensure that those who participate in clinical trials can have confidence that their safety is in trustworthy hands and that government certification means something. We want to encourage participation and support of clinical trials by protecting the integrity of these studies and strengthening the public trust. Thank you again, Mr. Chairman, for convening this hearing. I look forward to today's testimony, and I yield back my time.

[The prepared statement of Mr. Walden follows:]

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Mr. {Stupak.} Thank you, Mr. Walden. Ms. DeGette, for an opening statement, 3 minutes, please.

Ms. {DeGette.} Thank you, Mr. Chairman. Chairman, patient safety and research situations for this committee is really like food safety. One thing you can be sure of is that a crisis is looming just around the corner. In 1999, a young man named Jesse Gelsinger died while participating in a gene therapy trial at the University of Pennsylvania. An FDA investigation concluded the scientist involved in the trial, including the lead researcher, who had a potential financial interest in the results of the trial, broke several rules of ethical conduct including inadequate informed consent procedures. In 2006 the antibiotic, Ketek, caused liver failure and death in patients who used it. An investigation showed that investigators had given fraudulent data to the FDA to gain approval of Ketek.

A whistleblower who learned of the fraud contacted the Institutional Review Board that was responsible for approval of the Ketek clinical trial, but the IRB allegedly did nothing to report the fraud and stop the use of Ketek. And now here we are again today. Research is the key to innovation and discovery including curing deadly diseases, but as this whole panel agrees, the research must be

conducted ethically so that participants understand the risk and make informed decisions about volunteering. That is why we need to upgrade our entire patient protection system in this country.

Mr. Chairman, I have introduced legislation in the last 6 sessions of Congress, the Protection for Participants in Research Act, and it reforms federal regulation and oversight of research on human participants by making federal regulations applicable to all research that is in or affects interstate commerce, that strengthens the education and monitoring of Institutional Review Boards, that harmonizes FDA regulations and the common rule, the two major sets of federal regulations governing research participant protection, that strengthens protection against conflicts of interest by investigators or IRB members, that improves monitoring of research risks and reporting of adverse events and unanticipated problems.

We have reintroduced this legislation this session of Congress, and I would urge every member of this subcommittee on both sides of the aisle to look at the bill and think seriously about co-sponsoring it. The last session of Congress, we came close to passing the legislation on the suspension calendar because I think one thing we can all agree on in a bipartisan way is that we need to encourage

medical experimentation but we need to do it in a way that both protects the patient and gives them informed consent about what they are getting into. Mr. Chairman, I don't want to be here for 13 hearings like we have been on food safety. I want to get this done. We have been working on it a number of years. We know the problem. We know the solutions. And I am looking forward to working with everybody on this committee to improving research so that we can have a robust system but at the same time protect the participants. Thank you, Mr. Chairman.

[The prepared statement of Ms. DeGette follows:]

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Mr. {Stupak.} Thank you. Mr. Burgess for opening statement, please.

Mr. {Burgess.} Thank you, Mr. Chairman. In a surprise move, I am going to agree with the other side of the dais about the number of hearings, not wanting to have the numbers of hearings we have had on other areas before we do something. You know, today's economic environment, there is a lot of investigative activity that we could focus on, and we continue, continue, to have FDA-related hearings. I mean this is the Committee on Oversight and Investigations, not the committee to investigate the FDA. But I believe this subcommittee has some jurisdiction on what has happened with the financial services in this country, and we have had no hearings on that. Secretary Geithner might enjoy a visit to our committee and I would enjoy having the opportunity to question him. So the extent that this subcommittee has jurisdiction over the troubled asset relief program, I believe we ought to be involved.

The Department of Energy, we had two hearings in this subcommittee last Congress on the security of our national labs. I recall us having questions for the head of the Lawrence Livermore laboratory. Well, it turns out now he is just right down the street at the Department of Energy. When

are we going to go have Secretary Chu in to provide answers to that questions that we couldn't get answered last fall? Instead, we are having yet another hearing on the Food and Drug Administration, an agency that we all know is in desperate shape, is broken. The morale of its workers is precariously low. We acknowledge it. We are part of the cause. It is a 20th century agency operating in a 21st century world, a world that is global, commercial, and innovative with regards to food, drugs, and medical devices, but it is regulated by an agency that is underfunded, understaffed, under supported, and what meager funds we do provide them, they have got to expend preparing for the next congressional hearing.

Now these issues relating to the Institutional Review Boards are serious. Any human subject testing should be carefully overseen by the federal government to prevent abuses. The types of products that were being discussed in the issues before us today are products that I would have used in my--might have used in my former life, so I understand the seriousness of this issue, but I can also remember back right before I started medical school hearing about the experiments going on in Tuskegee, Alabama, with the former Department of Health, Education, and Welfare and their involvement. That is why the government now has the common

rule to govern 17 different departments and agencies within the federal government on human testing and why the Food and Drugs Administration has similar regulations governing human subject testing for medical devices and drugs.

There must be ongoing scrutiny of the internal review boards. We must make certain the science is unfettered and rigorous and the Office of Human Research Protection needs to have the appropriate oversight. We need to make certain that we don't politicize the process, that conflicts of interest are being avoided, and all adverse events are thoroughly evaluated and that there is a clear avoidance of the IRB shopping where an Institutional Review Board will be removed from one institution to another because the results were not favorable. I am particularly concerned about the interaction of the common rule with the Food and Drug Administration regulations governing the investigational new drug applications. We all now the failures of the IRB and Ketek. Their failure was the impetus behind the GAO report being presented to us today regarding the review and oversight of the Institutional Review Boards.

But this is a problem that can be fixed. Let us fix it and move on to the next thing. We should hold a hearing on the entire approval process at the FDA. The IRBs, certainly they need to be investigated, the registration system, but

what about the 510K exception for new drugs and the alleged revolving door where FDA employees go straight to the drug companies and then come back. We owe it to the American people. We owe it to the scientific community to fix the FDA and fix it right. Let us get on with that task. I yield back.

[The prepared statement of Mr. Burgess follows:]

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Mr. {Stupak.} I thank the gentleman. I would also note this week you addressed to a letter to us on wanting to do hearings on medical devices with the FDA, and that is something that we are looking at closely so just so the record is clear, we will probably have more FDA hearings unfortunately. Ms. Christensen for opening statement, please.

Ms. {Christensen.} Thank you, Mr. Chairman. This is a very important hearing, and I thank you, Chairman Stupak and Ranking Member Walden for holding it. Because of the differences we have seen in response to medications and other treatments by African Americans, we, including the National Medical Association who I see in the audience, have been encouraging individuals and providers in our communities to become involved in clinical trials. I even participated in one briefly before coming to Congress. But in our community the specter of Tuskegee still looms large in our minds, and then there have been more recent incidents. I recall joining with other members of the House to stop the testing of pesticides in children, mostly African American poor children, just a few years ago.

So if we though that this was an aberration or that Tuskegee could not happen again, obviously as we try to

convince our communities the GAO report tells us that we were badly mistaken. The IRB process is supposed to ensure the health and safety of individuals in clinical trials. We, who have apparently misplaced our trust in the system are outraged at the failures that are documented in the GAO report. This system needs to be fixed, and I for one cannot in good conscience encourage another person to participate in a clinical trial until it is. Thank you, Mr. Chairman. I yield back.

[The prepared statement of Ms. Christensen follows:]

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Mr. {Stupak.} Thank you, Ms. Christensen. Mr. Gingrey, opening statement, please.

Mr. {Gingrey.} Mr. Chairman, thank you. Today this committee has an opportunity to make sure that Institutional Review Boards are taking every possible step to ensure the safety of those who agree to participate in biomedical research. Biomedical research and clinical trials are critical to developing and perfecting the next generation of life saving medicine and devices. Without question, the potential benefits must outweigh the potential risks to participants. However, these individuals must also be made fully aware of the potential risks when they agree to participate. Mr. Chairman, I look forward to listening to the testimony, and I would like to reserve the balance of my time for questions, and I yield back.

[The prepared statement of Mr. Gingrey follows:]

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Mr. {Stupak.} Thank you, Mr. Gingrey. Mr. Green for opening statement, please.

Mr. {Green.} Thank you, Mr. Chairman. I thank you for having this hearing today on the Institutional Review Boards, the IRBs, and the federal government's oversight of these boards. IRBs were created to protect individuals from harm or death during an experiment and ensure individuals give informed consent to the researchers. IRBs are in place to minimize the risks to the subjects, that the risks of the study are reasonable in anticipation of the benefits. Protection for subjects during experimental research are vital. Unfortunately, we have two painful incidents in our past to remind us just how necessary these protections are, the formaldehyde distribution in 1960 and the Tuskegee study in 1974. Both of these incidents serve as painful reminders of the wrongdoing of researchers at the expense of the health and well-being of the subjects.

Most recent, we have the Ketek incident, which the IRB failed to investigate a whistleblower's allegations during continuing review of the application. I was on this subcommittee when we investigated Ketek and the flawed review process that enabled the drug to come to market. Several deaths have occurred during studies that received IRB

approval. In recent years, many called for reforms to the IRB system. IRB regulations were created in the 1970's and have not been reformed in recent years. Currently, HHS and the Office of Human Research Protection has the jurisdiction over IRBs for studies with federal funding. FDA has jurisdiction over testing for medical devices and drugs.

HHS requires IRBs but the FDA does not. However, the FDA is developing an IRB process. There are also independent IRBs not affiliated with any institution operating in the U.S. These IRBs are associated with the industry. The GAO and HHS have issued several reports documenting problems with the current IRB process. In 1998, GAO issued several recommendations for IRB reform, and to date none of these recommendations have been adopted by HHS or FDA. I am looking forward to the testimony of the witnesses, particularly GAO, so we can see if our oversight of IRBs is adequate and whether reforms of the system need to be made. And I yield back my time.

[The prepared statement of Mr. Green follows:]

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Mr. {Stupak.} Thank you, Mr. Green. Member of the subcommittee, Mr. Markey, for opening statement, please.

Mr. {Markey.} Thank you, Mr. Chairman, very much. While legitimate research is vital, human experimentation must be conducted under the highest ethical standards. This is a very important issue to me. In November of 1986, as chairman of the Energy and Commerce Subcommittee on Energy and Power, I released a report describing radiation experimentations on human subjects by American scientists between the 1940's and the 1970's. The people tested in these experiments were used as nuclear human guinea pigs to determine the effects of exposing humans to nuclear radiation. Most of those experiments provided little or no medical benefit to the patients. In many cases informed consent was not granted, yet, these individuals were asked to ingest, inhale, or be injected with radioactive materials, materials whose safety was not yet determined.

These scientists recklessly endangered human lives and much of their work was kept hidden from the public until the 1980's and 1990's. The good news is that although when I released my report in 1986 the Reagan and then Bush administrations refused to respond to it. President Clinton, in 1994, upon my urging established the Presidential Advisory

Committee on Human Radiation Experiments, which issued this report which led to the strengthening of regulations for research with human subjects.

We are here today to discuss IRBs. IRB is supposed to stand for Institutional Review Board. Unfortunately, with some experiments, IRB stands for irresponsible, reckless behavior. Unscrupulous IRBs have followed lax review procedures and unethical practices when assessing the safety of clinical trial experiments. As a result, participants have been put at risk of injury or worse, death. Without proper review from IRBs, the scientific integrity of clinical research work has been compromised. This can lead to faulty evidence regarding the safety of drugs and devices, and can further endanger the safety of the public at large if these products gain approval by the FDA.

When it comes to protecting the safety of consumers, we must have the highest standards. In February of 2007 when I called on the FDA through several of my letters and a hearing by this subcommittee, and, again, Mr. Chairman, you have been a real leader on this, to answer questions regarding the safety of the antibiotic Ketek, the FDA approved Ketek partly based on fraudulent studies of its safety. Later, we found that Ketek is linked to severe liver damage and death. In this case, the IRB responsible for approving the clinical

trials of Ketek ignored warnings from a whistleblower.

Mr. Chairman, you have really been a policeman, a watchdog, on this issue. This hearing is another in the long process that you have conducted, and I want to congratulate you for that. I yield back the balance of my time.

[The prepared statement of Mr. Markey follows:]

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Mr. {Stupak.} Thank you, Mr. Markey. Ranking member of the full committee, Mr. Barton, has joined us. Opening statement, please, Mr. Barton.

Mr. {Barton.} Thank you, Mr. Chairman. Apparently, I am still in time to do the digital transition opening statement too if that subcommittee chairman is here for this hearing. I want to echo what Congressman Markey just said about your leadership and Mr. Walden's leadership on this issue in taking a look at the Institutional Review Boards. We are following up today on an issue that was uncovered during an investigation in the last Congress. The question is whether these Institutional Review Boards do a good job of protecting human subjects. When we started looking into this, we were concerned that some of the IRBs were not equipped to handle the amount of the complexity of the work that comes up during the clinical trials.

As a part of our subsequent investigation was an undercover work that the GAO conducted over the last year. GAO made up a supposed clinical investigator, outfitted him with a transparently suspicious resume, assigned him a fake medical license number. GAO also concocted a verifiably false company, devised med systems as a sponsor of the fake study. The study protocol was straight from the Internet,

and the device, the company, and the doctor were 100 percent fictitious. Once this particular IRB learned the committee was investigating to their credit it took them less than a day to decide that something was wrong. Instead of actually doing something, they put out a news release that acted as if they had just been stung by James Bond instead of the GAO.

The IRB is here today to explain why it decided to approve the equally easy to detect fake protocol and whether it stands by that decision. I suspect that this subcommittee will have some very direct questions about the alleged science and the patently false protocol that Coast IRB rubberstamped and why it caused no apparent concern even though it had no supporting data from clinical trials and the study devised matched examples of significant risk devices on the FDA's own web site. I think we should be careful not to over emphasize or to under emphasize the significance of what this investigation has shown. Coast IRB was sloppy and/or negligent, perhaps just flat wrong, in its judgment about the protocol and the risk it posed to its study's subjects.

But, fortunately, two other IRBs that were presented with the same protocol rejected it, one without even considering it. The vast majority of clinical trials, at least I hope, are conducted without harm to patients. Even so, I am bothered by the fact that two of the IRBs that GAO

investigated and the other IRBs who advertised in trade magazines and on the Internet seemed to focus on the speed of their review and the guarantees of a quick turnaround time. In some of those ads, patient protection and safety seem almost like an after thought. The bigger issue today may not be that one IRB made a grade error and then tried to throw attention elsewhere, but that the current set of regulations does little to prevent such an error. That is our job if we need to review those regulations.

We need to take a close look at those regulations and ask whether they are meaningful in the current research and clinical trial environment. Current regulations require that an IRB must make a number of determinations before approving a protocol, including that risks are minimized to the patient and that the patient has knowingly consented to participating in the study. But as GAO and the HHS Office of Inspector General have been reporting for years, there is basically no test that an IRB must pass before it opens for business to show that it is qualified to review such clinical trials. It is frustrating that the same problems keep popping up. These are problems that the GAO and the Inspector General have discussed in reports issued as long as 10 years ago.

I know that the FDA recently announced a rule that would require IRBs to register with the FDA, but again that was a

reform that was called for years ago, and I don’t think that this rule would have made much difference with regard to solving the problems that the GAO has identified in its most recent undercover investigation. By putting the GAO findings in proper context, we can strengthen bio-medical research and innovation. If the public sees that our committee and federal agencies are ensuring that the research committee is looking out for the folks here confidence in clinical trials will be boosted and participation will increase. This should be a very meaningful hearing if we keep our discussion in perspective. I want to thank our witnesses for testifying today, and, again, you, Mr. Chairman, and Mr. Walden for leading on this issue. I yield back.

[The prepared statement of Mr. Barton follows:]

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[The prepared statement of Mr. Waxman follows:]

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Mr. {Stupak.} Thank you, Mr. Barton. That concludes the openings statements of members of the subcommittee. We have out first panel of witnesses before us. The panel that we have is Mr. Gregory Kutz, who is the Managing Director of Forensic Audits and Special Investigations at the Government Accountability Office, GAO, Dr. Jerry Menikoff, who is the Director of the Office of Human Research Protections at the Department of Health and Human Services, Dr. Joanne Less, who is the Director of the Good Clinical Practice Program at the Food and Drug Administration, and Mr. Daniel Dueber, who is the Chief Executive Officer at Coast IRB, LLC.

It is the policy of this subcommittee to take all testimony under oath. Please be advised that you have the right under rules of the House to be advised by counsel during your testimony. Do you wish to be represented by counsel? If so, would you have them--would you state your counsel's name? Mr. Kutz. Dr. Less. Dr. Menikoff. Mr. Dueber.

Mr. {Emord.} Jonathan Emord.

Mr. {Stupak.} Okay. During your testimony, if you want to stop and confirm with that, that will be fine. He cannot testify but he can give you advice. That is fine. It is the policy of this subcommittee to take all testimony under oath,

so I am going to ask you to please rise, raise your right hand, and take the oath.

[Witnesses sworn]

Mr. {Stupak.} Let the record reflect the witnesses replied in the affirmative. They are now under oath. We will proceed with your opening 5-minute statement. Mr. Kutz, we will start with you, please, sir.

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^TESTIMONY OF GREGORY KUTZ, MANAGING DIRECTOR, FORENSIC AUDITS AND SPECIAL INVESTIGATIONS, GOVERNMENT ACCOUNTABILITY OFFICE; JERRY MENIKOFF, M.D., DIRECTOR, OFFICE FOR HUMAN RESEARCH PROTECTIONS, DEPARTMENT OF HEALTH AND HUMAN SERVICES; JOANNE LESS, DIRECTOR, GOOD CLINICAL PRACTICE PROGRAM, FOOD AND DRUG ADMINISTRATION; AND DANIEL DUEBER, CHIEF EXECUTIVE OFFICER, COAST IRB, LLC

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^TESTIMONY OF GREGORY KUTZ

} Mr. {Kutz.} Mr. Chairman and members of the subcommittee, thank you for the opportunity to discuss Institutional Review Boards. Our investigation relates principally to private IRBs that authorize human subject testing. Today's testimony highlights the results of our investigation of the IRB system. My testimony has 2 parts. First, I will provide some very brief background, and, second, I will discuss the results of our investigation. First, as several of you have mentioned, federal regulations governing human subject testing evolved from society's horrified reaction to several cases.

For example, there were the forced medical experiments on countless Holocaust victims. In the U.S., we had the 40-

year Tuskegee study. In this case, hundreds of poor, mostly illiterate African American men, were not properly treated for syphilis so that the effects of this disease could be studied. Today, IRBs play a critical role in the safety and protection of human subjects. With this background in mind, let me move on to our results. Our investigation found that the current system is highly vulnerable to unethical or incompetent actors. We tested the IRB system with 2 separate but related undercover operations. The objective of the first operation was to see if an actual IRB would authorize our bogus medical device company to conduct human subject testing.

The objective of our second operation was to determine whether a real medical research company would hire our bogus IRB. If successful, this would show that the bogus IRB could have authorized human subject testing. First, our bogus medical device protocol was approved by a real IRB even though we had no medical expertise. Our bogus device, which we called adhesive block, was a post-surgical healing device for women that matched several FDA descriptions of a significant risk device. We created our protocol and fictitious device using information that was publicly available and on the Internet. The monitors show excepts from the IRB board meeting where our protocols were

unanimously approved and adhesive block was referred to as being probably very safe.

As shown on the monitors, some due diligence would have shown a mailbox as our suite or office, a fictitious lead researcher with a fabricated medical license and resume, a fabricated FDA marketing approval for our device, and a cell phone as the only number we provided. The next picture on the monitor shows a coupon that this IRB provided which got our attention. Given that we are dealing with experimental research on human beings, we were surprised that anybody would offer discount coupons for this service. This IRB is no fly by night operation. They are currently the IRB of record for over 70 federally-funded projects, and according to their own press release have overseen thousands of trials.

Two other IRBs we sent these very same protocols to had a very different response. The monitor shows examples of their comments, including this protocol was awful and a piece of junk, the riskiest thing I have ever seen, the odds of approval were 0 percent, and my favorite comment, if somebody approves it, oh, boy. For the IRB that approved our study, the only due diligence they appeared to perform was after they received a letter from this subcommittee. After receiving this letter, the IRB was able to determine, for example, that our lead researcher and FDA marketing approval

were, in fact, bogus. However, this IRB had already approved our bogus device for human subject testing 4 months before receiving your letter.

For our second operation, we created a bogus private IRB. Once again, we used phony company officials and a mailbox as our business address. We registered our IRB on line with HHS and created a web site that looked like the web sites that other IRBs used. Then we went fishing. We advertised our services on the Internet and in newspapers to see if a real researcher or researchers would contact us. The monitors show our advertisements. Notice that we emphasized the speed of our reviews, our HHS approval, and guaranteed results. We did refrain from offering discount coupons as part of our advertising campaign.

In response to these ads, our bogus IRB received protocols from one company and inquiries from five others. The company sending us its protocols was seeking approval to add a new test site for ongoing trials. Our bogus IRB, which as I mentioned had absolutely no medical expertise, could have authorized human subject testing at this site. However, we told this company that we couldn’t review their protocols because we were experiencing significant financial problems due to the current economic crisis. In conclusion, every year millions of Americans submit themselves to experimental

research. These people are among our nation's poorest and most vulnerable. I can't tell you whether our 2 undercover successful tests are isolated cases or the tip of the iceberg.

What I can tell you is given the history of human subject testing, it is hard to believe that anybody could be comfortable with the integrity of the current system. Mr. Chairman, that ends my statement and I look forward to your questions.

[The prepared statement of Mr. Kutz follows:]

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Mr. {Stupak.} Thank you, Mr. Kutz. Dr. Less, your opening statement, please. And for all the witnesses if you have a longer statement than 5 minutes, it will be included in the record.

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^TESTIMONY OF JOANNE LESS

} Ms. {Less.} Good morning, Mr. Chairman, and members of the subcommittee. I am Joanne Less of the Good Clinical Practice Program at the FDA. I appreciate your invitation to appear here today to discuss FDA's role in overseeing Institutional Review Boards. For over 40 years, FDA has been committed to protecting the rights, safety, and welfare of subjects who participate in clinical trials of FDA-regulated products. The obligation to protect individuals who volunteer for research and assume research risks in order to advance public health and bio-medical knowledge is integral to FDA's mission, and the agency continually strives to strengthen and promote the human subject protections. While measures to protect subjects are incorporated into all aspects and all stages of clinical trial, perhaps human subject protection is most clearly embodied in 2 critical activities.

The first is the requirement to obtain voluntary, legally effective informed consent from each study subject. The second is a requirement for independent ethical review of each clinical trial. The responsibility for human subject protection is one that FDA shares with sponsors, clinical

investigators, study monitors, and IRBs. Every party with a role in the conduct and management of the trial has clearly defined responsibilities under FDA's regulations. All of these parties must fulfill those duties and be vigilant in doing so or subjects could be put at risk. This network of overlapping responsibility is key to protecting the rights, safety, and welfare of subjects who participate in FDA-regulated trials.

IRBs are a critically important component of this collaborative oversight system. The primary purpose of IRB review is to assure the protection of the rights, safety, and welfare of human subjects. An IRB has the authority to approve, require modifications in or disapprove research. To approve a study, the IRB must determine that all of the following criteria are met. The risk to subjects are minimized, the risks are reasonable in relationship to anticipated benefits, selection of subjects is equitable, and informed consent will be obtained and documented. The IRB may require modifications to the protocol, informed consent or study procedures before it approves the study.

An IRB may disapprove a study due to protocol deficiencies or for reasons such as limited availability of suitable subjects. Once a study begins, IRBs are responsible for reviewing changes to research. IRBs have the authority

to suspend or terminate approval of research that has been associated with unexpected serious harm to subjects. There are different types of IRBs. Most IRBs are established and operated by universities, hospitals, and other institutions. These IRBs are comprised primarily of volunteers from the institution's faculty and staff. A small number of IRBs, often referred to as independent IRBs, are not affiliated with such an institution.

Independent IRBs may provide reviews for industry-sponsored projects conducted outside a university or hospital, for example, in a doctor's office. FDA applies the same oversight, scrutiny, and inspectional practices to all types of IRBs. The agency places a higher priority on inspecting IRBs that are new that have not been previously inspected, that have previously been found to be out of compliance or that are reviewing research involving high risk products or vulnerable populations. During these inspections, FDA investigators select one or more studies in the IRBs inventory. The inspector reviews the IRB procedures and records, follows the selected studies through the entire process, and interviews key staff.

FDA also conducts for-cause inspections of IRBs for which there have been complaints. During a for-cause inspection, FDA focuses on the issue identified in the

complaint and determines if there is evidence to substantiate it. If an FDA investigator uncovers a regulatory violation, the agency may take further action. For minor deviations, FDA generally issues a letter describing the deficiency and provides reference to the relevant regulations or guidance. For more serious violations, FDA may issue a warning letter requesting that the IRB submit a corrective action plan within 15 days.

FDA generally conducts a follow-up inspection to ensure that the violations were corrected. The agency may also impose administrative sanctions on an IRB. For example, FDA may withhold approval of studies that are reviewed by the IRB, direct that no new subjects be enrolled in ongoing studies, or terminate all ongoing studies. Because the clinical trials process has significantly evolved since FDA issued some of its regulations, FDA launched an initiative aimed at modernizing and strengthening the agency’s oversight of clinical trials. FDA issued a number of guidances with the expectation that they will reduce burdens, improve IRBs efficiency, and allow IRBs to give more attention to critical human subject protection activities.

Earlier this year, FDA issued regulations that would require all IRBs to register through an electronic system. This will enable the agency to more precisely identify IRBs

that review FDA regulated research, assist us in providing educational information, and help us to identify IRBs for inspection. DA has also established a task force to ensure that all pending and future recommendations related to the agency's oversight of clinical trials raised by Congress, the HHS Office of the Inspector General, and the General Accountability Office are fully addressed.

Finally, although FDA has traditionally conducted a majority of its inspections in association with the submission of a marketing application, the agency has been shifting more of its resources to inspections of ongoing studies. This will allow the agency to identify potential problems while the study is still active enabling implementation of corrective actions to minimize risk to subjects and preserve the integrity of the trial. FDA has also been improving its follow-up of violative inspections and working to identify alternative methods to select IRBs for inspection. It is FDA's strong belief that educating IRB members, chairs, and administrators fosters understanding of the human subject protection regulations and enhances their ability to protect subjects participating in research.

To that end, in partnership with OHRP and other organizations, FDA participates in numerous national and regional conferences and workshops. In conclusion, FDA

remains committed to strengthening human subject protection and improving its oversight of IRBs and other parties that conduct, oversee, and manage clinical trials. FDA has taken steps to ensure that recommendations regarding the agency's oversight of clinical trials, including IRBs, are fully addressed. While FDA has already implemented a number of changes to its clinical trial oversight activities, the agency continues to look for and welcome input about new approaches to fulfill these responsibilities. This concludes my statement. I would be happy to answer any questions.

[The prepared statement of Ms. Less follows:]

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Mr. {Stupak.} Thank you. Dr. Menikoff, your opening statement, please, sir.

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^TESTIMONY OF JERRY MENIKOFF, M.D.

} Dr. {Menikoff.} Good morning, Mr. Chairman, and members of the subcommittee. I am Jerry Menikoff, Director of the Office for Human Research Protections which is within the Department of Health and Human Services. I previously served as director of the office that oversees the NIH's human research protection program. Before that, for almost a decade, I chaired the Institutional Review Board at the University of Kansas Medical Center. The department's commitment to human subject protections spans more than 3 decades. In 1974 what was then known as the Department of HEW issued its first department-wide human subject protection regulations. OHRP is charged with enforcing the current regulations which are in 45 CFR part 46.

OHRP's mission is to protect the rights, welfare, and well-being of subjects involved in research conducted or supported by the department. The responsibility for protecting research subjects is one that OHRP shares with the FDA, agencies that fund research, institutions that conduct research, investigators who carry out that research, and the IRBs that review it. Everyone with a role in human subjects research must fulfill their duty to protect the subjects or

else those subjects could be at undue risk. The core provisions of the department's current human subjects regulations cover three major areas. First, institutions conducting HHS funded research must enter into an agreement called an assurance agreeing to comply with the regulations. Second, a committee called an Institutional Review Board or IRB must review and approve the research before enrollment of any subject. The IRB plays a central role in ensuring that the rights, safety, and welfare of subjects are adequately protected.

Third, the research must be conducted consistent with the regulations, which generally require obtaining the informed consent of the subjects and the IRB's continuing review of the research. The department's regulation in addition provides special protections for various populations considered to be vulnerable. Besides the regulations administered by OHRP, there are other federal regulations protecting research subjects. The FDA has its own set of regulations. These apply to clinical trials involving products regulated by FDA. These regulations are substantially similar to those administered by OHRP, though there are some differences.

In 1991, 14 other federal departments and agencies joined HHS in adopting a uniform set of regulations that are

identical to the core portion of the HHS regulations. This set of regulations is often referred to as the common rule. For all participating federal department and agencies the common rule outlines the same basic provisions for IRBs informed consent and assurance agreements. As I noted, the department's regulations require that institutions that are engaged in HHS funded research must sign an agreement with OHRP known as an assurance. Through this assurance the institution commits itself to have all its HHS-funded research conducted in compliance with the regulations.

Assurances must also include designation of one or more IRBs that will review the research covered by the assurance. The institution holds primary responsibility for ensuring that the IRBs it designates are appropriately qualified to review the types of research studies it conducts. The Federalwide Assurance, or FWA, was introduced in 2000 and has been the only type of assurance accepted by OHRP since 2005. Previously, OHRP reviewed assurances using procedures that often involved lengthy discussions with institutions. In 1998, the HHS Office of Inspector General recommended that OHRP shift its focus and resources to other parts of the system so as to better protect research subjects. The current largely automated system for processing FWAs was implemented as a response to that OIG report.

With the adoption of the FWA system in 2000, a new requirement was added. Any IRB designated under an FWA must be registered with OHRP. The process for registering an IRB with OHRP is separate from the process for obtaining FWA but the two are related. This registration process was implemented in response to a recommendation from that same OIG report. The report recommended a simple registration system which would collect minimal descriptive information such as location and contact information. This simplified registration system would still allow OHRP and FDA to communicate effectively with IRBs while maintaining the standards of protection for research subjects.

The IRB registration process requires among other things submission of a list of IRB members identified by name, qualification, and affiliations. OHRP generally accepts all IRB registration applications that include information showing compliance with the following requirements, that there are at least five IRB members, there is at least one person designated as a non-scientist and one designated as a scientist, and then there is at least one member designated as not affiliated with the institution. On January 15 of this year both OHRP and FDA issued IRB registration rules. The two sets of registration rules are quite harmonious and will be implemented through a single web-based IRB

registration system.

In conclusion, the protection of research subjects remains a highest priority for both the department and for OHRP. We continue to work on ways to better achieve that goal and very much welcome any recommendations that the subcommittee may have. Thank you for this opportunity to address you. I will be pleased to answer any questions.

[The prepared statement of Dr. Menikoff follows:]

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Mr. {Stupak.} Thank you, Dr. Menikoff. Mr. Dueber, your opening statement, please, sir.

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^TESTIMONY OF DANIEL DUEBER

} Mr. {Dueber.} Good morning. Coast IRB recently submitted the product in question, Adhesiabloc, to an independent forensic toxicological lab. That lab determined, as we did, as our board did on October 30, that the product was safe. Here is the conclusion by two top forensic toxicologists in the United States. It is my opinion within a reasonable degree of scientific certainty there is no sound scientific foundation for finding the constituents in the Adhesiabloc gel described in clinical study protocol pilot study of safety and efficacy of 2.5 percent Adhesiabloc gel to reduce adhesions following peritoneal cavity surgery, device clinical study protocol number P-D-15 version 1.4, unsafe at the dose recommended for testing.

In October of 2008, the Government Accountability Office, at the behest of this committee, perpetrated an extensive fraud against my company, Coast IRB, LLC. It did so without probable cause that Coast had committed any crime. Indeed, no one at Coast has committed any crime. It did so without involving the executive branch. It did so without satisfying any of the legal safeguards that the Department of Justice and the federal courts have in place. It acted

without probable cause that a crime had been committed.

If this committee's objective with this fraudulent and illegal GAO sting operation was to demonstrate that IRBs need to do more checking and verification of sponsor and PI licenses, verify the existence of companies and so on, fine, we will do that. And we have changed our SOPs to do just that because of this illegal fraud. But did you have to take the extremely negative approach of setting up an elaborate, expensive fraud? Yes, your fraud was very sophisticated, and you pulled the wool over our eyes. Congratulations. But you need to understand the effects of this charade. I personally have wasted 5 weeks of my valuable time defending the honor, integrity, and reputation of both our company and of me. We have spent many years building that.

My company has now spent over $100,000 defending itself, and do you know what that means? That means that we now have to lay off at least five people at our company to pay for this. A much better and positive approach would have been for you to call a conference together of key IRB industry leaders, FDA, OHRP, and the committee to identify what needs to be fixed and what laws, regulations are needed to fix the problem. No one would have had to have been harassed as Coast has with this sting. The GAO posed as a private business seeking review by my company of a medical device.

It represented the medical device to be one that was substantially equivalent to a device approved for market by FDA.

In an elaborate scheme, GAO violated federal and state laws, one, by falsely representing itself to be a medical device company, two, by submitting a fake clinical trial address, three, by submitting a fraudulent protocol for a fraudulent medical device, four, by submitting a forged CV for a fake principal investigator, five, by falsely representing the medical device to be substantially equivalent to a device approved by FDA for market, six, by submitting a fraudulent FDA 510(k) number for the device, seven, by submitting a fraudulent Federalwide Assurance number, and eight, by forging a Commonwealth of Virginia medical license and license numbers for its supposed principal investigator.

GAO also engaged in extensive verbal and e-mail correspondence with Coast IRB in furtherance of the fraud. The fraud would have persisted to this day had I not discovered it and had Coast not terminated the clinical trial. Had I not discovered it following receipt of this committee's request for documents, I am confident it would have been discovered before its next scheduled review of the trial in April, next month. Mr. Chairman, it is the

exclusive duty and province of the executive branch of this government to engage in law enforcement actions. By well settled precedent that branch alone may engage in clandestine stings upon probable cause that a crime has been committed. Innocent citizens of this country cannot be lawfully defrauded by their government. To hold otherwise replaces the rule of law with tyranny.

Mr. Chairman, what the GAO has done at the request of this committee is unlawful. The actions here involve mail fraud, wire fraud, forging of a Commonwealth of Virginia medical license, false presentation of license numbers and 510(k) numbers, and false holding out of people to be physicians in the Commonwealth of Virginia. Coast has notified federal and state law enforcement of these crimes. These are crimes whether committed by the GAO or anyone else in the absence of probable cause. They are crimes for which those responsible should answer. Although we have informed law enforcement that GAO is behind them, a fact never affirmatively confirmed by your committee staff to me, we have asked that the crimes be investigated and that those responsible be prosecuted.

Mr. Chairman, the question confronting me, and which I hope will occur to you, is whether this committee and the GAO have the lawful authority to defraud an innocent party to

prove a political point. My question, sir, is whether this committee and the GAO are above the law. You know, I am just very, very saddened and disappointed in our government right now. I cannot believe my government did this to me and my company. It is unconscionable. But Coast IRB shares everyone's concern in this room about the need to improve our oversight system. We have been at the forefront in the past about documenting the need for improvements in ICFs and IRB shopping and other categories. We want to work with FDA and this committee to improve the system in a positive way. Thank you, and I will be happy to answer any questions.

[The prepared statement of Mr. Dueber follows:]

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Mr. {Stupak.} The members will be recognized for 5 minutes for questions. I will begin. Mr. Dueber, I have to tell you how disappointed I am, I think Mr. Walden said the same thing, and the other members who are up here, with your opening statement. Coast IRB could have come forward this morning and admitted that they made numerous mistakes by not checking into the credentials of a fake company, a fake doctor, and a fake device that Coast ultimately approved for use in human testing. Instead, like a kid who has got caught with his hand in the cookie jar, you now come before Congress today to complain that you were caught. Nowhere in your opening statement is there any sense of concern that your company's approval could have led to human subjects being exposed to a dangerous substance without testing. Lives could have been injured or lost as a result of your company's action, and all you do is complain that you were caught.

Where is the first responsibility and where is the corporate responsibility? So let me ask you this, Mr. Dueber, you were interviewed on the record by committee staff last week. They asked you some basic questions about your medical review of GAO's experimental testing protocol. And let me put them on the screen. Here are your answers. When our counsel asked you, do you feel your company's medical

review of the protocol was adequate, you indicated yes. So is it fair to say that none of the board members, including Dr. Dodd, who did the primary medical review, has raised concerns with the medical review of this protocol? Is that fair to say that you have no concerns about the protocol?

Mr. {Dueber.} This was a sophisticated fraud, sir.

Mr. {Stupak.} My question is, is it your opinion that the medical review was fair in this case?

Mr. {Dueber.} We reviewed--we did a safety review. Dr. Dodd looked at the protocol.

Mr. {Stupak.} And you feel it is safe?

Mr. {Dueber.} We checked with--Dr. Dodd made the conviction--made the conclusion that it was safe, and we have just proven that it is safe with an independent review of--

Mr. {Stupak.} Sure, your independent review, you talk about the 2.5 percent of the Adhesiabloc. What about the 97.5 percent of the liter that would be left in the woman's abdomen? What about that 97 percent? You don't even know that it is, so how can you test to see if it is even safe in your little report you have there from your expert?

Mr. {Dueber.} He looked at it and he said that--

Mr. {Stupak.} He looked at what? 2.5 percent, that is what he looked at.

Mr. {Dueber.} He looked at the whole device.

Mr. {Stupak.} Look at your protocol. You are going to leave 1 liter behind. What about the other 97.5 percent of the liter that you have no idea what it was in our protocol because you never asked.

Mr. {Dueber.} Well, sir--

Mr. {Stupak.} So, therefore, you can't sit here and say the other 97.5 percent has been tested and safe when you don't know what the tests were because you don't know what the product contains.

Mr. {Dueber.} Sir, I am not a scientist. I did not do the primary--

Mr. {Stupak.} Neither am I.

Mr. {Dueber.} But what I can tell you is that Dr. Dodd told me when I talked to him about this that this propylene glycol substance--

Mr. {Stupak.} Which is 2.5 percent, 1 liter, is safe. Didn't the doctor tell you what the other 97.5 percent was?

Mr. {Dueber.} We didn't discuss--

Mr. {Stupak.} You didn't ask? What if it is poison? So let me go on. GAO submitted this fake protocol to 2 other IRBs that came to exactly the opposite conclusion than you did. They both rejected the study. The first IRB that rejected the study was a company called Argus IRB. Here is what they said. We realized it was a terrible risk for the

patient. The concept of the study was risky. It is the worse thing I have ever seen. Doing a surgery, a major surgery, on a patient, then a mystery guy walks in and dumps a solution in the body. Where is the safety for the patient? Who is overlooking all these parts? Who is looking for the patient--who is looking out for the patient? I had a problem with propylene glycol gel. They said it was a safe substance. I didn't see any data on it. There was no data in the protocol indicating that propylene glycol gel was safe internally. It was a serious problem.

Mr. Dueber, how is it possible that your company found that this study wasn't risky at all when other IRBs rejected it? And actually a second IRB called Fox Company, they said I could have sent the protocol to Board of Review but I spared wasting their time. There was no monitoring for safety. It appeared that people were just going to go out and start injecting people. Mr. Dueber, given what the other IRBs found, don't you think your company made a major mistake here?

Mr. {Dueber.} Our company followed the regulations that FDA requires.

Mr. {Stupak.} Really? Where is the due diligence in your company? Where is the safety of the patient by injecting them with a liter bottle and 97.5 percent--

Mr. {Dueber.} It had a 510(k) exemption for one thing.

Mr. {Stupak.} Did you go check that 510(k)?

Mr. {Dueber.} No, we did not.

Mr. {Stupak.} Is that part of due diligence, checking a 510(k)? You relied on it.

Mr. {Dueber.} It is now. We have changed our SOPs to incorporate those since we have been now hoodwinked by our government.

Mr. {Stupak.} My time is up. Mr. Kutz, let me ask you this last question, if I can. Do you believe Coast's medical review was adequate? Do you agree with Mr. Dueber that there was no risk involved with injecting a liter of this mystery substance into a woman's abdominal cavity?

Mr. {Kutz.} I don't have the expertise to say that, but what I would say is this is if you have a system where two companies can say this thing is the riskiest thing they have ever seen and they rejected it even in some cases before it got to the board, and at the same time we have an IRB that says this is perfectly safe, we got a real problem here. So I think that would be what I can say based on my expertise.

Mr. {Stupak.} Thank you. And I recognize Mr. Walden for 5 minutes, please.

Mr. {Walden.} Thank you, Mr. Chairman. Mr. Dueber, I want to go to this report from I guess it is Kupeck Group,

LLC, because he says in my opinion within a reasonable degree of scientific certainty there is no sound scientific foundation for finding that constituents in the Adhesiabloc gel described in clinical study protocol pilot study, blah, blah, blah, are unsafe at the dose recommended for testing. Is that the same thing as saying the entire grouping of those items in this proposed gel are safe? Does his report actually say or this company's report actually say that the entire compilation and usage of the gel was safe or just that the two constituent ingredients alone are safe?

Mr. {Dueber.} That is our understanding. We asked him to review the gel at the 2.5 percent for this study and for the amount left in the cavity and he said that it is not unsafe at this dose recommended for testing.

Mr. {Walden.} And so is he saying to you then that he would have approved it for use in human subjects?

Mr. {Dueber.} That is the way we understood it, yes.

Mr. {Walden.} And left in their stomach, sir, their belly for up to 5 months?

Mr. {Dueber.} Yes.

Mr. {Walden.} Where does it say that in the report? I don't see it in the conclusion, and where does it discuss the procedures involved?

Mr. {Dueber.} I haven't had the opportunity to read the

whole report.

Mr. {Walden.} When did you ask for the report, sir?

Mr. {Dueber.} Several days ago.

Mr. {Walden.} So what report did you ask for that would have shown this was safe when your board approved this gel 70?

Mr. {Dueber.} Well, as I--excuse me.

Mr. {Walden.} While you are consulting with counsel, I will go to Dr. Menikoff. You can continue to consult if you need to. Dr. Menikoff, obviously you are representing HHS. You heard my comments. I heard yours in terms of more of a recitation of what the rules and the procedures are for your agency and the same from Dr. Less for FDA. What troubles me greatly, and I think what troubles the people I represent, is that virtually anybody even with the most silly of applications can register as an IRB simply by e-mailing your agency and it gets entered even if the name of the town you are from is Chetesville, Arizona for which I assume there is no zip code. Is this preventable?

Dr. {Menikoff.} Congressman, it is true that anybody could enter information into the registration system. The registration system was a response to the very OIG report that several of you commented on, and it basically established the registration system, a method of collecting

minimal information so there would be a list of IRBs.

Mr. {Walden.} What do you do with that information mostly?

Dr. {Menikoff.} We use it to contact IRBs to send information to them.

Mr. {Walden.} Information about that?

Dr. {Menikoff.} About a change in the system. There may be a compliance allegation alleged against a particular IRB, so we will contact them using the contact information.

Mr. {Walden.} Do you use it to contact them about conferences and things?

Dr. {Menikoff.} It could sometimes be used for that. Absolutely.

Mr. {Walden.} Mr. Dueber, let me go back to you because I sense you may have an answer to my question.

Mr. {Dueber.} Yes, sir. The primary reviewer on this, Dr. Dodd--

Mr. {Walden.} Very distinguished credentials, by the way.

Mr. {Dueber.} Yes. And he is very familiar with propylene glycol which is the basis of this substance, and he told me that propylene glycol can be ingested in large amounts in the body and is not toxic and that it is proven to be non-cancerous. There has been no question about its

toxicity in any part of the body even remaining in the body for a period of time. He is an expert medical reviewer for the California Medical Board. He is chief of staff at the Lodi Medical Hospital. He is chairman of his Institutional Review Board at Lodi Medical Hospital. He is an OB/GYN also. He knows his stuff.

Mr. {Walden.} All right. I am sure he does. Dr. Less, since you are FDA, is there any problem with ingesting this chemical in your body and having it sit there for 5 months and in concert with the surgeries and all?

Ms. {Less.} Having not--

Mr. {Walden.} You can't answer that?

Ms. {Less.} I was just going to say having not seen the device description pre-clinical test and by compatibility testing, we wouldn't be able to comment on that.

Mr. {Walden.} Mr. Kutz, maybe you can help us here. What did the other IRBs say about this procedure and the protocols and the tests and all?

Mr. {Kutz.} I think it is important to know that because it goes beyond just is the product safe. If could read a few of their comments to you, if that is okay.

Mr. {Walden.} Please.

Mr. {Kutz.} The first one, as you mentioned, said that our submission was so bad they weren't even going to give it

to the board. They also said that our protocol showed no evidence of quality control for sterility or consistency of the product. The next comment is very, very important. They said there was no prior investigation report of the pre-clinical animal studies we claimed to have performed, and they wanted to know whether there had been any adverse events, whether our product killed animals or hurt animals.

The second IRB said who is the manufacturer of Adhesiabloc and where is it made? It seems like a logical question. We didn't put that in our protocols. Where will these surgeries take place? That wasn't in our protocols. How are the hospitals and surgeons being selected? That wasn't noted. Has the surgeon or hospital read the protocols and do they agree? We didn't answer that. Provide the diagram used to record the incision lines. And the last one that seems fairly relevant when you are discussing it, who will performing and taking the tissues and biopsies? So those are some of the substantive comments.

Mr. {Walden.} Mr. Kutz, did this IRB, which by the way made itself known to the public through their public relations outreach efforts, you didn't do that, did you?

Mr. {Kutz.} No, we never used--

Mr. {Walden.} And we did not. And so did this IRB come back to you with any questions about the protocols, any

questions about--

Mr. {Kutz.} Their initial focus was on the consent form, and they wanted us to, if you will, dumb it down so 5th grade level of reading could be done, so they were very focused on the consent form, which is part of their--not a lot of substance on the actual medical or the issues of the hospitals, who were these surgeons, who is this person actually putting the item into the woman's pelvic region after open surgery, no questions at all of substance like that.

Mr. {Walden.} My time has expired.

Mr. {Stupak.} Thank you, Mr. Walden. Ms. DeGette for questions, please.

Ms. {DeGette.} Thank you, Mr. Chairman. Mr. Dueber, how long has Coast been in business?

Mr. {Dueber.} Since 2002.

Ms. {DeGette.} Since 2002. And since that time, you have reviewed 352 protocols, correct?

Mr. {Dueber.} No. I don't know exactly how many we have reviewed.

Ms. {DeGette.} Okay. Have you declined any of the protocols that you have reviewed?

Mr. {Dueber.} My understanding is yes, but I don't know how many.

Ms. {DeGette.} Okay. Mr. Chairman, I would ask unanimous consent that Mr. Dueber supplement his response to tell this committee how many protocols that they have reviewed and how many they have approved and how many they have rejected.

Mr. {Stupak.} Without objection.

Ms. {DeGette.} Thank you. Now with this particular protocol you took this on 5 months ago, correct?

Mr. {Dueber.} Correct.

Ms. {DeGette.} And you approved the protocol for testing on humans within 48 hours, didn't you?

Mr. {Dueber.} On this particular study, I am not sure what the turnaround time was.

Ms. {DeGette.} Well, your company advertises a 48-hour turnaround on most cases, correct?

Mr. {Dueber.} What that refers to, ma'am, is that--

Ms. {DeGette.} Yes or no.

Mr. {Dueber.} I can't answer yes or no because I need to explain it.

Ms. {DeGette.} All right. Go ahead.

Mr. {Dueber.} The turnaround time refers to the amount of time it takes for the Coast administrative staff, which is separate from the board, to review the documents presented by the protocol sponsor and--

Ms. {DeGette.} Okay, I got you. So it is the administrative turnaround. How long and on average per protocol does it take you to approve this protocol for human testing?

Mr. {Dueber.} I am not sure because the board--every member of the board has to review thoroughly the protocol.

Ms. {DeGette.} So can you give me--how long did it take on this case? Did it take 48 hours to approve it for human testing on this case?

Mr. {Dueber.} Well, it probably took longer than that because--

Ms. {DeGette.} Well, how much longer?

Mr. {Dueber.} --there were two board--

Ms. {DeGette.} Three days, 4 days, 5 days?

Mr. {Dueber.} Well, there was a week between the preliminary approval and the final approval.

Ms. {DeGette.} A week. Okay. Now, excuse me, sir, we can swear in your lawyer if he would like to testify, but I would like you to answer. Now so it took a week to approve this protocol. At the time that the protocol was approved for human testing, the report that was prepared by this very fine doctor that you talked about, did he prepare that report at that time that the protocol was approved?

Mr. {Dueber.} Are you referring to the minutes of the

board?

Ms. {DeGette.} I am referring to the Kupeck Group LLC report that you provided to this committee late last night.

Mr. {Dueber.} You are asking how long did it take him to do this?

Ms. {DeGette.} No. I am saying did he prepare this at the time, 5 months ago, when it was approved?

Mr. {Dueber.} No.

Ms. {DeGette.} No. Was there a written report by him approved that went through all the scientific basis 5 months ago?

Mr. {Dueber.} No.

Ms. {DeGette.} Was there anything in writing analyzing the scientific evidence and the risk and benefits?

Mr. {Dueber.} There was extensive discussion at the board meeting itself between--

Ms. {DeGette.} Was there any written report prepared at that time?

Mr. {Dueber.} There were minutes prepared for that.

Ms. {DeGette.} Does this committee have copies of those minutes?

Mr. {Dueber.} Yes.

Ms. {DeGette.} Okay. I would ask our committee staff if I could get a copy of those minutes, please. Now this

report, when was this prepared, the report that you keep referring to as to the scientific efficacy of the protocol, prepared?

Mr. {Dueber.} Yesterday.

Ms. {DeGette.} And why was it prepared yesterday?

Mr. {Dueber.} Because we contacted--

Ms. {DeGette.} Because you were coming in to testify today, right?

Mr. {Dueber.} We contacted this individual and asked if he would review this because we were--

Ms. {DeGette.} Because you were coming in to testify today, right?

Mr. {Dueber.} Well, we were convinced because Dr. Dodd was convinced that this substance was safe. He made that determination. The board agreed. We have five doctors, high quality doctors, on our board, and they agreed it was safe.

Ms. {DeGette.} Okay.

Mr. {Dueber.} We just wanted before we came here to find out if that was--

Ms. {DeGette.} To find out, in fact, if it was safe?

Mr. {Dueber.} --in fact the case.

Ms. {DeGette.} We could have been doing human testing for 5 months without that report.

Mr. {Dueber.} But, ma'am, no one in--we have never at

Coast ever had a fraudulent study submitted to us. There is no economic reason for anybody to do such a thing.

Ms. {DeGette.} Okay. I am sorry. First of all, let me stop you and say I now have the minutes in front of me, and the whole discussion is about a paragraph long. But as the chairman is saying, the paragraph never talks about what is in that 95 percent of the substance, so how would they possibly know if this would be safe?

Mr. {Dueber.} It is based on propylene glycol which is proven to be safe.

Ms. {DeGette.} But that is 2.5 percent.

Mr. {Dueber.} Propylene--

Ms. {DeGette.} What is in the rest?

Mr. {Dueber.} The board reviewed that and felt that it was safe and there was--

Ms. {DeGette.} Okay. I am going to--

Mr. {Dueber.} --a 510(k) device upon which they were basing, you know, the fact that that existed and therefore it should be safe. And, of course, we didn't check the 510(k) device to see if it was real, but we never had reason to do that, ma'am.

Ms. {DeGette.} Let me just stop you. Now Ms. Christensen-Green and I are sitting here looking at this going we sure don't want this in our abdomens, and I think

all the other women sitting here today are thinking that. That is the thing about IRBs. We think that when we approve--when we ask IRBs to review a protocol, we are doing it so that they can review the safety of the entire protocol. And we have had situations like this where--we had one situation where an IRB approved a protocol where they performed one type of plastic surgery on one-half of someone's face and another type on another half, and that person was grossly disfigured. What would have happened if this actually would have gone into human testing, and they would have put something poisonous as the other 97.5 percent into women's abdomens?

Mr. {Dueber.} I can't speculate on what would have happened.

Ms. {DeGette.} I can't either. Dr. Menikoff, would you agree that is a problem?

Dr. {Menikoff.} Congresswoman, this study is outside OHRP's jurisdiction. It was not federally funded.

Ms. {DeGette.} Well, I understand that, but if there was a study that put 97.5 percent of a substance as part of a human trial into someone's abdomen, that would seem to be a problem?

Dr. {Menikoff.} Again, this is not under our jurisdiction. I think FDA is a better position to comment on

the facts. We saw no protocol.

Ms. {DeGette.} So you don't--okay. Dr. Less, what is your--

Ms. {Less.} We have not seen the protocol or device description either. We would need to know what is in the product before we could comment.

Ms. {DeGette.} Right, but you certainly wouldn't think that--you certainly wouldn't approve some kind of a drug that put a whole bunch of fluid like this where it wasn't specified what it was as part of a surgical operation?

Ms. {Less.} We would need to know what is in the product, how it is being used, a full device description.

Ms. {DeGette.} I just have--

Mr. {Stupak.} No, no, we got to move on. We have both former chairs who would like to ask questions. Mr. Barton for questions, please.

Mr. {Barton.} Thank you. You talk about a target rich environment for questions. My first question is to our representative from the GAO. The protocol and the device that you all chose, you, not you personally, but your organization consciously picked one that the FDA had already rejected and then changed it to make it even worse, isn't that correct?

Mr. {Kutz.} We picked something that was available on

the Internet and altered it significantly. The 3 components of the actual gel, we made up from stuff on the Internet so we had never mixed it together. I can't--we don't know if it works or doesn't work. We just put it together on paper.

Mr. {Barton.} But you tried to make it very easy for anybody that was really trying to review the protocol to figure out that it was terrible and reject it, which 2 of the IRBs did.

Mr. {Kutz.} Yes. We didn't know what we were doing.

Mr. {Barton.} And then this one rubberstamped it almost before they got it, is that a fair statement?

Mr. {Kutz.} Well, they actually--I mentioned a coupon in the opening statement. They gave us a pre-review with the coupon and then the final review was where they authorized the informed consent and than the actual protocols.

Mr. {Barton.} How did you pay for their review?

Mr. {Kutz.} Well, we gave them our credit card number. As it turns out, they never actually charged us.

Mr. {Barton.} Really? I would have thought they would have cashed the check almost as quickly as they certified approval.

Mr. {Kutz.} We were surprised they didn't. Everybody else did.

Mr. {Barton.} Dr. Less and Dr. Menikoff, what can be

done to decertify this company right now? Why are they still in business?

Ms. {Less.} Again, we don't have the--we have not seen the GAO's report to be able to comment on what actually transpired.

Mr. {Barton.} I am not asking you about that. I mean I am so mad at the company, I can hardly be civil, but I am almost as upset with our government folks who are supposed to oversee these IRBs, and this company has gotten 4 or 5 notice letters in the last 2 to 3 years, and yet they are still in business, and they have the gall to come here and threaten to sue the government. They ought to have their butt being kicked out the door within the week.

Ms. {Less.} I could provide some background to you on how the process would generally work for a product such as this. This would be considered a significant risk product subject to FDA's jurisdiction that would require an investigational device exemption in order for the study to proceed.

Mr. {Barton.} So basically as the representative of the FDA you just say business as usual.

Ms. {Less.} No.

Mr. {Barton.} These folks are going to stay in business for another 4 or 5 years, maybe approve a product that kills

some innocent person, and then we will have another oversight hearing 3 or 4 years down the road. What steps are being taken right now to decertify these charlatans that raised $4 million in revenue last year scamming the public?

Ms. {Less.} Congressman, what I wanted to explain to the committee is that for significant risk products such as this there should have been FDA oversight as well as IRB oversight.

Mr. {Barton.} There wasn't.

Ms. {Less.} No. This product should have been submitted to the FDA so we could have reviewed the product, looked at what it was made of by compatibility testing, sterility testing, all of that. That piece of this picture was not part of the operation, so that piece of the human subject protection was not invoked.

Mr. {Barton.} As the FDA representative, what are you going to do to use whatever enforcement mechanisms the FDA has to hold this particular IRB company accountable?

Ms. {Less.} We would have to go and look at--

Mr. {Barton.} What are you going to do?

Ms. {Less.} We need--

Mr. {Barton.} Are you going to do anything at all? Are you going to make a report? Are you going to make a recommendation?

Ms. {Less.} We will take the information from the GAO, fully evaluate it, do our own investigation and see what needs to happen.

Mr. {Barton.} You will do that?

Ms. {Less.} We need to see the GAO's findings and see exactly what happened and evaluate it and see what we need to do.

Mr. {Barton.} Do you have any sense of outrage about this?

Ms. {Less.} Without knowing exactly what went on--

Mr. {Barton.} So the answer to that is, no, you don't?

Ms. {Less.} We do. We are very concerned with human subject protection.

Mr. {Barton.} Dr. Menikoff, you represent HHS. Do you have any sense of outrage about this? Are we the only people--the people that are elected, are we the only ones that seem to be--

Dr. {Menikoff.} First of all, I would certainly welcome on OHRP's behalf obtaining information about what happened. We have yet to see any actual information or documentation of what happened. We would welcome obtaining that and reviewing it and taking appropriate action.

Mr. {Barton.} So you are in a passive mode also? If we bring a dump truck load of documents, you will review them?

Are you going to be an advocate for investigation, use the authority of the Health and Human Services?

Dr. {Menikoff.} OHRP is an advocate for improving the protection of research subjects. Again, nobody has provided us yet any document that information about what happened. We welcome that. We are eager to get it even before this hearing, and we would welcome receiving it, and we have appropriate procedures to protect subjects, and we would implement those procedures and determine appropriate action.

Mr. {Barton.} Well, my time has expired, Mr. Chairman, but I am outraged, and I am going to encourage you and Mr. Waxman and Mr. Walden to use every authority of the United States Congress and the Energy and Commerce Oversight and Investigations Subcommittee to eliminate these bad actors. I have a sister-in-law who is undergoing cancer therapy treatment. She is Stage IV right now. And she is looking at submitting to some protocols for some experimental drugs that would be subject to an IRB approval, and it appalls me, it appalls me, that, you know, it is apparently with the exception of GAO who seems to be pretty intense about this, FDA and HHS appear to be almost indifferent, and of course the IRB president is incense that we are even asking questions. I mean that is just outrageous. So I will work with you, Mr. Chairman, and we will--

Mr. {Stupak.} Mr. Kutz, if you want to respond to Mr. Barton.

Mr. {Kutz.} Yes. We have actually sent a letter to FDA as of yesterday requesting them to do an investigation. The interesting point is when the letter was sent by the committee and Coast made the allegations against us, FDA had an investigator with the U.S. Attorney to go after charges after our fake company, so they were very aggressive at that point in time--

Mr. {Barton.} Bless their little hearts.

Mr. {Kutz.} --about going after--without any evidence except a letter from Coast they were ready to go to the U.S. Attorney to go after us, so I just wanted to make sure you understood that, Mr. Barton.

Mr. {Barton.} We have a company here that has received three or four notice letters in the last several years. I mean it is just ridiculous. I yield back.

Mr. {Stupak.} We thank the gentleman. Our hearing is going to continue. As the former chairman noted earlier, this is our second hearing on IRBs and something we have an interest in. There will be legislation. I know Ms. DeGette has legislation. There will be other legislative proposals after this hearing, I am sure. We have seven votes on the floor. I am going to ask members' patience and ask them to

come back in approximately 1 hour. We will be in recess for 1 hour, and then we will come back and continue this hearing. Thank you.

[Recess.]

Mr. {Stupak.} This meeting will come back to order. Witnesses are reminded they are under oath. And, Mr. Dueber, Ms. DeGette, hopefully she is going to come back, but she had asked you if it was your policy to prove the protocol to board members within 24 or 48 hours. You said, no, it was longer. She asked specifically about this one but under testimony before the committee the record should reflect on page 27 the question was you tried to do this once if a protocol goes to the board or board members turn around and make a decision within 24 to 48 hours, is that correct? Your answer was right, right, yes.

Mr. {Dueber.} Yes. I checked into that. Again, I am new to the company. I have been there 5 months.

Mr. {Stupak.} Well, you shouldn’t be new to the truth. Either it is yes or not. I mean you have your testimony. Your attorney has it. Just a caution, that is all.

Mr. {Dueber.} I was not intentionally telling--

Mr. {Stupak.} I didn’t think so. Okay. Ms. Christensen for questions, please.

Ms. {Christensen.} Thank you, Mr. Chairman. This is

one of my first hearings on the Institutional Review Boards, and I am really shocked at some of what I am reading and hearing. And I am concerned that the IRB can be listed and then utilized by researchers without the Department of Health and Human Services even having to do a cursory check and that if federal funds are not involved or an FDA-regulated product is not involved there doesn't have to be any federal oversight or research if I am understanding correctly. And I also wonder listening and reading if there should even be private for profit IRBs. Maybe they ought to be university-based or somehow more directly under the purview of the department.

My first question, I will begin with you, Mr. Dueber. When the committee staff interviewed you last week, you acknowledged that your company did not verify the physicians leading these experimental studies or that their credentials were accurate. In fact, when the GAO submitted its fake protocol to your company you didn't verify that Jonathan Kruger, the person listed as the primary clinical investigator, in fact, had a legitimate medical license, is that correct?

Mr. {Dueber.} Yes. What we did was we have never had the experience of having a fraudulent group of people lying to us about their existence and about their licenses. They

did submit a license copy but it turned out to be fraudulent too. So what we have learned from this is we need to start checking that. We have changed our SOPs accordingly, but we did in our review what was required by regulations, and regulations do not require that that be done but regardless of whether it is required or not, we are doing that now.

Ms. {Christensen.} But you did eventually once you were asked to testify checked on the doctor. How long did it take for you to make that determination?

Mr. {Dueber.} Well, this whole thing didn't come up until I got the letter from the subcommittee on the 23rd of February so some time after that, a day or two after that, we started checking into--

Ms. {Christensen.} Was it a long process to check to determine whether he was--

Mr. {Dueber.} Well, the date that sticks in my mind where most of the work was done was March 5, and it took a team of us about maybe 3 to 4 hours to check all these things out, the existence of the company which didn't exist, the phone numbers, the licenses, and all that. It took quite a bit of time to just go--

Ms. {Christensen.} For all of it, but probably checking to see whether the doctor was a duly licensed physician--

Mr. {Dueber.} That doesn't take long. That is why--you

know, that is prime example of why we are going to start changing that and start doing it.

Ms. {Christensen.} Mr. Kutz, let me turn to you. You submitted a fake medical license to Coast IRB on behalf of Dr. Kruger. I think it is in the binder that you might have there. It is tab 2. It is the State of Virginia. The date on the license is 1990.

Mr. {Kutz.} That is correct. I don't have the binder but that is correct.

Ms. {Christensen.} But Virginia requires medical doctors to obtain a new license every 2 years like most places do so this 19-year old license would have expired back in 1992. Isn't that something that the IRB should have caught?

Mr. {Kutz.} Since they weren't looking at that, I guess they wouldn't have caught it, but certainly if they understood that they had to be done every 2 years that would be something that they could put in their protocols.

Ms. {Christensen.} Well, Mr. Dueber, how come the company did not catch the fact that this was an expired license? I am a physician, so I am very sensitive to issues relating to physicians.

Mr. {Dueber.} I don't know. I wasn't there. I don't know why it wasn't caught.

Ms. {Christensen.} But you would agree that if a doctor had engaged in malpractice or had lost their license that it would be the job of the IRB or Coast in particular to check that?

Mr. {Dueber.} After this experience, I would agree, yes.

Ms. {Christensen.} And you would agree that if you realize that that license had expired 19 years before that you would--would you have approved that study if you had picked up that the license had expired or that the person--well, that the license had expired, just simply that?

Mr. {Dueber.} Well, that is speculating but if someone submitted something like that and then it had expired we would do a lot of other things then to check into the validity of other things sent to us, which could end up resulting in us not taking on the study or not approving it.

Ms. {Christensen.} But the principal investigator not having a valid license would be a reason to not approve, wouldn't it?

Mr. {Dueber.} Yes.

Mr. {Stupak.} Gentlewoman, would you yield on that point? This license was invalid on its face, was it not? You didn't have to check. It was invalid, 17 years old, 10 years old, so it was invalid. There was no checking to be

done.

Mr. {Dueber.} Yes, that is correct.

Ms. {Christensen.} My time has expired, Mr. Chair. Thank you.

Mr. {Stupak.} Any other questions?

Ms. {Christensen.} I did have another one.

Mr. {Stupak.} Go ahead.

Ms. {Christensen.} Okay. To Dr. Less. In April of 2007, well before our investigation of Coast began, HHS received a letter containing allegations about Coast. They turned the letter over to FDA because the accusations related to FDA-related research. FDA initiated an inspection of Coast in July, 2007. In March, 2008, FDA issued a warning letter to Coast finding that Darren McDaniel, who was the CEO at the time, improperly assigned someone with only a high school education to conduct an expedited review of a human testing protocol.

Dr. Less, I think it is commendable that the FDA took action to investigate and address this allegation, but as the GAO investigation has shown, Coast had numerous other problems including a review process that approve protocols based on a 19-year old medical license, board members don't read protocols, and these coupons that explicitly encourage IRB shopping. Why didn't FDA identify some of these other

clear deficiencies at Coast?

Ms. {Less.} Congresswoman, FDA, when they go out and do an inspection they generally spend a few days inside and they pull two or three studies, follow those studies from approval through continued review, look for adverse events, see whether or not the IRB had appropriately addressed those adverse events or changes to the protocol. When we went out on this, it was a for complaint--a for-cause inspection. We had been out there several times before, had not identified problems. So for this case we went out specifically to look into the allegations that expedited review had not been used properly, so we were investigating that. And we did issue a warning letter and we imposed sanctions because we had been out there before and had found some minor violations so we imposed sanctions that they not use expedited review anymore.

And generally what we will do when we do issue a warning letter is follow up. We make sure that the IRB institutes a corrective action plan within 15 days. We review that, look to see if it has adequately addressed everything that we were concerned about, and then we put them on our list for follow-up inspection.

Ms. {Christensen.} So you don’t do a comprehensive review generally when you visit an IRB, you just review the specific complaints?

Ms. {Less.} It depends on why we are out there because we had been there several times before and had done a more comprehensive review and pulled a number of studies and looked at those other studies. But in this particular case we just focused on the complaint.

Ms. {Christensen.} But the original letter also identified other concerns including back dating, changing board meeting minutes and not following through with board requests that the FDA inspection investigate those issues while you were there?

Ms. {Less.} We did look into all of those. The ones that we identified in our warning letter, I believe, were all related to the abuse of expedited review and potential conflict of interest that the CEO had inserted himself into the process and had inappropriately used expedited review, and so we focused on those issues.

Ms. {Christensen.} Including the back dating and changing of the board--you did. And, Dr. Menikoff, did the allegations result in an evaluation of Coast's internal practices and procedures?

Dr. {Menikoff.} Are you talking about the current allegations?

Ms. {Christensen.} No, the ones that I just referred to, the 19 year old doing the expedited review and the

backdating, changing board meeting minutes, not following board requests.

Dr. {Menikoff.} Well, Congresswoman, as noted earlier, OHRP and FDA have separate jurisdiction. They began this investigation on a study which was under FDA jurisdiction and was not under OHRP jurisdiction. FDA and OHRP regularly communicate, and we discuss issues relating to actions that one agency or the other takes, and we will deal appropriately and generally do deal appropriately in terms of this.

Ms. {Christensen.} Well, I am going to stop here but my question really was did you do an allegation as a result of those set of allegations? Did you do an evaluation related to this?

Dr. {Menikoff.} The evaluation was under FDA's jurisdiction at the time, and we would normally at that point--it is the same set of regulations. We would normally allow FDA to conduct an appropriate investigation.

Ms. {Christensen.} Thank you, Mr. Chairman. I appreciate the additional time. Thank you.

Mr. {Stupak.} Thank you. Mr. Dueber, if we go back to that license, that license that was 19 years old, if you could put that back up on the board, could also indicate that maybe the doctor had been malpractice, no longer licensed to practice medicine, could it not, if the license was 19 years

old?

Mr. {Dueber.} It could have been anything. The fact that we didn't catch that it had expired was something we should have caught.

Mr. {Stupak.} Right. Right. And the reason why we are doing these hearings, and I have been on this committee now for 15 years, and Mr. Walden for quite a while too, back in 2002 we had a veteran die during experimental drug testing conducted by someone who was not credentialed to practice medicine in the United States like this Jonathan Kruger technically is not because his proof of license is 19 years old. So your responsibility as an Institutional Review Board is to do due diligence to protect the health and safety of the patient. You are the gatekeeper between medicine and the patient. And you testified earlier you had four--I think you had five, you have four doctors and one registered nurse and two other people in reviewing this. I am baffled as to why there is no due diligence and why things like this are not caught.

If I had four doctors looking at a license, I think someone would have caught it. You might talk about 2-1/2 percent of Adhesiabloc but 97.5 percent of it, we don't know what it is, and then you are going to put this in a lady's abdominal cavity but not by the doctor who performed the

surgery but by an assistant according to the protocol, and the doctor wouldn't even know. And if I was a patient and I became sick after you dumped this liter bottle in me, I would go to the doctor, and the doctor who performed the surgery wouldn't know anything about it because the protocol was real specific that the doctor had to be out of the room when they applied the Adhesiabloc gel to the patients. I would have thought someone--I am not a doctor, but I thought that is pretty strange, isn't it, because when I get sick, where am I going to go? I am not going to go to the assistant who put the gel in me because I don't know who it is because I am under anesthesia and I am out. I am going to go back to my doctor. My doctor isn't going to know anything about it according to this protocol. That is crazy, isn't it?

Mr. {Dueber.} I spoke further with Dr. Dodd, and he told me that he was familiar with a product called Hisken. He said it is a similar product used in surgeries, and is added to the abdominal cavity in the same relative volumes as the protocol here. Dr. Dodd said he is very familiar with Hisken and was comfortable with that volume so--

Mr. {Stupak.} But you never verified the 510(k) process to see what this junk is I am dumping in the woman's body. You never looked. Now there might be something out there that maybe in the surgical field someone may use but remember

you are the gatekeeper. You are the person who is protecting the patient from some doctor whose license is 19 years old and you are the gatekeeper, so just because there might be something out there but since you don't know what 97.5 of this stuff is, you really can't say it is safe.

Mr. {Dueber.} Well, that is precisely why after having experienced this whole episode that we have gone through, we have changed our SOPs to check the 510(k), to check on the predicate device it is based on, to check the doctor's credentials, to check the existence of the company.

Mr. {Stupak.} So what about the--you said you have done thousands of these trials. Currently you are in 70 clinical trials. Did you do those in those others? Did you check the doctor's credentials? Did you check to see what the licensing regulations are, the 510(k), whatever you call it?

Mr. {Dueber.} We did not, and, you know, we have never had a fraud like this perpetrated on us. We have had--

Mr. {Stupak.} It is not a fraud on you. You didn't do your work. We caught you. That is all. It is not a fraud. Where is the fraud?

Mr. {Dueber.} No, that is incorrect, sir. We did our job. We did what FDA regulations require.

Mr. {Stupak.} Really? I thought you said your job was to do due diligence and protect the patient. How did you

protect the patient in Coast's IRB with this protocol?

Mr. {Dueber.} We were following the regulations that were outlined in the FDA's regulatory--

Mr. {Stupak.} Does the FDA license say--regulations say you have to check the credentials of the doctor?

Mr. {Dueber.} No.

Mr. {Stupak.} Does it say you have to check the substance?

Mr. {Dueber.} We never had to, sir, because we have never had anyone try to--

Mr. {Stupak.} What expertise do you have, if you say now when you are caught, well, the FDA didn't tell me to do this, but the FDA doesn't tell you the basic stuff, so what is the expertise of your Coast IRB to even run to review protocols? If you can't catch simple things like this and if the FDA doesn't tell you and you can't think of it, what qualifications then do you have to be an IRB?

Mr. {Dueber.} We have a great deal of qualifications. We have got some outstanding very educated, very experienced doctors and nurses and laypeople on our board.

Mr. {Stupak.} Then why didn't they catch it? You had more medical people, and I have looked at a lot of IRBs, of the seven people, five of the seven have medical backgrounds and they never catch any of this stuff. That is amazing,

especially since our protocol, as testimony was earlier, Mr. Kutz had indicated, is truly based on a real study of a product that killed people.

Mr. {Dueber.} Our review--well, this product wouldn't kill people, and we know that. Our procedures are--

Mr. {Stupak.} Tell me what is in this bottle. How do you know this won't kill anybody?

Mr. {Dueber.} I am not a scientist. I can't answer that.

Mr. {Stupak.} Well, you keep saying this product wouldn't kill anybody, Adhesiabloc wouldn't kill anybody. You don't even know what is in it. See, that is the part that baffles us up here. You act like you did nothing wrong, it would not harm anybody, but you don't know what is in here. Isn't that your responsibility again to protect the patient? Isn't that your responsibility? How can you protect the patient if you don't know what is in it? I mean the other two IRBs that we have spoke of and Mr. Kutz has talked about, man, that just said this is crazy. You shouldn't do this. There is no patient safety. We don't know what the substance is. No one should do this. And then when they finally realize someone approved it, they said, oh, boy. That was your famous quote, I think, there, Mr. Kutz.

Mr. {Dueber.} We have had--you know, Dr. Dodd was the

original expert that reviewed this, and now we have this other outside party that reviewed it who is an expert and--

Mr. {Stupak.} This outside party, did he review--he reviewed Adhesiabloc, he reviewed this, your expert there you mentioned?

Mr. {Dueber.} The expert reviewed that, yeah.

Mr. {Stupak.} Oh, yeah? What is in here? What does your expert say is in here?

Mr. {Dueber.} I don't have his report in front of me.

Mr. {Stupak.} You just paid for another bad report because no expert has ever reviewed this. You know why? Because we made it up last night. There is 2.5 percent, the stuff on the top, we made this up. So if your expert--if you paid someone money to review this they never contacted us to get what the contents we are talking about. How can you review something if you don't even know the chemical formula of the stuff you are supposed to be reviewing? Let me ask you this. Let me ask you something you should know something about. This is your coupon that Mr. Kutz testified to that was delivered to him after you had your first contact with him where Coast, here is your coupon, good for one time research protocol review worth $1,300. Take a free test drive on us. And here is the back of your coupon.

So let me ask you, take a free test drive. There is a

picture of a car and all that here, and there is a smiley face looking--here is the car. Here is the smiley face looking at me in the rear view mirror in my car, and it says coupon good for one time research protocol review worth $1,300. And then it says coast through your next study. So it sounds like to me that your study is more likely to be approved if you go with Coast. Am I reading that wrong?

Mr. {Dueber.} No--yes, you are reading it wrong because what that is is a marketing piece. It is just trying to get different companies, new companies, to try out Coast and try out Coast's customer service. You know, there is nothing wrong with using some kind of a promotion to gain new business. It doesn't have anything to do--this is the business side of the business. This has nothing to do with the review board and the decisions they make. Those are 2 separate businesses.

Mr. {Stupak.} Coast through your next study. We coasted through in 48 hours and there are all kinds of problems with our study, right?

Mr. {Dueber.} We are not using that marketing piece anymore but, you know, that is just a piece that was used to try to generate some new business. It has nothing to do with the actual review of the studies. That is done by a separate review board that are independent contractors, and they have

nothing to do with the business side. They don't know anything about money that we make or money that we don't make. They are not--

Mr. {Stupak.} Well, speaking of the money you make, you made what, grossed $9.3 million last year. At $1,300 a pop, that is a heck of a lot of reviews.

Mr. {Dueber.} Most of them are a lot more than that because that is a single study rate. You know, there are protocols that have hundreds of sites, generate a lot more revenue because there is a lot more work involved to review it.

Mr. {Stupak.} Sure. Let me ask FDA or HHS, how many Institutional Review Boards come on line every month?

Dr. {Menikoff.} Each month we process about 300 applications. Some of those are amendments or renewals.

Mr. {Stupak.} So basically how many are new ones a month?

Dr. {Menikoff.} I don't have an exact number on that.

Mr. {Stupak.} Are you concerned that people are seeing this as sort of a quick way to get rich? Do you need 300 a month? That is 3,600 a year.

Dr. {Menikoff.} Again, Mr. Chairman, many of those are likely to be amendments or renewals of an existing IRB.

Mr. {Stupak.} But don't you think we should have some

kind of limitations on IRBs? Shouldn't they have some qualifications before you become an IRB?

Dr. {Menikoff.} If you would like me to address the registration system, the registration system that OHRP runs was put into place as a result of the OIG 1998 report. The goals of the registration system were modest to have a list of the number of IRBs out there and to have some contact information.

Mr. {Stupak.} This is your registration system. This is Trooper dog, remember, at Maryland House?

Dr. {Menikoff.} Mr. Chairman, the system is such that we verify that people put in the information for requested piece of information.

Mr. {Stupak.} Really? How do you verify it with Trooper dog here?

Dr. {Menikoff.} By registering an IRB the government, federal government, is in no way endorsing that IRB or in any way saying that IRB--

Mr. {Stupak.} Don't you think when an IRB is registered with the HHS there is sort of like a seal of approval authentic because I have this approval, like fake medical devices sent up by Mr. April Fuhl.

Dr. {Menikoff.} Okay. Mr. Chairman, again, we in no way--the system is not designed to be any endorsement of an

IRB, nor do we intend it to be, and to the extent any of the evidence you revealed during this hearing or the GAO has revealed--

Mr. {Stupak.} Yeah, but my question was doesn't it give people an aura of authenticity because you--

Dr. {Menikoff.} I understand that. We were not aware that this was a problem that people out there were thinking--

Mr. {Stupak.} Really?

Dr. {Menikoff.} --because an IRB was registered that the federal government was endorsing it. The federal government has many systems by which it has lists of--again, this is sort of like a contact phone book.

Mr. {Stupak.} This is an IRB that is supposed to be set up to protect patient safety. This isn't a phone book.

Dr. {Menikoff.} I understand that, and there are many parts of the system that actually help ensure that IRBs are operating appropriately. The registration system--

Mr. {Stupak.} Tell me one thing you do after you register an IRB, what do you do to make sure they are valid IRBs or doing it properly?

Dr. {Menikoff.} OHRP has several divisions that work at this. We have a compliance division that we accept reports of non-compliance from anybody who wants to report.

Mr. {Stupak.} So nothing until somebody complains like

if someone dies?

Dr. {Menikoff.} If you are asking whether the current system basically puts a stamp of approval on an IRB at the moment it is created, it was not designed to do that.

Mr. {Stupak.} Mr. Kutz, what did your investigation find when people would register? Was that a seal of authenticity, approval or something? Why did you undertake that part of registering fake IRBs with HHS?

Mr. {Kutz.} Obviously, he is saying it is not intended to, but one of the IRBs, for example, that we submitted our protocols to, said that it gave us an aura of legitimacy. And so, yes, I believe people out there would--and plus it is called assurance, but it is really self-assurance, and so it doesn't really provide anything except registration, as he said, of what is in the system. So maybe we shouldn't be calling it assurance either. It depends on how you perceive that. I could perceive assurance to mean someone has actually reviewed and approved an application.

Mr. {Walden.} Mr. Chairman, will you yield on this point because I thought the CFRs, the regulations of the federal government in 45 CFR part 46.101(d) state that as part of evaluating assurances the department ``will take into consideration the adequacy of the proposed IRB in light of the anticipated scope of the institution's research.'' Is

that not part of your rules?

Dr. {Menikoff.} Yes. Now that rule dates back to 1974. It was implemented at a time when this whole system was first being created and people didn't understand the complexity of how the system works, how you best protect research subjects, and how an IRB should function. Over the decades as the system was implemented, people discovered basically that the efforts being spent in implementing that provision essentially amounted to verifying, for example, that an IRB that reviewed medical type studies had one or two doctors on it, and a lot of effort was being spent at assuring that fact. This was then reviewed by the OIG in the 1998 report I described, and it actually concluded that the way that provision was being implemented was not actually advancing human protections, that a better way to do this was to create a more streamlined system that basically what you needed was--

Mr. {Walden.} And we are 10 years later, and that system is due to come on line this summer?

Dr. {Menikoff.} No. Part of that system have already been implemented.

Mr. {Walden.} And so if you had had to follow this regulation that is still on the books, correct?

Dr. {Menikoff.} Yes.

Mr. {Walden.} Would not that check of assurance to make sure that the fake IRB created by GAO was legitimate, wouldn't that regulation have caught that? These folks listed themselves as from a city in Arizona named Chetesville. I mean come on. Do we have nothing in place that would have caught a fake IRB?

Dr. {Menikoff.} Congressman, the system is currently designed in a way that you gave a registration with some cute names that again had spelling errors and other things that unless somebody sat there and tried to pronounce the names and the addresses, they would not pick up the things that seem incredibly obvious right now, and the system wasn't designed to do that. We do not have our staff going through the names to see whether people have put funny names on the list, nor indeed would we know what--

Mr. {Walden.} So what good is it to register with your agency when you put a stamp of approval on an IRB that then is system wide usable for others to go through to certify human tests? Is it a pointless purpose?

Dr. {Menikoff.} Congressman, we are not putting a stamp of approval on the IRB. If the federal government--

Mr. {Walden.} But people market it that way. We have examples of advertisement where they say, this one, I won't read you the name, you can count on IRB standard for high

quality review and documentation, full AAHRPP accreditation, good standing with FDA, registered with OHRP.

Dr. {Menikoff.} Okay. And, again, it is mentioning several other entities. One of those is AAHRPP which is an accreditation entity that is in the business of accrediting IRBs. But in terms of the federal government aspects of this, we are not in the business currently--that would be a different system, and we welcome your input in terms of whether or not you think that would be a good thing to do. That would be a dramatic change from the system. The system is never designed to basically have us from the outset endorsing and putting some sort of stamp of approval--

Mr. {Walden.} So you think the system works well today?

Dr. {Menikoff.} Right now we think we have a well-functioning system. There is certainly room for improvement but in terms of the part of the system that OHRP deals with, it is interesting that GAO, for example, we deal with the funded studies. GAO was not able to create a fake study that went through and got federal funding.

Mr. {Walden.} No, but GAO could have created a privately--a study through private funding that would have your HHS stamp of approval on an IRB, right?

Dr. {Menikoff.} Again, it is not a stamp of approval. It is a registration.

Mr. {Walden.} Well, you don't call it that but you could say I am registered with HHS.

Dr. {Menikoff.} You are a problem. We welcome the information and we will look into this in terms of making sure that people out there know that the government currently is not putting a stamp of approval. It is a registration list. Anybody could sign up on the list. That is exactly what--

Mr. {Walden.} Clearly.

Dr. {Menikoff.} --OIG intended when it asked for this list to be created. They wanted a quick and dirty way to put people on our list so we would know vaguely how many IRBs are out there and contact information.

Mr. {Walden.} Mr. Kutz.

Mr. {Kutz.} Well, I think the Federalwide Assurance which includes the IRB and the medical device company, this is necessary for federally funded research so it is, I assume, meaningful for federal people applying for federal grants with, I believe, 19 agencies, so I would be believe those agencies potentially put some credibility behind people that have Federalwide Assurance.

Mr. {Walden.} Because what you are getting when you register with Mr. Menikoff's office is Federalwide Assurance.

Mr. {Kutz.} Correct, for federal funded projects.

Mr. {Walden.} That is the gate. You got to get through that gate in order to even go to the next step, right?

Mr. {Kutz.} Correct.

Mr. {Walden.} And then there may be a check or balance that catches you there?

Mr. {Kutz.} There could be beyond that, yeah, but just to get that--you have to get that to even apply is my understanding.

Mr. {Walden.} So it does serve more than just a place to register to get mail for future conferences or other updates. It is actually something that is required elsewhere in the government?

Mr. {Kutz.} For federally-funded projects, not for privately funded. That is my understanding.

Mr. {Walden.} Do you disagree with that?

Dr. {Menikoff.} Okay. If I could clarify, we are talking about two things here. There is a registration system which is a registry, a list of some information about each IRB. There is an assurance process, the Federalwide Assurance. They are different things. The registration list, yes, an IRB to be used by an entity that wants to get federal funding or HHS funding has to be listed on the registration list. If I could describe the Federalwide Assurance, that is essentially an agreement by which before

you take federal funding, you have to agree, you have to sign on the dotted line that your entity agrees to abide by the federal regulations. So essentially by getting Federalwide Assurance an entity is actually committing itself and putting itself under a legal burden that it will abide by the regulations.

The federal government is in no way endorsing the entity, but it just that a federal funding agency at HHS cannot give funds to them until it has basically sworn and said, yes, we will protect human subjects. We agree that we will have to abide by the federal regulations. That is a good thing, and the intent of the system is to encourage, make sure people could get Federalwide Assurance and could basically be willing to swear that they will indeed abide by the federal regulations.

Mr. {Walden.} I will tell you, I guess when I get back home and try and explain how you register an IRB or whatever you want to call it, and it is up here on the chart, fake medical device, easy reviews. They are clever names, I don't doubt that. And that that gives you then the authorization to oversee the protocols on the human tests and that that seems to be all it takes.

Dr. {Menikoff.} If I could clarify, in terms of the jurisdiction side that OHRP deals with a major part of the

picture has been left out, which is that the IRB is not working in a vacuum. As we noted again, GAO was actually not able to get federal funding. An IRB reviewing a study, is it hard to get federal funding.

Mr. {Walden.} But they did get approval on the other side of the coin. They were able to go to an IRB and get approval for human tests.

Dr. {Menikoff.} Yeah. And I am just pointing out an IRB that is reviewing a study that is getting federal funding, getting federal funding itself involves a very detailed process of checks and balances--

Mr. {Walden.} I understand that.

Dr. {Menikoff.} --that again that is a part of the research world that is under OHRP's jurisdiction. Much of the vetting that you are concerned about will actually happen, for example, before NIH gives funds. Barely 20 percent of the studies actually get funded these days. It is very competitive. These things are reviewed by panels of the most eminent--

Mr. {Walden.} So you don't see that there is any real problem with what you have learned from GAO, is that--

Dr. {Menikoff.} Up to now, everything you have indicated GAO has done, I would think would be highly problematic for that to have happened in terms of the studies

that get federal funding. Again, we are open to looking at the information on what happens but--

Mr. {Kutz.} We didn't apply for federal funding and I am not sure--and I don't think we actually would because we might actually displace a legitimate applicant so that would not be necessarily an appropriate undercover test in this case, but we didn't apply. So I am not sure if we couldn't but we didn't apply, and I assume there are a lot of other controls there that would have had to have been tested, but just for the record we did not try to get federal funding. We just used this to give us an aura of credibility up there amongst the people that were medical device and IRB companies.

Mr. {Walden.} So where in your fake IRB ad, you felt like you got that stamp of approval, and it meant something in the marketplace when you advertised?

Mr. {Kutz.} We used it as that, and certainly again as I mentioned at least one of the IRBs that we sent our protocols to said it gave us legitimacy. And I understand what HHS is saying here, but that is the perception out there, so that is an important--whether they like it or not that is what the reality is out there amongst people.

Mr. {Walden.} Thank you, Mr. Chairman.

Mr. {Stupak.} Mr. Burgess, questions?

Mr. {Burgess.} Thank you. Mr. Dueber, let me just ask you, was this product ever used? Are there any patients who received this product?

Mr. {Dueber.} No, not that I know of.

Mr. {Burgess.} The board approval came in October, the end of October.

Mr. {Dueber.} The first approval did and then November 6 they approved the total project including the ICF form.

Mr. {Burgess.} But no patients had been enrolled? Is there any way to know that absolutely for certain?

Mr. {Dueber.} No. We have not--we did not receive any SAEs or PD, protocol deviations, or anything of that sort like a sponsor would be required to send us if there was a need to send that to us.

Mr. {Burgess.} But say there wasn't any protocol deviation. Say everything went just as smooth as silk. Would you know that a patient had or had not received the 4 250 milliliter vials of stuff?

Mr. {Dueber.} Not until we did a continuing review, which the board set for 6 months later, which would be next month, then we would have to go back and have resubmission to us of all the documents. It basically is a full review again of the protocol and the ICFs and what not.

Mr. {Burgess.} Well, Mr. Chairman, I am going to ask

that that information be made available to us, and I would hope it would be made available to us before a month from now. In light of everything that we have heard today, patient safety should be critical and uppermost in everyone's mind. If we have got people out there who have been treated with a product that wasn't even a product--

Mr. {Stupak.} Mr. Kutz could probably answer it.

Mr. {Burgess.} That is a real issue.

Mr. {Kutz.} But there is no real patients. The whole thing was bogus so there were no people signed up. Now they could have been but they weren't. There were no surgeries performed. Again, everything that we provided was fabricated.

Mr. {Dueber.} And on March 6, I might add, we convened the board of our company not knowing that this was still--not knowing what this was, we convened the board and rescinded approval for the study and notified the study sponsor of that, but never could get hold of anyone on the phone or what not. And who we had to send it to was a post office box so it was a phony site to begin with.

Mr. {Burgess.} So there was no actual product produced.

Mr. {Dueber.} No.

Mr. {Burgess.} This looks like a big--

Mr. {Dueber.} This was all a big setup.

Mr. {Kutz.} We never actually mixed the product together, never, ourselves.

Mr. {Burgess.} Okay. Now the issue that was of concern to people about the 2.5 percent active ingredient, the propylene glycol, and then I guess 97.5 percent diluent. Do we know, was that just made-up stuff too? There was no actual diluent that was used in those 250 milliliter vials?

Mr. {Kutz.} Correct. We didn't say what the other 97.5 percent was. Our protocols were silent on that.

Mr. {Burgess.} Okay. I will just point out that is unusual to pick a product up off the shelf and not know what the rest of it is because the vehicle is important to--it is important to be aware of what the vehicle is. Let me just ask you this. If this had gone forward, if this has been a real product or whatever, who would have paid for the surgery? This is a product that could only be placed at the time of an operation, presumably an anesthetic. Day surgery or hospitalization, all of that entails some cost so to get to that point where you can actually administer the product, who was going to pay for the rest of everything else that was happening that day, lab work, hospitalization, day surgery, surgeon's time, anesthesia time?

Mr. {Dueber.} I believe the way this was set up was that the patients were people that were going to have surgery

anyway, and they would have had to have paid for that surgery through whatever means they had to pay it. They were not receiving--

Mr. {Burgess.} Okay. Let me just interrupt you on that thought. Would you have actively excluded the patient on the Medicaid system? We made a big deal about no federal funds were used, but would you have excluded a Medicaid patient from this protocol?

Mr. {Dueber.} That would have been the sponsor's decision, and we wouldn't have had any involvement in that, so I don't know.

Mr. {Burgess.} So there could have been federal funds used in the installation of this product in the peritoneal cavity?

Mr. {Dueber.} If it were a real--yeah, that could be the case.

Mr. {Burgess.} Right. It is hard when you are dealing with a make-up world, and I do understand that and I sympathize with you but we shouldn't be here in the first place, so I am going to press on. The second surgery, the second look operation 20 weeks later, so 6 months later we are going to have another look to see whether or not our product worked, who is going to pay for that surgery?

Mr. {Dueber.} I am not sure, sir. I don't know. I

don’t know.

Mr. {Kutz.} I don’t believe our protocol said. That was one of the questions we got from one of the other IRBs, who is paying for the surgery, who are the physicians, who are the surgeons, who are the people that are going to actually apply Adhesiabloc to the women’s pelvic area. That was all silent in our protocols. Those were serious questions we got from the other IRBs.

Mr. {Burgess.} It just struck me because that is not a normal course of events. You do a laparoscopy for pelvic pain diagnosis endometriosis. You are not necessarily going to be back in 20 weeks looking to see what things look like today, so that is a little bit of an unusual situation just from my recollection of clinical practice. I realize it has been a few years but that would be a deviation. Someone has to pay for it. Again, my concern there is if we involve the Medicaid system then again federal dollars are used in this test protocol so we can’t really just say no federal funding was used so we can’t be interested. I think we should be interested from a patient safety standpoint but there was a real possibility had this not been a fake study that federal funds might well have been used depending upon the part of the country where the study was conducted because obviously we heard on this committee time and time again about the

greater and greater proportion of patients that are being covered by Medicare given the state of the--I am sorry, Medicaid, given the state of the economy.

Is there--I am not sure whether I need to address this to Dr. Menikoff or Dr. Less, but here you have albeit a make believe company and it got one positive response to several it sent out. Does anyone sort of take the 30,000 foot level look at this and say, wow, two IRBs turned this down and one bit? I wonder why it only had a 33 percent acceptance rate out there in the universe of IRBs. Would that trigger a red flag on anyone's part in any of the federal agencies that have oversight not necessarily of the federal funding but of the patient safety aspects?

Mr. {Dueber.} Yes, I think it has a big bearing with all due respect. I sit here, you know, feeling troubled that only three were selected, and we were one of the three. I mean why not select 40 or 50 of them? I mean I understand where you are going, and I honestly have to say I am on your side. I want my company to do an excellent job of protecting human subjects, and of course we have work to do. We are not perfect. No one is perfect.

Mr. {Burgess.} I am going to interrupt you in the interest of time because the chairman is going to cut me off. He always does and I can't stop him. But, Dr. Menikoff or

Dr. Less, is there any mechanism in place right now when you only have a 33 percent uptake rate that that raises a red flag, that maybe this was a protocol that needs to be looked at more scrupulously?

Ms. {Less.} Congressman, there is a check in place in our regulations that when a study for a medical device, when it is presented to an IRB, the IRB is supposed to make the determination of whether or not an IDE is needed. If the IRB disagrees with the sponsor who has presented it as a non-significant risk product, if the IRB decides it is not a non-significant and it is, in fact, significant risk, the IRB is supposed to tell the sponsor that and the sponsor is supposed to report it to FDA within 5 days. So there is that check in place. FDA would be notified if an IRB, as they were supposed to do, make a decision, and if they disagreed with the sponsor.

Mr. {Burgess.} Did that happen in this make believe world that we are in today? Did any of that occur?

Ms. {Less.} No, that did not occur.

Mr. {Burgess.} I know I am a little slow on this, but who should have picked that up? Where should that have occurred?

Ms. {Less.} Well, the sponsor, who was fake, should have been reporting that to FDA.

Mr. {Burgess.} And does the FDA have any mechanism in place to know that, oh, my goodness, this sponsor did not make any sort of report at all. We wonder why. There is some curiosity to go back and look and see why no report was made.

Ms. {Less.} We wouldn't necessarily know if the sponsor did not comply with the requirement and not make that report. We wouldn't necessarily know. If they did make the report then we would go out and look at the study, decide whether or not we agreed with the IRB or the sponsor, decide whether or not it did in fact need an IDE.

Mr. {Burgess.} So there is no way to track, I will just call them dropped cases for want of a better word, if the investigations just don't come back to you, then you don't know why they weren't pursued?

Ms. {Less.} Well, what could have actually happened if they were a real case if a sponsor goes to an IRB and says my product is low risk, the sponsor says, no, in fact, that is actually high risk, that sponsor then could not conduct the trial. They would make the report to us. They would not be able to start the trial. If they went--and so there is that check in place that they would be reporting to us and--

Mr. {Burgess.} What is they were venue shopping on this and went to several IRBs simultaneously as the fake company

did?

Ms. {Less.} Well, hopefully when they went to the second IRB they wouldn't lie and say that it is still a low risk product. They would fix their protocol or go in and say this is a significant risk product because again that second IRB would have to ask the sponsor of the trial is this a significant risk, does it require an IDE? The product could not be shipped and the study couldn't be started without our approval too for this kind of product so there is that second check in place that the trial could never have gotten--or should never have gotten started without coming to FDA.

Mr. {Burgess.} Mr. Kutz, was that your finding as well?

Mr. {Kutz.} We said it was significant risk and for the one IRB we provided a 510(k) which would have been a prior marketing approval but, no, we said it was a significant risk. We did not say it was low risk.

Mr. {Burgess.} So should the FDA have picked up on that fact and gotten back to you and said hold the phone?

Mr. {Kutz.} We never contacted the FDA.

Mr. {Burgess.} Oh, you did not?

Mr. {Kutz.} No.

Mr. {Burgess.} But in the real world it would be your obligation as an investigational company to contact the FDA?

Mr. {Kutz.} I am not aware of the regulations on that.

Mr. {Burgess.} Right, but it was GAO in charge of the fake company so you were CEO of a fake company. If you were a CEO of a real company, would that have been the obligation of the real company to do that?

Mr. {Kutz.} FDA knows the--I don't know the answer to that.

Mr. {Burgess.} I need a yes or no or the chairman is going to whack me.

Ms. {Less.} Yes. The fake company should have reported to FDA that the product was determined to be a significant risk. These types of products, we have a guidance document that lists significant and non-significant risk products. This type of product is listed as significant risk.

Mr. {Burgess.} It is voluntary at this point. No one is required to do that so if somebody slipping under the radar a time or two, we really got no way to go back and do any sort of internal check on that. I would be interested if I were the FDA today, are there any others that have slipped under our radar like this? How many other bad studies have we missed?

Ms. {Less.} It is not voluntary. It is mandatory that the sponsor report to us within 5 days of the IRB tells them that a product that they presented to them is significant risk.

Mr. {Burgess.} What penalty might they invoke if they don't report?

Ms. {Less.} If they don't report, we would go after them. We could issue a warning letter. We would go out and inspect, issue a warning letter.

Mr. {Burgess.} What if you found that federal funds were used such as in the Medicaid or S-CHIP system, would HHS become involved at that--

Mr. {Stupak.} Last one now, Mr. Burgess. We have been more than generous with time. We have another member waiting.

Mr. {Burgess.} All right. If the federal funds were used to pay for the surgeries or the procedures, Dr. Menikoff, would that get your interest?

Dr. {Menikoff.} When you are referring to federal funds being used, the general sense of that is basically that the funding for the study taking place, in other words, an investigation that is funded by NIH or CDC or FDA itself may be running a study. Normally probably the fact that one of the procedures is paid through Medicaid, for example, wouldn't implicate that. The key is that somebody in getting federal funds to run one of these studies, if this study was done with NIH money, GAO again didn't fully respond, but the odds are extraordinarily low that any of this could have

happened because in getting those funds the legitimacy of this entity would have been vetted this way and that. You would have had top scientists asking who is this person? What knowledge does he have to do this? Is he a well-trained physician? What papers has he written?

Many, many parts of this system work together and particularly on the HHS funded side to make sure that we have legitimate things happening and this information then works together with the IRB in terms of making sure that there are substantial protections in place. So again the facts do speak for themselves. GAO didn't end up producing a fake, federally-funded study. I think it would have been very, very difficult to do that. There are many, many protections in place.

Mr. {Burgess.} And yet still federal funds could have been put--

Mr. {Stupak.} Mr. Burgess, I really do have to in all sincerity--Mr. Markey has been waiting patiently. You are more than 7 minutes over.

Mr. {Markey.} Thank you, Mr. Chairman, very much. Mr. Dueber, based on the review that your company conducted here, would you have been comfortable with your wife or your mother being treated in her abdomen with the solution your company approved?

Mr. {Dueber.} I can't answer that. I do not know.

Mr. {Markey.} You don't know if you would be comfortable recommending to your wife and mother something that you recommended for all of these other--

Mr. {Dueber.} You know, it is speculating. I would have to--you know, I don't know. The doctor that I talked to that was on our board that approved this does this surgery, uses a similar product. He felt it was safe. We have had it reviewed by an expert, outside expert, and he says it is safe. I mean the ingredients that supposedly were in it are supposed to be--the active ingredients are supposed to be safe. The inactive ingredients have no interference with the effectiveness of active ingredients so absent any other information to prove them wrong, I guess if I was in a decision-making mode, I would probably say, yes, go ahead and use it on them. But of course that is their decision, not mine.

Mr. {Markey.} Well, if you look at your record the committee requested information on all of your reviews for the past 5 years, and this is what you provided, that your company reviewed a total of 356 proposals for human testing, and you approved all of them. So that means you approved 100 percent of all the studies that you reviewed.

Mr. {Dueber.} I am not sure the numbers you are looking

at, 356, what--

Mr. {Markey.} You approved--356 protocols were approved and the board voted--

Mr. {Dueber.} For what time period? I am sorry.

Mr. {Markey.} Over a 5-year period.

Mr. {Dueber.} No, we have approved more studies than that, sir.

Mr. {Markey.} These are the records that you submitted to the committee, and I am working off of your documents that you provided to us.

Mr. {Dueber.} I believe you may be looking at the audit numbers that we sent to you.

Mr. {Markey.} We have every--you provided to us every vote which the board cast over the last 5 years, and of the 356 protocols you approved every single one of them, 7 to 0 on each vote, except on one occasion when 1 single board member dissented, so that means out of 2,492 votes cast by board members all but one were in favor of approval.

Mr. {Dueber.} We have been requested to provide you with a list of all of our protocols since the inception of Coast and which ones were approved, which ones were not approved, and we will work on that and send that information to you. I can tell you that we do audit a fair number of protocols. In the last 3 years we have done about 50 to 60

audits, and some of those audits, we have overturned the original ruling of the original approval of those studies.

Mr. {Markey.} Mr. Kutz, let me read to you from their web site. Here is what it says. It says Coast IRB's quick document turnaround will save you valuable time and ensure that you can seamlessly move on to the next steps quickly and efficiently. Our superior service guarantees your site approval documents will be sent to you the next day following every board meeting. In this case, do you believe that emphasis on speed contributed to the company's failure to conduct even cursory due diligence which if it had been done by the firm would have been as a result of a basic documentation review found that there was ultimately a fictitious nature to this entire enterprise?

Mr. {Kutz.} The answer is probably yes. One of the reasons we picked the three we picked were because they appeared to have the less stringent documentation requirements. That is why we picked them. So we were testing the system. We were picking ones that we thought would have the less stringent paperwork requirements. And, in fact, as I mentioned also, the other thing that this IRB was selected is because they offered us a coupon.

Mr. {Markey.} Well, I think that it is pretty clear that--I know Mr. Dueber doesn't see it that way at this

particular point in time, but I think the GAO and this subcommittee are providing a real service to your company, sir. I think that we are trying to help to protect against such a lackadaisical system harming human beings. And you seem to be outraged actually in our pointing out this deficiency in the way in which your company conducts business. I just think it is important for you, sir, to reconcile yourself to this as an intervention in underlying corporate pathology and that we are trying to help you correct your business practice so that the public is protected.

I know you don't see it that way right now, but I think when you look back years from now you will see it that way, and I just think that perhaps now you are being advised by counsel to take the position which you are taking in your testimony here today, but it is not helpful to you to be denying the obvious which the GAO and our subcommittee chairman have identified to you. That is my advice to you. Try to start out where you are going to be forced to wind up anyway. It is going to be a lot prettier. This testimony that you are delivering today is not helpful to yourself or to the cause of insuring that there are real processes that protect the public. Thank you, Mr. Chairman.

Mr. {Stupak.} Thank you, Mr. Markey. A couple

questions I want to ask to follow up Mr. Burgess, and I think Mr. Walden hit on it too. On IRB shopping, IRB shopping, this is a practice in which researchers shop their protocol around to different IRBs until they get an approval. In 2002 the previous administration considered issuing regulations to require researchers to disclose prior IRB decisions so people would know if the study had been rejected in the past. On January 17, 2006, the previous administration withdrew this proposal, concluding that IRB shopping does not occur or does not present a problem to an extent that would warrant rulemaking at this time, so 4 years later they withdraw it.

According to this decision, the administration apparently felt they had no reason to believe IRB shopping was occurring with any regularity. Dr. Less, that came out of the FDA. Who would have made that decision in the FDA? Would it have been the FDA, HHS, the administration, who would have made that decision to withdraw this form shopping--IRB shopping requirement?

Ms. {Less.} Mr. Chairman, after we issued the Advance Notice of Proposed Rulemaking, we evaluated all of the comments received. We had a working group involving experts from across the agency including our Office of Chief Counsel, all of the centers, and we looked at the comments and made that decision based on the information that we received and

also in light of current regulations and the protections that we think that our regulations offer.

Mr. {Stupak.} So you asked IRBs and they said, no, we don't do that?

Ms. {Less.} No. We put it out for public comment and we got 55 comments. We reviewed all of those very carefully. We looked back at the IG report, which said that they were aware of a few case of IRB shopping, and the comments that we received, we also didn't have any real reason to believe that there was any concern over IRB shopping. There are a number of reasons why companies will go to multiple IRBs for legitimate reasons. Sometimes a company will go to more than one IRB at the same time simply to get their study up and running more quickly.

That doesn't necessarily mean they are shopping for the fastest or the least stringent IRB. We also can--we were concerned with the burden that it would put on IRBs in the sense that if you had a study with multiple sites, say 10, 20, 40 sites, if all of those IRBs had to share previous reviews, we felt it could overwhelm the system. And without knowing the other IRBs review practices, you would have no basis for deciding on the merit of that review. And we have seen that as an instance with say adverse event reporting.

Mr. {Stupak.} So when Mr. Dueber--let me ask you this.

We asked you when you were interviewed last week by the committee staff, you disagreed. You said that IRB shopping, and I quote--in fact, if you want to look at your testimony it is front of Dr. Menikoff there on page 83, I believe it is. It has a green tab on it there. When asked about IRB shopping, you said, ''Has been a problem of IRBs, I understand for quite some time.'' So IRB shopping is a concern then, right, amongst IRBs, that they are going to go get a bad decision from one IRB, so they go to another IRB until they get it, that is a problem?

Mr. {Dueber.} From my perspective and my company's perspective, it is a problem and--

Mr. {Stupak.} Then answer me this. This is your coupon that you gave out to Mr. Kutz. On the bottom of the coupon it says, and I am going to read directly now, it says Coast IRB's free test drive offer applies towards initial protocol informed consent form and investigator's drug brochure reviews only, $1,300 value. Coast IRB, LLC pledges to protect the full confidentiality of all research studies sent to us for review. In 2005, the FDA removed the guidance prohibiting IRB shopping. As such, you are free to use our free test drive offer to compare Coast services with another IRB's concurrently if after comparing our services to those of another IRB, you choose not to continue with Coast IRB, we

will destroy all documentation we have on file associated with your study.

Neither your money, research time or confidentiality will ever be at risk. It sounds like to me you are encouraging with this free coupon IRB shopping, the practice that you say you are against.

Mr. {Dueber.} Sir, that marketing piece was created before I arrived at Coast, and we are no longer using that for that particular reason. But, you know, our position is that--and the company's position has been that IRB shopping is a problem, and there needs to be some kind of a database that everyone can refer to to see if someone has submitted--a sponsor has submitted a protocol to some IRB and other IRBs can check that before we approve a study because--

Mr. {Stupak.} Do you think there should be a ban on IRB shopping, and if a stud is rejected should be sent to the FDA?

Mr. {Dueber.} I think the last part probably, yeah, but we are in favor of improving the system and making it more difficult for people to do that because obviously that is not healthy.

Mr. {Stupak.} Right. Mr. Kutz, under current law if you had been a real company, you would have been allowed to ignore these two rejections you received and continue with

your approval from Coast, isn't that right?

Mr. {Kutz.} I believe so, and actually one thing I would mention on the shopping in our initial e-mails to the IRBs we sent this to, we said very specifically that we were shopping for an IRB.

Mr. {Stupak.} Okay. So they all knew you were shopping, you were IRB shopping?

Mr. {Kutz.} That is what our e-mail said, yes, the e-mails from the requests you got from the IRBs.

Mr. {Stupak.} Okay. And after you got the approval from Coast, could you have begun your experimental testing on human beings? Would there have been any other steps in the FDA or HHS review before you started your experimental test on real people and putting this fluid here, our liter bottle of Adhesiabloc in the pelvic abdominal cavity of women?

Mr. {Kutz.} As I mentioned, because there is no federal dollars associated with it, my understanding is yes.

Mr. {Stupak.} Thank you. Mr. Burgess, I know you always have questions.

Ms. {Less.} Mr. Chairman, if I could clarify.

Mr. {Stupak.} Sure.

Ms. {Less.} That study should not have been started. It was a significant risk product. It would have required approval from FDA so the sponsor should never have started

the study without coming to FDA.

Mr. {Stupak.} Who should have come to FDA?

Ms. {Less.} The sponsor. The sponsor would go to the IRB, get IRB approval, and they also would be required to get FDA approval before that study could start and before any product could be shipped, so the sponsor--

Mr. {Stupak.} What is the requirement to do that?

Ms. {Less.} Pardon me?

Mr. {Stupak.} What was the requirement to do that? I got my protocol approved. I got my consent form approved. So why would I have to go to the FDA?

Ms. {Less.} Under the IDE regulations and investigational device exemption regulations at 21 CFR part 812 for a significant risk product, which this is, the sponsor would be required to get both FDA and IRB approval before it ships the product or starts the trial.

Mr. {Stupak.} That is because Mr. Kutz misrepresented, but what if it was some other project already approved? There was no requirement to go to the FDA because we had what, a 510(k) there, right?

Mr. {Kutz.} We faked the 510(k).

Mr. {Stupak.} We had a 510(k) so we don’t have to go to the FDA on this one. He could have started on real patients if it was a real one.

Ms. {Less.} Well, hopefully the sponsor, if it was a real sponsor, would have understood that this product is not subject to 510(k).

Mr. {Stupak.} And what do you do to make sure a real sponsor does that?

Ms. {Less.} A real sponsor is supposed to come to FDA--

Mr. {Stupak.} I know. There is a lot of assumption in these laws, aren't there, that people are being above board. We proved today they are not.

Ms. {Less.} Actually we have a number of programs in place where sponsors can come to FDA, ask if they need an IDE. We have a pre-IDE process where they can submit a pre-IDE to us, have us look at the protocol, look at the device, look at the testing that they have done to see whether or not it needs an IDE.

Mr. {Stupak.} With all due respect, FDA hasn't been doing their job. That is why we are having this hearing because when we did Copernicus study 3014 which there was criminal fraud and your own CID asked FDA to do criminal charges against Copernicus and the doctors who were doing this, FDA refused to do it. You rejected it. So there is very little faith on this side of the dais that FDA is doing it right. So when we suppose people are going to do it and we suppose the FDA is going to do their job, we know what the

end results are. Unfortunately, people die. I will go to Mr. Burgess.

Mr. {Burgess.} Mr. Kutz, let me just ask you, my understanding is you based this fictitious product on another product that actually existed but didn't have a good track record, is that correct?

Mr. {Kutz.} We got it on the Internet off of FDA's web site and then we substantially altered the entire--we had a format. We didn't know what a protocol actually was supposed to look like so we got one just so we could know what it looked like, and then we changed it completely and then we actually made up the ingredients.

Mr. {Burgess.} How many FDA protocols did you have to look at before you found one that struck you as a good one to proceed?

Mr. {Kutz.} We just wanted one. I don't know if there were any more or not. We just found one on the Internet and once we found that, we just used the format. We didn't use the actual details of it. We created our own. It just showed us what one looked like.

Mr. {Burgess.} Was it hard to find one that led you in the right direction?

Mr. {Kutz.} Yeah. I don't think there were a lot of them out there.

Mr. {Burgess.} Okay. Dr. Less, Dr. Menikoff, I am assuming that the Inspector General at HHS has been notified of this situation, is that correct? I mean does HHS have--

Dr. {Menikoff.} No. We referred this to FDA's investigators.

Mr. {Burgess.} Okay.

Dr. {Menikoff.} That is the letter we sent.

Mr. {Burgess.} Will it at some point go to HHS IG?

Dr. {Menikoff.} No, we plan to refer it to the FDA and we talked to the investigators that work under Dr. Less.

Mr. {Burgess.} Had there been Medicaid funds used on any patient who received this compound inappropriately, would that have triggered HHS' involvement?

Dr. {Menikoff.} I don't believe so. Again, the HHS jurisdiction that OHRP has relates to there being a funding agency for the study so basically NIH or CDC--

Mr. {Burgess.} Or CMS?

Dr. {Menikoff.} Excuse me?

Mr. {Burgess.} Or CMS?

Dr. {Menikoff.} CMS could act as a funding agency for the study. The fact that one patient in the study got paid and--

Mr. {Burgess.} We heard testimony by Mr. Dueber that the funding for the study was going to come from the third

party coverage of the patient essentially. Perhaps there was no charge for the study protocol or the protocol drug but there is a substantial amount of activity that has to occur to get to the place where the drug is administered and all of that activity was presumably going to be paid for by a third party payer, so in a way CMS would have been funding this study had it proceeded if Medicaid patients had been enrolled or S-CHIP patients.

Dr. {Menikoff.} My understanding is that is not the way in which something becomes HHS funded in terms of OHRP's jurisdiction. The basic issue is has somebody applied for a grant from an HHS grant making agency and they then approve this. I mean that is the protection, and it is actually a very strong protection. Again, this would not have happened if somebody tried to get HHS funding. I think it is extraordinarily unlikely, and people who are enrolling in HHS funding studies should actually be relatively confident that--

Mr. {Burgess.} This whole deal is extremely unlikely and yet we find ourselves here in a parallel universe that the GAO made for us, and now we are having to try to pick our way through it. I just find it--I personally find it unbelievable that HHS is not more interested in the fact that funding sources could have been diverted into a bogus study

and the patient required to have a second procedure, a second look procedure, 20 weeks later. I mean this is a big dollar item that we are talking about, 50 patients receiving a second look laparoscopy. There is no way to know how many of those would have been Medicaid, but that is a significant expenditure.

Dr. {Menikoff.} Congressman, it sounds as if you are talking about use of federal funds for an inappropriate purpose, that is--I don't know what unit of HHS would deal with that basically. OHRP is dealing with the human subjects protection aspect of it, not misappropriation of federal funds or misuse of federal funds in some way. I can't comment on what part of HHS does deal with that.

Mr. {Burgess.} Well, give us some comfort. Now what are the next steps that are going to be taken here? Clearly, there are things that need to be improved but are there some enforcement steps that are going to be taken? What happens next?

Mr. {Kutz.} Only with respect to the one referral. I think the bigger picture is that you had the set of protocols that went to three IRBs and you get two completely different answers at the same time. That is the part I think that should concern the subcommittee here. On the one hand, two IRBs said this was a ridiculous protocol, unsafe to patients.

It should have never been approved. Another one is still testifying as we speak that it was perfectly safe. It is hard to believe you could have that divergent of a situation and that raises questions to me about the whole IRB system, especially the private IRB system.

Mr. {Burgess.} And, Dr. Less, would you concur that from FDA's perspective that there is reason to be concerned about the whole system?

Ms. {Less.} No, sir, I would not. I think under this circumstance from what I have heard this product was a significant risk product. It should have been submitted to FDA for review. The study would not start without FDA and IRB review, and in this case there would have been that safeguard in place with having both the IRB approval and FDA approval needed before any patients could be put at risk or the study could have even started.

Mr. {Burgess.} So any enforcement activity would be directed toward a company that doesn't exist that was made up by the GAO, would any enforcement activity be directed in Coast's direction for proceeding with a study with tenuous underpinnings?

Ms. {Less.} Without seeing the report, I can't comment on that but in general FDA has taken action when an IRB has failed to make the determinations that it is supposed to make

meaning they found significant risk determinations and looking to see whether an IDE is required for the study.

Mr. {Burgess.} Okay. Well, so what would happen? What would that action be?

Ms. {Less.} We would go out and do an inspection of the IRB, look at their studies, their processes, see whether there were other studies that perhaps a wrong decision was made and if we found a problem, we would issue a warning letter. We could impose sanctions. And then we would see if they put a corrective plan in place to take care of that. If not, then we could pursue other activities.

Mr. {Burgess.} Do you ever make a silent pact with yourself that we will never use this IRB again? Do you keep a list? Is there a watch list?

Ms. {Less.} Well there is a--all of our warning letters are public. They are on the web site so any sponsor doing a study should be looking at that web site to see--

Mr. {Burgess.} Is there any way to know that one side is talking to the other on this because this seems to be one of the problems we have encountered today. You had two say this was a bad deal, one said it is okay. Nobody talks about it, so it potentially could have gone forward with a very, very difficult study from the standpoint of a patient.

Ms. {Less.} Well, warning letters are public. IRBs are

obviously not happy to receive those. They take them very seriously and do some corrective actions. We require that they submit a corrective action plan within 15 days if we issue a warning letter, and we do follow up to make sure that those corrective actions are taken.

Mr. {Burgess.} Well, now Coast had on its web site Q and A, have you ever been investigated from the FDA, and they said, well, they had but they got a commendation, but in fact that wasn't accurate, I understand now, is that correct?

Ms. {Less.} I have not seen the information on their web site. I am sorry, Congressman.

Mr. {Burgess.} This is again a printout of Coast's web site. Do we have that to project? The frequently asked questions--

Mr. {Stupak.} Coast's web site, do you have it? No, they don't.

Mr. {Burgess.} Under the frequently asked questions section, have you ever been audited by the FDA? Answer, December 15-17, 2003, Coast IRB was selected for a routine surveillance inspection. We received a commendation from the FDA investigator regarding the thorough and effective oversight provided by our IRB operations. A follow-up audit was conducted in 2005 at which time no further action was required by the FDA investigator. Do you think that is a

true statement?

Ms. {Less.} We inspected Coast four times. The first three times we did issue letters saying that voluntary action was indicated, meaning that we found minor deviations from the regulations and we asked them to--in the letter we pointed out what those deviations were, pointed them to the appropriate regulation or guidance. They did submit a letter back to us stating that they had taken care of the issues that we addressed in each of those three letters.

Mr. {Burgess.} Were those warning letters? Would those be the equivalent of warning letters?

Ms. {Less.} No. they did not rise to the level of a warning letter. They were what we call voluntary action indicated. We have no action indicated, voluntary action, and then official action, which is the warning letter level.

Mr. {Burgess.} Have they ever received a warning letter?

Ms. {Less.} Yes. Their most recent inspection that we conducted in 2007, we issued a warning letter to the IRB.

Mr. {Burgess.} And we had this approval in October, 2008 by the board so presumably they were under a warning when this study, proposed study, was to be undertaken, is that correct?

Ms. {Less.} We had issued a warning letter, and they

submitted a corrective action plan, told us that they had put training in place for their safe and were testing their staff on the conduct under the regulations of what would be required, and so we had reviewed all of that information. They had also, I believe, hired an outside consultant that was also supposed to be overlooking their processes.

Mr. {Burgess.} Is that the basis on which you gave them a commendation?

Ms. {Less.} We don't give commendations to anyone, Congressman.

Mr. {Dueber.} In addition to that, Congressman, we--

Mr. {Burgess.} But that is misleading statement on your web site then, isn't it? She said the FDA doesn't give commendations.

Mr. {Dueber.} They sent us a letter reinstating our use of expedited review. We had given them a corrective action plan and acted very swiftly. In addition to that, our CEO--

Mr. {Burgess.} Okay. I am going to interrupt you because I am going to get cut off again. If you would be good enough to provide that letter to the committee, we would very much like to--

Mr. {Dueber.} The committee already has that letter. We provided that in the package of materials we sent.

Mr. {Burgess.} Thank you, Mr. Chairman. I will yield

back in the interest of time.

Mr. {Stupak.} Thank you, Mr. Burgess. Dr. Less, you said earlier that warning letters are more serious violations. In fact, the FDA issued a violation letter--a warning letter, excuse me, a warning letter on March 11, 2008, to Coast for three different parts on expedited review of IRBs, isn't that correct?

Ms. {Less.} Yes, sir, that is correct.

Mr. {Stupak.} And now Mr. Kutz has sent a letter about this situation and how Coast had reviewed this IRB--or this protocol, so will the FDA now invoke a more severe penalty then on Coast based--they already have a warning letter sitting there in their file. Now they got another allegation of wrongdoing. What will the FDA action be?

Ms. {Less.} Congressman, we will need to take all that information into account and do a thorough evaluation. Normally, if we issue one warning letter, the next warning letter would include sanctions and we would take more serious action, but without knowing the specifics and having reviewed the entire case, I can't comment on this particular one.

Mr. {Stupak.} Mr. Dueber, let me ask you this, and I will wrap up this hearing here. Are all of the seven people who approved this protocol, the bogus protocol, do they still work for Coast?

Mr. {Dueber.} Yes, they do.

Mr. {Stupak.} Okay. Has anyone at Coast lost their job because of their failure to adequately review this protocol?

Mr. {Dueber.} One individual is leaving the company shortly.

Mr. {Stupak.} But not as discipline action for this matter?

Mr. {Dueber.} No, sir.

Mr. {Stupak.} Okay. And how about the chair of the Institutional Review Board here, your chair of this board that reviewed this protocol. She indicated she didn't even read the protocol. Is she still working for you and she is still a member of the company?

Mr. {Dueber.} Yes, she is. We evaluate our board members once a year.

Mr. {Stupak.} Okay. You said a couple times that you have changed your SOP. I take it that is standard operating procedure review process, right?

Mr. {Dueber.} Right.

Mr. {Stupak.} So it sounds like a lot of good changes have been implemented.

Mr. {Dueber.} Yes, that is correct.

Mr. {Stupak.} So a lot of good actually has come from being caught here on this bogus--

Mr. {Dueber.} Yes, it has, and I might add that during our lunch break I talked to Dr. Less and I basically pleaded with her to bring FDA into my company and do a full top down, you know, front to back audit of our company because since I started with the company, I have done nothing but try to make sure that the company does exactly what it should be doing and do the best it can of any IRB.

Mr. {Stupak.} And in all fairness, you have been there since December of 2008, right, basically 4 or 5 months?

Mr. {Dueber.} I started at the end of September.

Mr. {Stupak.} September.

Mr. {Dueber.} And, you know, my track record is totally opposite of what we are talking about here so I need time to improve things, and we are improving. We have done--we have got an incredibly dedicated staff more so than I have ever seen in any company I have worked for before that they really--everyone, their first thing that they worry about is protection of human subjects.

Mr. {Stupak.} Then how did they miss this one so bad? I guess that is the part that baffles us.

Mr. {Dueber.} Well, we got hoodwinked. I mean, you know, this was a pretty good--

Mr. {Stupak.} You didn’t get hoodwinked. You took the bait hook, line and sinker. I mean in your testimony in all

fairness you said that once you got the letter you started looking at it. It took seconds to figure out that something was wrong here. I think it was the doctor's credentialing that was 19 years old. It took you seconds to do that just by going on the Internet. The procedure that we used, our magic elixir here, was actually found on the Internet. All this could have been discovered with a little due diligence. Hopefully, I am glad to hear some good things have come from all this whole thing also.

Mr. {Dueber.} Definitely.

Mr. {Stupak.} I want to thank you all for coming here and thank you for your testimony today. That concludes all questioning. I want to thank all of our witnesses for coming. The rules of the committee provide that members have 10 days to submit additional questions for the record. I am sure there will be some. I ask unanimous consent that the contents of our document binder on the desk there be entered in the record provided that the committee staff may redact any information that is business proprietary, relates to privacy concerns or law enforcement sensitive. Without objection, the documents will be entered into the record.

[The information follows:]

********** COMMITTEE INSERT **********

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Mr. {Stupak.} This concludes our hearing. The meeting of the subcommittee is adjourned.

[Whereupon, at 1:55 p.m., the subcommittee was adjourned.]