

REGULATIONS/GUIDANCE RECOMMENDATIONS TO ELIMINATE

FOOD AND DRUG ADMINISTRATION (FDA)

I. Premarket Regulations

- **Notice of Proposed Rulemaking (NPRM) for Good Laboratory Practices (GLP) for Nonclinical Laboratory Studies (21 CFR Part 58)**

The NPRM would amend the GLP regulations for nonclinical laboratory studies to, among other things, impose a rigid quality systems framework. This “one-size-fits-all” approach conflicts with a flexible, common-sense risk-based approach (i.e., focus on “errors that matter”) FDA has adopted in other areas (e.g., GMP), is burdensome to implement and has no clear benefit. Current risk-based controls for GLP studies ensure safety by focusing manufacturers on risks that matter.

- **Outdated Testing Requirements (21 CFR 610.2(a), 610.13(b))**

- 21 CFR 610.2(a) requires biologic manufacturers to submit samples of each lot to FDA, upon request, prior to distribution. The regulations are outdated as many manufacturers have shifted away from a lot-based system to continuous manufacturing. Additionally, submission of samples to FDA prior to distribution does not reflect a risk-based approach and makes it difficult for manufacturers to efficiently manage the supply chain.
- 21 CFR 610.13(b) requires pyrogenic rabbit testing of injectable biologics. This method of testing has been replaced by more modern/appropriate endotoxin testing. Modern tests already employed by manufacturers ensure safety of these biological products.

II. Postmarketing Regulations

- **Guidance for Industry, Providing Postmarketing Periodic Safety Reports in the ICH E2C(R2) Format (Periodic Benefit-Risk Evaluation Report)**

This guidance sets forth conditions where FDA will waive its requirements for submission formats to authorize sponsors to use the PBRER format (more commonly used globally). To the extent regulations are modified to authorize use of PBRER without the need for an FDA waiver (as suggested in PhRMA’s list of regulations to modify), this guidance should be eliminated.

III. Quality, Manufacturing, and Compliance

- **Draft Guidance (and planned rulemaking), Submission of Quality Metrics Data/Technical Conformance Guide/Technical Specifications Document**

FDA's quality metrics initiative requires manufacturers to collect, analyze, and submit FDA-defined metrics for each product (e.g., number of out-of-specification test results for lot release and long-term stability testing invalidated per number of such tests). FDA's one-size-fits-all approach would require significantly burdensome process changes for industry with no clear benefits to the public, FDA, or industry. The draft guidance also diverts resources from new product development and raises concerns about confidentiality of data. Companies already collect internal quality data (in their own format, reviewable by FDA inspectors) to maximize quality manufacturing. FDA should pause efforts to implement the Quality Metrics program and continue dialogue with industry to determine a path forward.

- **Draft Guidance, Implementation of the "Deemed to be a License" Provision of the Biologics Price Competition and Innovation Act of 2009**

The draft guidance addresses legal issues regarding products currently approved under new drug applications (NDAs) that will be deemed to be licensed under a biologic license application (BLA) in 2020. The draft guidance would eliminate valuable marketing exclusivities for these products on the date of transition (e.g., an innovative product with 2 remaining years of exclusivity would lose this exclusivity and immediately be subject to biosimilar competition). This unprecedented taking presents great concern to innovative companies and threatens the balance between innovation and competition recognized by Congress.

CENTERS FOR MEDICARE AND MEDICAID (CMS)

- **Medicaid: Covered Outpatient Final Rule (the "AMP" rule) ((CMS-2345-FC) Expanding the Medicaid Rebate Requirements to the Territories; 42 C.F.R. § 447.502 (extending definitions of "State" and "United States" to the Territories as of April 1, 2020); Note 81 Fed. Reg. 80003 (Nov. 15, 2016) (interim final rule delaying extension of the rebate program to the Territories until April 1, 2020))**

The Medicaid rebate program has been operating in the 50 States and the District of Columbia since its start in 1991. This 2016 final rule, which has been delayed to 2020, redefines "State" to include the territories (Puerto Rico, Guam, Northern Mariana Islands, American Samoa, and US Virgin Islands) and extends the rebate program to drugs provided to Medicaid beneficiaries in the Territories. This would require manufacturers to collect data on all their sales in the Territories and take those sales—many of which could be subject to price controls and could trigger new lower best prices—into account in determining Best Price and AMP. This would result in Medicaid rebate liability on Medicaid utilization in the Territories. CMS should rescind the regulatory provisions defining "State"

to include the Territories under the rebate program and revert back to the definition of State used by the Medicaid rebate program since 1991.

- **Medicaid: Requiring Monthly Average Manufacturer Prices (AMPs) (42 C.F.R. § 447.510(d) (requirement to calculate and report monthly AMPs); 42 C.F.R. § 447.510(d)(3) (requirement to revise previously-filed monthly AMPs for three years); 42 C.F.R. § 447.510(e) (certification requirements))**

Medicaid rebates are calculated each quarter using formula based on the AMP for the quarter (generally manufacturer’s average price to retail pharmacies and wholesalers) and the Best Price for the quarter (generally the manufacturer’s single lowest net price to any commercial customer). Manufacturers must calculate and report these quarterly metrics because they determine rebate payments. But CMS regulations were issued in 2007 to require that manufacturers also calculate and report monthly AMPs for all of their drugs: an extra burden that wastes resources because (for all but multiple source drugs) the monthly AMPs have no purpose—CMS has yet to articulate any purpose for these. These monthly AMP filings trigger additional burdens with no purpose: companies must calculate and report the monthly AMPs, report any revision to monthly AMPs for three years after the initial filing, and have top officials (e.g., CEP, CFO) certify to the accuracy of these figures. CMS should undergo notice and comment rulemaking to rescind these needless reporting requirements.

HEALTH RESOURCE SERVICES ADMINISTRATION (HRSA)/340B Program

- **340B Contract Pharmacy Guidance (HRSA, Notice Regarding 340B Drug Pricing Program Contract Pharmacy Services, 75 Fed. Reg. 10272 (March 5,2010))**

HRSA’s 2010 sub-regulatory guidance permits any 340B covered entity to dispense deeply discounted drugs purchased under the discount program through an unlimited number of unrelated, off-site retail “contract pharmacies” not recognized in the 340B statute. This 2010 policy allowing their unrestricted use has led to sharp growth in the 340B program, and contract pharmacies increase the risk of legal violations by 340B entities, including the risk of illegal diversion of 340B discounted drugs, illegal “duplicate discounts” (where a manufacturer sells a drug at a 340B discount and also is billed for a Medicaid rebate on the same drug). This 2010 contract pharmacy guidance should be rescinded immediately and HRSA should revert back to its pre-2010 policy under which only covered entities lacking an in-house pharmacy could use a contract pharmacy and those entities could only use one contract pharmacy site.

- **340B Final Rule re Ceiling Price/Manufacturer Civil Monetary Penalties/Penny Pricing (HRSA, 340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties Regulation, 82 Fed. Reg. 1210 (Jan. 5, 2017); HRSA Release 2011-2 “Clarification of Penny Pricing” (November 21, 2011); Interim Final Rule Delaying the Effective Date to May 22, 2017, 82 Fed. Reg. 14332 (March 20, 2017))**

This ACA rule imposes a series of burdensome requirements on manufactures that go well beyond the 340B program’s original purpose. It creates two separate sets of burdensome refund requirements and does not permit manufacturers to offset these refunds for prices that were too low. It also fails to permit de minimis exceptions to the refund requirements, forcing manufacturers to provide even nominal refunds that cost more to process than the refund itself. The rule also finalizes a policy that forces certain drugs to be priced at a penny (\$.01) to 340B covered entities, resulting in companies having to essentially give away certain drugs for free under the 340B program. This exacerbates the diversion problem that is already rampant in the program. Finally, the rule fails to provide concrete standards regarding when there is a “knowing and intentional” overcharge of a 340B ceiling price, subjecting manufacturers to unfair civil monetary penalties. The rule contains fundamentally flawed Obama administration policies based on questionable legal authority and should be rescinded. At a minimum, the rule should be further delayed beyond May 22, 2017 to give the new Administration time to review questions of fact, law and policy in the rule and to evaluate how the rule factors into the larger 340B program. Ultimately the Trump Administration should develop new proposals, seek comment on those proposals through a new proposed rule, and issue a sensible final rule that complies with the law and eliminates pointless burdens on manufacturers.

PATENT AND TRADEMARK OFFICE (PTO)

- **Regulation on Amendment of the Patent in Post-Grant Proceedings (37 CFR 42.121 (IPR Proceedings); 37 CFR 42.221 (PGR Proceedings))**

The regulations provide unwarranted limitations on the ability of the patent owners to amend patent claims during Patent Trial and Appeal Board (PTAB) proceedings, including both inter partes review (IPR) and post-grant review (PGR) proceedings. The regulations should be repealed, and the PTAB should directly apply 35 U.S.C. § 316(d)/35 U.S.C. § 326(d), which provide patent owners an opportunity to move to amend patent claims in IPR/PGR proceedings