September 18, 2017

Food and Drug Administration
Division of Drug Information
Center for Drug Evaluation and Research
10001 New Hampshire Ave.,
Hillandale Building, 4th Floor
Rockville, MD 20852

Re: Administering the Hatch-Waxman Amendments: Ensuring a Balance Between Innovation and Access (FDA-2017-N-3615)

Dear Sir/Madam:

APhA is pleased to submit these comments to the Food and Drug Administration's ("FDA") public meeting, "Administering the Hatch-Waxman Amendments: Ensuring a Balance Between Innovation and Access" (hereinafter "Public Meeting"), held July 18, 2017. The American Pharmacists Association ("APhA") was founded in 1852, and represents 64,000 pharmacists, pharmaceutical scientists, student pharmacists, pharmacy technicians, and other parties invested in improving medication use and advancing patient care. APhA members provide care in all practice settings, including community pharmacies, hospitals, long-term care facilities, community health centers, physician offices, ambulatory clinics, managed care organizations, hospice settings, and the uniformed services.

Congress intended to strike a balance between encouraging innovation in drug development and patient access to affordable alternatives to innovator drugs when it passed the Drug Price Competition and Patent Term Restoration Act of 1984, otherwise known as Hatch-Waxman Act[1] Since the law passed, the pharmaceutical industry, FDA and United States health care system have evolved in many ways, including in the areas of drug development and patient safety efforts.[2] APhA believes components of FDA's current drug approval policies can be improved to better achieve Congress' intended goals related to the Hatch-Waxman Act.

I. REMS Programs

As discussed by many panelists at the Public Meeting, there are concerns manufacturers may be using Risk Evaluation and Mitigation Strategy (REMS) programs inappropriately to delay generic drug development and marketing. Panelists cited certain REMS programs' limited distribution requirements and patenting of REMS programs as particularly problematic due to

[1] *See* H.R. Rep. No. 98-857 (Part I), 98th Cong, 2d Sess. At 14-15 (1984), reprinted in 1984 U.S.C.C.A.N. 2647-48; see also, *e.g., Teva Pharmaceutical Industries Ltd.* v. *Crawford*, 410 F.3d 51, 54 (D.C. Cir. 2005)
[2] FDA. A Brief Overview of Risk Evaluation & Mitigation Strategies (REMS), available at: https://www.fda.gov/downloads/AboutFDA/Transparency/Basics/UCM328784.pdf, last accessed: August 19, 2017.

their impact on limiting generic drug developers' access to samples. In 2007, the Food and Drug Administration Amendments Act gave FDA authority to require REMS from manufacturers to ensure the benefits of a drug or biological product outweigh its risks.[3] REMS programs vary by drug or class of drug to account for unique safety risks, and some drugs would not be able to be approved, or able to stay approved, unless a REMS with elements to assure safe use was required. APhA believes modifications to FDA's REMS policies and other solutions may need to be adopted to prevent REMS programs from serving as a barrier to generic drug development, without creating loopholes that may meaningfully detract from patient safety and clinical benefit.

II. Product Hopping

APhA also has concerns with the practice of product hopping or evergreening[4] — a brand-name company introducing minor changes to a drug's formulation to limit substitution and shift patients to the new drug before a generic comes to market. APhA opposes practices which circumvent the intent of drug product review laws and negatively impact the pharmacist's ability to substitute medications to safe, effective, lower-cost alternatives. APhA supports pharmacists collaborating with the prescriber and patient to design cost-effective treatment regimens, identify formulary or generic products as a means to reduce costs, and intervene on behalf of the patient to identify alternate therapies.[5] Product hopping limits the effectiveness of these collaborations and pharmacists' efforts to optimize patient medications and cost-effectiveness. APhA encourages FDA to consider methods to prevent or discourage drug sponsors from engaging in such activity and consider alternative policies to better utilize pharmacists to limit the impact of product hopping and other practices that circumvent the intent of the Hatch-Waxman Act.

III. Biological Products

The Public Meeting's scope was the Hatch-Waxman Act, which does not apply to biosimilar products. However, APhA believes it is equally important to balance innovation and access for biological products, including interchangeable biosimilars. As FDA is aware, there has yet to be an interchangeable biosimilar approved in the United States. Many states have passed legislation allowing the pharmacist to substitute interchangeable biosimilars independently. APhA encourages FDA to develop and implement a framework for determining biologic product interchangeability and continue to update the Purple Book so to serve as a comprehensive resource for approved biologic products and their interchangeability to inform providers.

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[3] *See* Food and Drug Administration, FDA Basics Webinar: A Brief Overview of Risk Evaluation and Mitigation Strategies (REMS), available at: https://www.fda.gov/AboutFDA/Transparency/Basics/ucm325201.htm, last updated July 27, 2017, last accessed September 1, 2017.

[4] APhA. March 2017. Re: Importation of Non-FDA Approved Prescription Drugs, available at: https://www.pharmacist.com/sites/default/files/files/APhA%20Comments%20Importation%20FINAL%203%2022%202017.pdf, last accessed: August 19, 2017.

[5] *See* Brief for the FTC as Amicus Curiae, Mylan Pharmaceuticals, Inc. v. Warner Chilcott plc, et al. U.S. 3d Cir. (2016), describing a typical product-hopping scheme, "A brand-name pharmaceutical company expects generic rivals to win FDA approval to compete with the company's profitable brand-name drug using automatically substitutable AB-rated equivalents. To thwart such substitution, the brand-name company introduces minor changes to the drug's formulation, such as therapeutically insignificant tweaks to dosage levels or to the form of administration (e.g., capsules vs. tablets). Before generic equivalents have a change to enter, the brand-name manufacturer then takes various steps to extinguish demand for the original version… The shift in prescriptions is generally a one-way street: once doctors prescribe a medicine and find that it works, they are generally reluctant to switch users back to the original formulation even if a cheaper generic version of it later becomes available."

IV. Drug Pricing and Costs to Patients

As noted by the Federal Trade Commission (FTC), "Generic drugs play an important role in disciplining drug pricing and controlling drug costs."[5] Because the Hatch-Waxman Act encourages greater access to generic drugs and pharmaceutical innovation, drug pricing and costs to patients is directly impacted by policy changes related to Hatch-Waxman. Therefore, FDA should consider these factors when evaluating new policies related to innovation and access.

V. Impact of Limited Distribution Requirements on Pharmacies and Patients

During the Public Meeting, panelists discussed limited distribution as a means to impede generic drug development by limiting generic drug manufacturers' access to innovator drugs, as described above. APhA also believes limited distribution at the pharmacy level, including that associated with REMS programs, may have additional negative impacts on the patient and create an unfair playing field for supply chain stakeholders. As more costly and complex medications are being developed, some manufacturers, clinics, practitioners' offices and pharmacies have entered into contracts that effectively limit retail or community pharmacy distribution of certain medications, even if a specialty pharmacy or other entity is willing to meet manufacturer imposed standards to enable distribution. Consequently, APhA is concerned REMS programs may also be used as a tool to limit the number of entities providing certain medications which may effectively dictate the pharmacy the patient attends and ultimately, patient access and choice. APhA encourages FDA to work with the FTC to examine this and other unintended consequences of REMS programs at the pharmacy level to determine whether these practices limit competition and harm consumers.

In addition, APhA is concerned limited distribution requirements (both those required by REMS program and self-imposed by manufacturers) on pharmacies also increase the cost of care by forcing patients to attend multiple pharmacies which deprives patients the benefits of a strong pharmacist-patient relationship, such as improved medication adherence. APHA recommends FTC also investigate the anticompetitive effects of manufacturer-imposed limited distribution.

Thank you for your leadership and work on this issue. We look forward to supporting FDA's efforts and working to improve patients' access to affordable and safe medications through feasible implementation approaches. If you have any questions please contact, Jenna Ventresca, Director, Health Policy, by email jventresca@aphanet.org or phone (202) 558-2727.

Sincerely,

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Executive Vice President and CEO
cc: Stacie Maass, BSPharm, JD, Senior Vice President, Pharmacy Practice and Government Affairs

[5] Federal Trade Commission Bureau of Economics (2013). The Effect of Generic Drug Competition on Generic Drug Prices During the Hatch-Waxman 180-Day Exclusivity Period, available at: https://www.ftc.gov/sites/default/files/documents/reports/estimating-effect-entry-generic-drug-prices-using-hatch-waxman-exclusivity/wp317.pdf, last accessed: September 13, 2017.