United States Senate
WASHINGTON, DC 20510

June 22, 2017

Scott Gottlieb
Commissioner
U.S. Food and Drug Administration
10903 New Hampshire Avenue
Silver Spring, MD 20993

Dear Commissioner Gottlieb:

We write in response to your recent statement that the Food and Drug Administration (FDA) will take measures to curb anticompetitive abuses of its regulatory processes for the approval of generic drugs, a goal that aligns with the objectives of bipartisan legislation that we have introduced, the Creating and Restoring Equal Access to Equivalent Samples (CREATES) Act.

We were encouraged by your recent testimony before the House Committee on Appropriations, in which you noted, "Simply put, too many patients are priced out of the medicines they need." As you recognized in your recent testimony before the Senate Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies, manipulation of regulations has contributed to the problem: "The bottom line is that there is no question there are places where companies do take advantage of rules meant for one purpose as a way to gain commercial advantage." We agree with your concern that some companies may be manipulating the Risk Evaluation Mitigation Strategy (REMS) programs to delay generic competition.

We have introduced the CREATES Act (S.794) to address two abuses of the REMS program, while maintaining current patient safety standards and helping to lower prescription drug costs.

You discussed the first abuse addressed by our legislation in your testimony before the Senate Appropriations Subcommittee: branded companies preventing generic competitors from obtaining branded samples. Without access to these branded samples, a generic company cannot do the testing necessary to receive FDA approval, delaying lower-cost competition that would benefit consumers. Just last year, the FDA reported that it had received more than 150 inquiries from generic drug companies unable to obtain samples needed for bioequivalence testing.[1] Some companies argue that certain REMS, which limit how a prescription drug is distributed (known as Elements to Assure Safe Use, or "ETASU") prevent the sale of the product to a generic company. The FDA has rejected this justification. The purpose of an ETASU is to protect patients, not to prevent potential competitors from obtaining needed samples.

[1] See Letter from Dayle Cristinzio, Associate Commissioner for Legislation, to Senator Patrick Leahy at 1 (December 22, 2016).

The CREATES Act would eliminate this problem by creating a narrow remedy that generic companies could use to obtain samples quickly when a branded company tries this strategy. In the case of drugs subject to limited distribution requirements, our bill maintains current safety protections for bioequivalence testing, which the FDA has said are adequate.[2]

You discussed the second abuse that our legislation targets in your House Appropriations Committee testimony. Under current law, if a REMS requires an ETASU, there is a presumption that a generic manufacturer and the brand should use the same REMS, which is known as a single, shared REMS. The FDA may waive the requirement and approve a separate system for the generic product if the burden of creating a single, shared system outweighs the benefit of a separate system.[3] As a practical matter, until the branded and generic companies agree to a single, shared system or the FDA waives that requirement, the generic company cannot receive approval. Meanwhile, the branded company, under the previously approved REMS, continues to sell its product without facing generic competition.

The longer branded companies delay reaching an agreement on single, shared systems, the longer they avoid competition and deny consumers cost-saving alternatives. In nearly a decade since Congress created this system, only one branded company has reached agreement on a single, shared REMS prior to the generic company receiving FDA approval.[4] The FDA has approved five other single, shared REMS, but in those cases, the REMS was required after both the branded and generic company were approved and on the market.[5] This pattern suggests that when branded companies are not benefiting by extending negotiations, it is easier to reach agreement on a single, shared REMS. In addition, there are now 11 single, shared REMS systems in negotiations, "many of which involve the costliest medications to patients and to Medicare spending as a whole."[6] In all but one of the negotiations, the parties have missed at least one of the milestones set by the FDA. In January, the FDA waived the single, shared REMS requirement for a product after four years of failed negotiations.[7]

The CREATES Act provides a narrow and simple solution. It would eliminate the presumption of a single, shared REMS, and the associated unintended incentives to delay competition. Instead, the FDA would be authorized to either approve a single system for the generic product that meets the same, safety requirements as the branded company's system or require a single, shared REMS when necessary. This approach does not change the safety requirements for generic drugs subject to a REMS.

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[2] *Id.*

[3] 21 U.S.C. 355-1(i)(1)(B). The FDA may also waive the requirement if the ETASU is claimed by a patent or trade secret and the ANDA has unsuccessfully sought a license for use of the intellectual property.

[4] See Letter from Dayle Cristinzio, Associate Commissioner for Legislation, to Senator Patrick Leahy at 5.

[5] *Id.* at 5.

[6] *Id.* at 6.

[7] January 17, 2017 Memorandum from Deputy Director Sharp to Abbreviated New Drug Applications (ANDA) for sodium oxybate oral solution products.

While we continue to advocate for this legislative solution, we encourage you to take action on your announcement to consider whether the FDA can waive the requirement for a single, shared REMS "more readily" than it has in the past. In particular, we urge you to consider implementing a framework in which the FDA would waive a single, shared REMS if, after a good faith effort or a reasonable amount of time, the generic company has submitted a separate proposal that satisfies the legal requirements for a REMS.

We applaud your interest in addressing abuses of the regulatory process that delay competition and increase prescription drug costs without enhancing patient safety. We appreciate that, yesterday, you announced a public meeting on July 18 to address drug pricing, including these issues. At the same time, the REMS issue is well understood, and the CREATES Act provides a simple and effective solution. We ask that by July 24, you respond with what regulatory actions you believe the FDA can and cannot take to address strategies that prevent generics from obtaining samples needed for required regulatory testing and abuses in the REMS program. We look forward to working with you to promote safe, effective, and affordable drug prices by fostering greater competition.

Sincerely,

Amy Klobuchar
United States Senator

Mike Lee
United States Senator

Patrick J. Leahy
United States Senator

Charles E. Grassley
United States Senator

Sheldon Whitehouse
United States Senator

Richard Blumenthal
United States Senator

Richard J. Durbin
United States Senator

Dianne Feinstein
United States Senator