Response to Questions for the Record

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Subcommittee on Health

Hearing on 21st Century Cures: Examining the Role of Incentives
in Advancing Treatments and Cures for Patients

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Question #1

Would you comment on some of the barriers that Class III medical device manufacturers face when seeking coverage and payment from CMS for innovative cutting edge technology that improves the lives of patients?

Response

I have no comment in response to this question, as I have not examined the Class III medical device market or regulatory regime.

Question #2

In your testimony, you mentioned the evergreening provision. I understand that is not just a one-time event, but could go on forever wherever a small change can produce another 15 years of exclusivity. Mr. Boutin claims in his testimony that MODDERN Cures has the strongest anti-evergreening language ever included in legislation. Do you agree with that? Do you think that the law prevents evergreening or could companies get multiple 15 years exclusivity?

Response

The MODDERN Cures Act is vulnerable to evergreening strategies in two ways. The first problem is that a branded firm can earn multiple 15-year exclusivity periods under the Act, provided it develops or acquires a second drug that contains a new "active moiety." For example, a second drug treating the same disease in the same class as the first would be eligible for a fresh exclusivity period, if it contains an active ingredient with a slightly different chemical structure. (For biologics, the active moiety in the second drug must not be "highly similar," an undefined term that is vulnerable to evasion.)

Moreover, in certain circumstances, the second drug may be eligible for exclusivity even if the active ingredient has been previously approved. This potential scenario arises when a branded firm develops a so-called single enantiomer of a previously approved drug. For example, Prilosec is a mixture of two enantiomers, only one of which is therapeutically effective. Nexium is in essence a purified version of Prilosec, containing only the single useful enantiomer.

Under the Act, the developer of a drug like Nexium is likely to argue that the single enantiomer is a distinct "active moiety" eligible for a second 15-year period. The FDA might be expected to disagree, as the agency rejected a similar interpretation of its rule governing five-year new chemical entity (NCE) exclusivity.[1] On the other hand, a branded firm might respond that the definition contained in the NCE rule does not mention enantiomers, and in other contexts the FDA has treated a single enantiomer as a distinct active moiety.[2]

"Active moiety" is undefined in the Act, leaving the scope of protection uncertain. Branded firms would have a strong incentive to pursue an expansive interpretation of the term. The result could be large and disproportionate extensions of branded drug exclusivity, unjustified by the limited incremental benefit to patients incentivized by such extensions.

The second problem is product hopping. Near the end of the 15-year exclusivity period, the branded firm has an incentive to shift patients to a second, related drug, prior to generic entry. As discussed in my testimony, this shift can be accomplished by promoting the new product, increasing the relative price of the old product, or withdrawing the old product from the market. The product-hopping problem is not unique to the MODDERN Cures Act, but rather endemic to the regulatory regime governing generic entry.

However, the MODDERN Cures Act would worsen the product-hopping problem by lengthening the base period of protection that is extended by the switch. As a consequence, the 15-year exclusivity period would serve as a floor on the duration of protection, rather than a ceiling. In addition, the two evergreening techniques might be deployed in tandem, if a branded firm used product-hopping to shift patients from one drug with exclusivity to a second drug with exclusivity. The potential result would be an effective 30-year term of protection.

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[1] See 54 Fed. Reg. 28,872, 28,898 (1989) (preamble to rule); 59 Fed. Reg. 50,338, 50,359 (1994) (reaffirming rule). A recent statutory change permits an approved enantiomer to receive NCE exclusivity under certain limited circumstances.

[2] See 21 C.F.R. § 314.108(a) (defining "active moiety" for purposes of FDA rule implementing NCE exclusivity); FDA, Approved Active Moieties to Which FDA Has Issued a Written Request for Pediatric Studies under Section 505A of the Federal Food, Drug, and Cosmetic Act, http://www.fda.gov/Drugs/DevelopmentApprovalProcess/DevelopmentResources/ucm050002.htm (listing Prilosec (omeprazole) and Nexium (esomeprazole) as distinct "active moiet[ies]" for which pediatric studies have been requested).