March 24, 2004

Via E-Mail and Federal Express

Division of Dockets Management (HFA-305)
Food and Drug Administration
5630 Fishers Lane, Room 1061
Rockville, MD 20852

Comment of Apotex Corp. in Support of Citizen Petition Docket No. 2004P-0075/CP1

Apotex Corp. ("Apotex") develops and manufactures generic prescription drugs and in particular solid pharmaceutical dosage forms (*e.g.*, tablets and capsules), for sale in the United States, subject to the requirements of the Food, Drug and Cosmetic Act ("FDCA") and the FDA's implementing regulations. Through its counsel, Gilbert's LLP, and pursuant to 21 C.F.R. § 10.30(d), Apotex submits this comment in support of Mylan Pharmaceuticals Inc.'s ("Mylan") citizen petition docket no. 2004P-0075/CP1.

Apotex supports Mylan's request that FDA prohibit the marketing of "authorized generics" during the 180-day exclusivity period described in 21 U.S.C. § 355(j)(5)(B)(iv) because this practice violates the letter and intent of the FDCA. Under any reasonable interpretation of the relevant legislative provisions, FDA's approval of an authorized generic for marketing during a first applicant's exclusivity period denies that applicant the marketing exclusivity to which it is entitled.

Authorized Generics Violate the Right of a First Applicant to 180 Days of Marketing Exclusivity

Following recent amendments, the Hatch-Waxman Act defines "180-day exclusivity period" as follows, at section 505(j)(5)(B)(iv):

> (II) DEFINITIONS— In this paragraph
>
> (aa) 180-DAY EXCLUSIVITY PERIOD— The term '180-day exclusivity period' means the 180-day period ending on the day before the date on which an application submitted by an applicant other than a first applicant could become effective under this clause.

In turn, this language refers to the immediately-preceding clause:

(iv) 180-DAY EXCLUSIVITY PERIOD—

> (I) EFFECTIVENESS OF APPLICATION— Subject to subparagraph (D) [relating to forfeiture], if the application contains a certification described in paragraph (2)(A)(vii)(IV) and is for a drug for which a first applicant has submitted an application containing such a certification, the application shall be made effective on the date that is 180 days after the date of the first commercial marketing of the drug (including the commercial marketing of the listed drug) by any first applicant.

Hence, "180-day exclusivity period" is defined by reference to the period of time during which FDA is prohibited from finally approving ANDAs other than the first applicant's, but the 180-day exclusivity period is not defined as necessarily arising from the prohibition on FDA's approval of later-filed ANDA under section 505(j)(5)(B)(iv)(I). Stated otherwise, "180-day exclusivity period" is defined only by its duration and the fact that it is an "exclusivity" period. Congress left open the question of the precise scope of that "exclusivity."

In Apotex' view, any reasonable interpretation of the term "exclusivity" includes an exclusivity as against all generics, be they "authorized generics." [1] By definition, a shared exclusivity is not an "exclusivity" at all. Exclusive does mean "limiting or limited to possession, control, or use by a single individual or group." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003) (emphasis added). But FDA's current interpretation of section 505(j)(5)(B)(iv) allows brand name companies to render any exclusivity utterly meaningless, because FDA would allow them to license not only one authorized generic licensee, but any number of third parties — one, ten or a hundred— to share the first ANDA applicant's exclusivity. This cannot be right.

It is plain, therefore, that the marketing of any authorized generic during the 180-day exclusivity period is inconsistent with the concept of "exclusivity." This conclusion is supported by the widely-accepted principles that statutory construction should avoid absurd results,[2] and that courts have an obligation to effectuate Congress' plain purposes in enacting a statute.[3]

The conclusion that "shared exclusivity" goes against the plain meaning of section 505(j)(5)(B)(iv) is most evident where an authorized generic licensee previously filed an ANDA containing a paragraph IV certification in respect of the drug it proposes to sell under license

---

[1] To the extent that authorized generics are represented to be generics, are marketed as generics and are sold at generic prices, they are "generics" for exclusivity purposes. *See* FDA's *Response to Teva's Citizen Petition*, FDA Docket No. 009-1446, at 7 (Feb. 6, 2001) (a Mylan press release announcing the sale of a "generic" drug is enough to make a brand name company-licensed drug a generic).

[2] *See, e.g., Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 510-511 (1989); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965).

[3] *See, e.g., Holloway v. United States*, 526 U.S. 1, 9 (1999) (statutory language should be interpreted in light of congressional policy); *Caron v. United States*, 524 U.S. 308, 315 (1998) (rejecting petitioner's reading of a statute because it "yields results contrary to a likely, and rational, congressional policy").

from the innovator company. In such a case, this late-filing generic company purports to end run the 180-day exclusivity period by abandoning its ANDA for a license under the brand name company's NDA. But as Mylan's Citizen Petition points out, a generic company cannot evade the strictures of section 505(j)(5)(B)(iv) through such arrangements.

In FDA Docket No. 009-1446 (August 9, 2000), Teva Pharmaceuticals USA, Inc. ("Teva") filed a citizen petition requesting FDA to determine whether Mylan's marketing of Pfizer's extended-release nifedipine tablets triggered Mylan's 180-day exclusivity period. In its *Response to Teva's Citizen Petition* (Feb. 6, 2001), FDA found that Mylan's marketing of the listed drug triggered its exclusivity, even though section 505(j)(5)(B)(iv), on its face, only linked the 180-day exclusivity to the marketing of a drug "under the previous [ANDA] application." By analogy, therefore, a later-filing generic applicant cannot end run the 180-day exclusivity period, and compete with the first applicant during that time, by selling the repackaged listed drug as a generic.

In addition, the statutory language creating the first generic applicant's 180-day exclusivity period is similar to the language creating the new chemical entity exclusivity under FDCA section 505(c)(3)(E) and the pediatric exclusivity under FDCA section 505a. In Apotex' submission, therefore, the first generic applicant's exclusivity is no less an exclusivity than those other exclusivities created by Congress to offer incentives to brand name companies.

Authorized Generics Are Inconsistent with the Purpose of the Hatch-Waxman Act

In its *Response to Teva's Citizen Petition*, FDA identified 3 factors to be considered in interpreting the 180-day exclusivity provision of the Hatch-Waxman Act:

> First, the statute is to be interpreted in a manner consistent with "the statute's interest in affording market access and incentives for both generic and non-generic makers," and to maintain "an incentive for the parties to fulfill the purposes of Hatch-Waxman". Second, FDA should avoid an interpretation that excessively favors the first generic and the innovator parties' "anticompetitive hold" over the drug. The court observed that "Hatch-Waxman intended to provide an incentive for drug companies to explore new drugs, not a market 'windfall' for crafty, albeit industrious, market players." Finally FDA should avoid interpreting Hatch-Waxman so the decision on whether a generic applicant is entitled to exclusivity rests entirely in the patent holder's hands.

Response to Teva's Citizen Petition at 5, *quoting Mylan Pharmaceuticals, Inc. v. Henney*, 94 F. Supp 2d 36 (D.D.C. 2000) (citations omitted).[4] Taken together, these factors strongly suggest that FDA lacks the legislative authority to approve the marketing of authorized generics during the 180-day exclusivity period.

---

[4] *Mylan Pharmaceuticals, Inc. v. Henney* was vacated by *Pharmachemie B.V. v. Barr Labs., Inc.*, 276 F.3d 627 (D.C. Cir. 2002) on grounds of mootness, but this development does not bring into question the correctness of FDA's analysis in its *Response to Teva's Citizen Petition*.

Authorized Generics Undermine the Incentives Congress Created for True Generics

By enacting section 505(j)(5)(B)(iv), Congress created an incentive for generic companies to challenge and invent around drug patents, in the form of a 6-month opportunity to be the sole supplier of a generic version of the innovator's drug. Authorized generics, however, rob true generics of this incentive to fulfill the goals of the Hatch-Waxman Act. Mylan observed in its Citizen Petition that authorized generic agreements are "designed to cripple the Paragraph IV ANDA applicant's exclusivity" (Mylan Citizen Petition at 2). Having been the target of an authorized generic license agreement in respect of Paxil (paroxetine hydrochloride), Apotex would go further: authorized generics do in fact cripple a first applicant's 180-day exclusivity.

Apotex' affiliate, TorPharm, Inc., was the first generic company to file an ANDA containing a paragraph IV in respect of paroxetine; it therefore held the rights to the 180-day exclusivity period for that drug. On the day it launched its generic paroxetine, however, PAR Pharmaceutical, Inc. ("PAR") launched an authorized generic licensed from GlaxoSmithKline plc ("GSK"). Prior to launch, Apotex expected sales for its paroxetine product to be in the range of $530-575 million during the 6-month exclusivity period. Given competition from PAR's authorized generic product, Apotex only generated $150-200 million in total sales. There can be no doubt that the PAR authorized generic crippled Apotex' 180-day exclusivity — it reduced Apotex' entitlement by two-thirds— to the tune of approximately $400 million, according to IMS data. Hence, authorized generics undermine the legislative balance embodied in the Hatch-Waxman Act.

Authorized Generics Are Anticompetitive

There is no basis to argue that authorized generics are desirable to prevent a first generic company's "anticompetitive hold" over a product, or to prevent some "extension" of the 180-day exclusivity. In fact, it is authorized generics themselves that are anticompetitive.

In its *Response to Teva's Citizen Petition* (Feb. 6, 2001), at 7, FDA explained that "the commercial marketing trigger [of the 180-day exclusivity period] is intended to give the first ANDA applicant with a paragraph IV certification the opportunity to market a generic version of the innovator's drug with no competition for 180 days" (emphasis added). The purpose of FDCA section 505(j)(5)(B)(iv), therefore, is to confer an economic benefit on the first generic applicant that has filed a paragraph IV certification, in the form of marketing exclusivity.[5]

By granting first applicants this exclusivity period, Congress intended to stimulate the development and marketing of new generic products and, for this reason, the 180-day exclusivity period is best seen as a pro-competitive legislative measure. But the promoters of authorized generics are attempting to deprive first applicants —and ultimately the public— of the pro-competitive benefit of the Hatch-Waxman Act. For this reason, authorized generics are anticompetitive.

---

[5] By contrast, it has often been observed that the purpose of patents (outside of the pharmaceutical industry, at least) is not to grant an actual monopoly to the patentee, but only a right to exclude others from practicing an invention, regardless of whether or not this right translates into economic power. *See, e.g.*, 2 Herbert Hovenkamp, Mark D. Janis & Mark A. Lemley, *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property* § 4.2a (2002).

Moreover, authorized generics do not genuinely increase competition because authorized generic licensees are generally prohibited from marketing the licensed product unless and until a real generic has entered the market.[6] So authorized generics neither introduce additional generic competition in the marketplace, nor to they lead to the marketing of new drug products.

Authorized Generics Give Brand Name Companies the Unilateral Right To Do Away with the 180-Day Exclusivity Period

With respect to the third consideration relied upon by FDA in its *Response to Teva's Citizen Petition*, authorized generic agreements are precisely a case where a generic applicant's exclusivity "rests entirely in the patent holder's hands." FDA's rubberstamp approval of authorized generics for marketing during a first applicant's 180-day exclusivity gives a brand name drug company the unilateral power to render meaningless and eviscerate the 180-day exclusivity through the licensing of the listed drug to one or more generic competitors. As Judge Roberts of the U.S. District Court for the District of Columbia recently observed in *TorPharm, Inc. v. FDA*, No. 03-2401, 2004 U.S. Dist. LEXIS 524 (D.D.C Jan. 8, 2004) (appeals pending), with respect to "shared exclusivity":

> it would be ironic if Congress meant to give the drug innovators [the power to create a shared exclusivity between generic companies by filing additional patents in respect of a drug product] when its aim was to get more and cheaper generics on the market faster." *See* January 2, 2004 Tr. at 56.

Judge Roberts' purposive reading of the Hatch-Waxman Act is equally applicable to authorized generics. Consider the case of a brand name company that has fought generic competition for years, as GSK did in connection with Paxil —in that case, through the relentless listing of questionable patents in the Orange Book. Through such unrelenting anticompetitive efforts, brand name companies can force generics to incur enormous litigation costs. It is patently unreasonable for FDA to then authorize these brand name companies to frustrate the FDCA's mechanism for compensating generics for these delays and expenses. In Apotex' view, if a brand name company exercises its right under section 505(j)(5)(B)(iii) to stay a generic's ANDA approval by filing an action against that company, it should be precluded from licensing an authorized generic for sale before or during that generic company's 180-day exclusivity.

FDA itself has acknowledged that the Hatch-Waxman amendments to the FDCA carry out a compromise between protecting patent rights and stimulating generic innovation. As it stated recently, the Hatch-Waxman amendments "attempt to balance two competing interests: promoting competition between "brand name" and "generic" drugs and encouraging research and innovation." Applications for FDA Approval to Market a New Drug, 67 Fed. Reg. 65,448, 65,448 (proposed Oct. 24, 2002) (codified at 21 C.F.R. pt. 314).[7] As a result, FDA must

---

[6] *See, e.g.*, Eon Wellbutrin SR Generic Launch Could Slow GSK Conversion Efforts, *The Pink Sheet*, Dec. 1, 2003, at 17 ("The Eon launch should come as good news to Watson, which has a licensing agreement with GSK to market an "authorized" Wellbutrin SR generic upon market entry by a third party.")

[7] *See also Mylan Pharms, Inc. v. Thompson*, 268 F.3d 1323, 1326 (Fed. Cir. 2001) ("These provisions of the Hatch-Waxman Amendments 'emerged from Congress' efforts to balance two conflicting

interpret the FDCA in a manner that respects the Hatch-Waxman compromise. Yet, FDA's approval of an "authorized generic" drug for marketing during a 180-day exclusivity period obliterates the incentives that Congress chose to give to generic companies to challenge and invent around drug patents.

For these reasons, Apotex supports Mylan's citizen petition docket no. 2004P-0075/CP1.

Respectfully,

GILBERT'S LLP

Tim Gilbert
Vincent de Grandpré

The Flatiron Building
49 Wellington Street East
Toronto, Ontario
Canada M5E 1C9
Tel: (416) 703-1100
Fax: (416) 703-7422

cc: Janet Woodcock, MD, Center Director
Gary J. Buehler, OGD Director
Daniel E. Troy, Chief Counsel

---

policy objectives: to induce name brand pharmaceutical firms to make the investments necessary to research and develop new drug products, while simultaneously enabling competitors to bring cheaper, generic copies of those drugs to market.' *Abbott Labs. v. Young*, 287 U.S. App. D.C. 190, 920 F.2d 984, 991 (D.C. Cir. 1990) (Edwards, J., dissenting on other grounds).").