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Robert M. Califf, M.D., MACC
Commissioner of Food and Drugs
Food and Drug Administration (HF-1)
10903 New Hampshire Avenue
Silver Spring, MD 20993

Robert.Califf@fda.hhs.gov

SENT VIA U.S. MAIL AND ELECTRONIC MAIL

Re: Status of FDA Response to Boehringer Ingelheim's December 2020 Citizen Petition Regarding Biological Products

Dear Dr. Califf:

As the Senior Vice President and General Counsel of Boehringer Ingelheim USA Corporation, I write on behalf of our company to welcome you to your new role at FDA and to seek your assistance in resolving a time-sensitive matter that impacts not only biological manufacturers and sponsors but also, most critically, patients who rely on biological medications. Specifically, FDA's current interpretation of the term "strength" under the Biologic Price Competition and Innovation Act ("BPCIA") encourages brand sponsors to employ minor concentration changes as an anti-competitive tactic to prevent or delay competition from interchangeable biological products, contrary to the goals of the BPCIA. Your leadership is crucial to ensuring that patients have timely access to safe, effective, and affordable interchangeable versions of more expensive brand biological products.

On December 2, 2020, Boehringer Ingelheim Pharmaceuticals, Inc. ("Boehringer Ingelheim") submitted a Citizen Petition, Docket No. FDA-2020-P-2247, requesting that FDA interpret "strength" in the same manner as when the BPCIA was enacted. If you have not yet had the opportunity to review our Citizen Petition, I urge you to do so, and I include it with this letter for your convenience.

In short, the Citizen Petition challenges a new FDA policy that the "strength" of an injectable biological product (*i.e.*, parenteral solution) is based on *both* the total content of drug substance (in mass or units of activity) *and* the concentration of drug substance (in mass or units of activity per unit volume). This interpretation of "strength" is incorrect as a matter of both law and policy. It conflicts

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with the clear language of the BPCIA because it ignores the well-established meaning of that term when Congress passed the BPCIA in 2009. The meaning of "strength" in the BPCIA is clear and unambiguous—it means "total drug content," without regard to concentration. FDA's interpretation also undermines the BPCIA's goal of speeding the development of biosimilar and interchangeable biological products, with no legitimate countervailing regulatory purpose.

To state the most extreme example, under FDA's interpretation, a brand biologic manufacturer could add or remove *a single drop of water* to its product and thereby block approval of a 351(k) application for a competing product. This tactic is particularly damaging to biosimilar and interchangeable biological products because of the high costs (estimated to be between $100 to $200 million) and extended time (estimated to take eight to ten years) needed to develop such products. By changing the concentration of the reference product at strategic moments and then aggressively switching patients to the new product, brand sponsors can avoid direct competition from products that are biosimilar or interchangeable to the previous concentration. Indeed, this is already happening.

To encourage the development of a vibrant marketplace for interchangeable biological products, prompt action by FDA is needed to halt these anti-competitive tactics. Specifically, we urge FDA to issue a decision granting our Citizen Petition, which has been pending since December 2020, though FDA was aware of the issues it raises long before that. In fact, Boehringer Ingelheim first raised these issues with FDA in January 2020, more than two years ago, in an effort to prevent these anti-competitive tactics from being used against its biological product, Cyltezo® (adalimumab-adbm). Following various exchanges with FDA, Boehringer Ingelheim ultimately submitted the Citizen Petition, which FDA indicated was a prerequisite to further engagement with FDA on these issues concerning Cyltezo. At that time, FDA provided encouraging informal assurances (albeit not promises) to Boehringer Ingelheim that we would receive a substantive ruling on the Citizen Petition within approximately six months. But to date, FDA has not issued a substantive response or given any indication as to when a substantive response will be forthcoming.

Boehringer Ingelheim respectfully requests that you exercise your leadership as Commissioner to instruct responsible FDA officials to rule on the Citizen Petition immediately. Biosimilar manufacturers, payors, and PBMs need clarity from FDA now to make critical business decisions that will impact the biosimilars market now and into the future. As you know, one of the primary goals of the BPCIA is to spur competition among biological products and thereby increase access to affordable biological products by patients in the United States. Granting our Citizen Petition would directly serve that goal and would put an end to unnecessary and anti-competitive evergreening tactics and provide much needed regulatory certainty for the marketplace.

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Thank you for your consideration of this request. I welcome further discussion with you on these issues, and I hope to have the opportunity to meet you in person soon and continue to build the relationship between FDA and Boehringer Ingelheim.

Sincerely,

Sheila A. Denton, Esq.
Senior Vice President and General Counsel
Boehringer Ingelheim USA Corporation

Enclosure

cc (without enclosure):

Elizabeth H. Dickinson, J.D., Senior Deputy Chief Counsel, Office of the Chief Counsel
Elizabeth Jungman, J.D., Director, Office of Regulatory Policy
Sarah Yim, M.D., Director, Office of Therapeutic Biologics and Biosimilars
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