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1001 Pennsylvania Avenue NW
Washington, DC 20004-2595

May 13, 2020

Re: Docket No. FDA-2020-P-0368

Dear Mr. Fuson:

This letter responds to the citizen petition you submitted to the Food and Drug Administration (FDA or the Agency) on January 22, 2020 (Petition) on behalf of Crowell & Moring, LLP (Crowell & Moring). In the Petition, you request that the Agency:

> [R]efrain from finalizing the memorandum of understanding ("MOU") under section 503A(b)(3)(B)(i) [of the Federal Food, Drug, and Cosmetic Act) (21 U.S.C. 353a(b)(3)(B)(i))] or taking any regulatory action against compounders based on section 503A(b)(3)(B)(ii) that relies on a definition of "distribution" that includes "dispensing" unless and until FDA:
>
> (1) Promulgates a final regulation with such a definition consistent with the Administrative Procedure Act ("APA"), the Regulatory Flexibility Act ("RFA"), the Unfunded Mandates Reform Act ("UMRA"), the Congressional Review Act ("CRA"), the Paperwork Reduction Act ("PRA"), and Executive Orders ("EOs") 12866 and 13132; and
>
> (2) Issues a final guidance describing the conditions under which the Agency does not intend to take action against compounders, including specialty pharmacies, in states that have not signed the MOU, for distributing more than 5 percent of their compounded drug products interstate ("Five Percent Limit").

(Petition at 1-2 (footnote omitted).)

We have carefully considered the information submitted in the Petition. For the reasons below, the Petition is denied.

I. BACKGROUND

A. Statutory Background

Section 503A of the FD&C Act (21 U.S.C. 353a) describes the conditions that must be satisfied for drug products compounded by a licensed pharmacist in a state-licensed pharmacy or a Federal facility, or by a licensed physician, to be exempt from the following sections of the FD&C Act: (1) Section 501(a)(2)(B) (21 U.S.C. 351(a)(2)(B)) (concerning current good

manufacturing practice (CGMP) requirements); (2) section 502(f)(1) (21 U.S.C. 352(f)(1)) (concerning the labeling of drugs with adequate directions for use); and (3) section 505 (21 U.S.C. 355) (concerning the approval of drugs under new drug applications or abbreviated new drug applications).

A compounded drug product may be eligible for the exemptions under section 503A of the FD&C Act only if it is, among other things,

> . . . compounded for an identified individual patient based on the receipt of a valid prescription order or a notation, approved by the prescribing practitioner, on the prescription order that a compounded product is necessary for the identified patient.[1]

Drug products compounded under section 503A of the FD&C Act are not required to demonstrate that they are safe or effective, have labeling that bears adequate directions for use, or conform to CGMP. Congress, therefore, imposed strict limitations for drug products compounded under section 503A of the FD&C Act to protect the public health and the integrity of the drug approval process, including the requirement to have a valid prescription order or notation approved by the prescribing practitioner for an identified individual patient.

Another condition that must be satisfied for a drug product to qualify for the exemptions in section 503A of the FD&C Act pertains to strict limitations on the distribution interstate of drug products compounded under that section. This condition requires that: (1) the drug product is compounded in a State that has entered into an MOU with the Agency that addresses the distribution of inordinate amounts of compounded drug products interstate and provides for appropriate investigation by a State agency of complaints relating to compounded drug products distributed outside such State; or (2) if the drug product is compounded in a State that has not entered into the MOU, the licensed pharmacist, pharmacy, or physician does not distribute, or cause to be distributed, compounded drug products out of the State in which they are compounded in quantities that exceed 5 percent of the total prescription orders dispensed or distributed by such pharmacy or physician (Five Percent Limit).[2]

Section 503A(b)(3)(B) of the FD&C Act directs FDA to develop, in consultation with the National Association of Boards of Pharmacy (NABP), a standard MOU for use by the States in complying with section 503A(b)(3)(B)(i) of the FD&C Act.

B. Development of the Standard MOU

Although not required by the FD&C Act, throughout the process of developing the standard MOU in consultation with NABP, FDA has solicited public comment on the MOU, carefully considered these comments, and made significant changes to drafts of the MOU in an effort to address issues raised by comments. In the *Federal Register* of January 21, 1999 (64 FR 3301), FDA announced the availability for public comment a draft standard MOU, developed in consultation with NABP (1999 draft standard MOU). Over 6,000 commenters submitted comments on the 1999 draft standard MOU. Because of litigation over the constitutionality of

[1] See section 503A(a) of the FD&C Act.
[2] See section 503A(b)(3)(B)(i) and (b)(3)(B)(ii) of the FD&C Act.

the advertising, promotion, and solicitation provision in section 503A of the FD&C Act,[3] the draft standard MOU was not completed. In 2013, section 503A of the FD&C Act was amended by the Drug Quality and Security Act (DQSA) (Pub. L. 113-54) to remove the advertising, promotion, and solicitation provisions that were held unconstitutional, and FDA took steps to implement section 503A of the FD&C Act, including the provisions on the MOU.

In the *Federal Register* of February 19, 2015 (80 FR 8874), FDA withdrew the 1999 draft standard MOU and issued the 2015 draft standard MOU for public comment. FDA received more than 3,000 comments on the 2015 draft standard MOU. The 2015 draft standard MOU stated, in relevant part:

> For purposes of this MOU, a pharmacist, pharmacy, or physician has distributed an inordinate amount of compounded human drug products interstate if the number of units of compounded human drug products distributed interstate during any calendar month is equal to or greater than 30 percent of the number of units of compounded and noncompounded drug products distributed or dispensed both intrastate and interstate by such pharmacist, pharmacy, or physician during that month. Exception: For purposes of this MOU, FDA does not intend to include, in the consideration of inordinate amounts, prescriptions dispensed to a patient (or patient's agent), if the patient (or patient's agent) to whom the drug is dispensed carries the drug across State lines after it has been dispensed to the patient (or patient's agent) at the facility in which the drug was compounded.

The 2015 draft standard MOU defined the term *distribution* to mean that "a compounded human drug product has left the facility in which the drug was compounded." The definition continued, "[d]istribution includes delivery or shipment to a physician's office, hospital, or other health care setting for administration and dispensing to an agent of a patient or to a patient for the patient's own use."

In the *Federal Register* of September 10, 2018 (83 FR 45631), FDA withdrew the 2015 draft standard MOU and issued the 2018 revised draft standard MOU for public comment. FDA received dozens of comments during the comment period on the 2018 revised draft standard MOU. The 2018 revised draft standard MOU stated, in relevant part:

> For purposes of this MOU, a pharmacy or physician has distributed an inordinate amount of compounded drug products interstate if the number of prescription orders for compounded drug products distributed interstate during any calendar month is greater than 50 percent of the number of prescription orders for compounded drug products distributed or dispensed both intrastate and interstate by such pharmacy or physician during that month.

The 2018 revised draft standard MOU defined the term *distribution* to mean that "a compounder has sent a drug product out of the facility in which the drug was compounded." The definition continued, "[s]uch distribution may include, but is not limited to, delivery or shipment to a

[3] The conditions of section 503A of the FD&C Act originally included restrictions on the advertising or promotion of the compounding of any particular drug, class of drug, or type of drug and the solicitation of prescriptions for compounded drugs. These provisions were challenged in court and held unconstitutional by the U.S. Supreme Court in 2002. See *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357 (2002).

physician's office, hospital, or other health care setting for administration, and dispensing the drug product by sending it to a patient for the patient's own use."

In the notice of availability for the 2018 revised draft standard MOU, consistent with the notice for the 2015 draft standard MOU, the Agency proposed a 180-day period after the final standard MOU is made available for signature before FDA will enforce the 5 percent limit in States that have not signed the MOU, and invited public comment on whether this was an appropriate timeframe.

Concurrent with this letter, FDA is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (PRA) in connection with issuing a final standard MOU which the Agency, in consultation with NABP, developed for use by the States in complying with section 503A(b)(3)(B)(i) of the FD&C Act. The standard MOU that FDA intends to finalize, pending OMB approval of the associated information collection, states, in relevant part:

> For purposes of this MOU, a pharmacy has distributed an inordinate amount of compounded human drug products interstate if the number of prescription orders for compounded human drug products that the pharmacy distributed interstate during any calendar year is greater than 50 percent of the sum of:
>
> (i) the number of prescription orders for compounded human drug products that the pharmacy sent out of (or caused to be sent out of) the facility in which the drug products were compounded during that same calendar year; plus
>
> (ii) the number of prescription orders for compounded human drug products that were dispensed (e.g., picked up by a patient) at the facility in which they were compounded during that same calendar year.

The final standard MOU defines *distribution of compounded human drug products interstate* to mean that "a pharmacy or physician has sent (or caused to be sent) a compounded drug product out of the State in which the drug was compounded."

II. DISCUSSION

The Petition makes two requests regarding the Agency's implementation of section 503A(b)(3)(B) of the FD&C Act. Before finalizing the MOU, or taking action against a compounder under section 503A(b)(3)(B) that "relies on a definition of 'distribution' that includes 'dispensing,'" the Petition requests that the Agency: (1) promulgate a final regulation defining "distribution" for purposes of section 503A(b)(3)(B); and (2) issue a final guidance detailing an enforcement discretion policy for compounders in states that do not sign the MOU. (Petition at 1-2.) We address each of these requests below.

As a threshold matter, we note that, although the Petition's specific requests are for the Agency to undertake additional procedures before finalizing the MOU and beginning to enforce the 5 percent limit, much of the Petition is devoted to an examination and rejection of a definition of distribution that includes *dispensing*. As discussed further below, in this instance, the substance of the definition is immaterial to an analysis of

whether rulemaking is required. Nonetheless, to provide more context for the process the Agency has undertaken in developing the MOU consistent with the statute, we explain the thinking behind a meaning of distribution that includes dispensing for purposes of section 503A(b)(3)(B) via the Petition's framework.

A. Petition's Request for FDA to Define *Distribution* for Purposes of Section 503A(b)(3)(B) of the FD&C Act Through Rulemaking

In support of the first request, the Petition asserts that:

> FDA cannot lawfully finalize the MOU with a definition of 'distribution' that includes patient-specific dispensing without first promulgating that definition in a final rule consistent with the APA, CRA, RFA, UMRA, PRA, and EOs 12866 and 13132.

(Petition at 2.)

The Petition further states that FDA cannot "lawfully take regulatory action against compounders located in states that have not signed the MOU based on a definition of 'distribution' that includes dispensing without such a rule in place." (Id). The Petition states that "substantive rulemaking under the APA" is necessary because "the definition of 'distribution' [to include dispensing] invokes the Agency's statutory authority to modify a legal norm" and "creates new law, rights, and duties with a substantial, binding impact on the Agency, states, and compounders." (Petition at 8). In addition, the Petition states, "section 503A requires substantive rulemaking to implement section 503A(b)(3)(B)." (Id.)

As discussed in more detail below, we do not agree with Petitioner's assertion that a definition of "distribution" that includes dispensing, for purposes of section 503A(b)(3)(B), modifies legal norms, nor do we agree that it creates new law, rights, or duties beyond those included in section 503A itself. To the extent that legal norms are impacted, or that new law, rights, and duties are imposed regarding compounders who seek for their drugs to qualify for the exemptions in 503A, they are imposed by the statute itself. Additionally, section 503A(b)(3)(B) is clear that the process contemplated by Congress for implementing section 503A(b)(3)(B) is through the development of an MOU in consultation with NABP, not through rulemaking.

> (1) A definition of distribution that includes dispensing for purposes of section 503A(b)(3)(B), is, necessarily, consistent with the prescription requirement in section 503A

FDA disagrees with the characterization in the Petition that a definition of distribution that includes dispensing in the MOU "modifies federal and state legal norms that distribution and dispensing are distinct acts." (Petition at 2.) FDA also disagrees with the assertion in the Petition that a definition of "distribution" in the MOU that includes dispensing "imposes new, substantial, binding laws, rights, and duties on the states, industry, and itself." (Petition at 2.)

The Petition disagrees, substantively, with a definition of distribution that includes dispensing. The Petition argues that "the legal norm is for distribution to exclude dispensing and the MOU and Five Percent Limit to apply exclusively to office stock." (Petition at 10.) And that,

> [b]y drastically expanding the reach of the MOU and the Five Percent Limit from office stock to nearly all compounded drugs, FDA's proposed definition of 'distribution' would create new and substantial law, rights, and duties for the Agency, the states, and compounders who seek to operate under section 503A.

(Petition at 2.)

In other words, the Petition believes that the legal norm is not only that distribution and dispensing are distinct acts, but also that "distribution" excludes all dispensing *pursuant to a prescription* and that, because FDA's has proposed definitions of "distribution" that include some dispensing pursuant to a prescription, such a definition modifies the legal norm and thus creates new and substantial law, rights, and duties.

The Petition's approach, however, fails to take into account that the meaning of "distribution" for purposes of section 503A(b)(3)(B) of the FD&C Act must be consistent with the Congressional intent expressed in the language of section 503A of the FD&C Act. Specifically, the conditions set forth in section 503A of the FD&C Act, including section 503A(b)(3)(B), must be interpreted consistent with the prescription requirement in section 503A(a) of the FD&C Act. As noted above, a compounded drug product may be eligible for the exemptions under section 503A of the FD&C Act only if it is, among other things:

> . . . compounded for an identified individual patient based on the receipt of a valid prescription order or a notation, approved by the prescribing practitioner, on the prescription order that a compounded product is necessary for the identified patient.[4]

The prescription requirement under section 503A of the FD&C Act is a critical mechanism for distinguishing compounding by a licensed pharmacist or licensed physician from conventional manufacturing. Such requirement helps to ensure that drug products compounded under section 503A of the FD&C Act, which are not FDA-approved, are not subject to the requirement that labeling bear adequate directions for use, and are not subject to CGMP requirements, are provided to a patient only based on individual patient need.

We acknowledge that there are Federal and State laws that explicitly define distribution to exclude dispensing when that definition furthers a regulatory purpose. However, we do not agree that there is a clear "legal norm" that Congress intended to apply here, particularly the norm identified by petitioners.

It is notable that Congress declined to define either of these terms in section 503A of the FD&C Act, as it has done elsewhere,[5] instead leaving explicit instructions for FDA to develop an MOU

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[4] For additional discussion of the prescription requirement, see the December 2016 guidance for industry *Prescription Requirement Under Section 503A of the Federal Food, Drug, and Cosmetic Act*, available at the FDA web page at https://www fda.gov/files/drugs/published/Prescription-Requirement-Under-Section-503A-of-the-Federal-Food--Drug--and-Cosmetic-Act-Guidance-for-Industry.pdf.

[5] In other (non-compounding) contexts, where it would further a regulatory purpose, Congress and the Agency have specifically defined *distribute* to exclude dispensing. See, for example, section 581(5) of the FD&C Act (21 U.S.C.

that addresses certain "distribution" of compounded drugs. In order to develop a standard MOU that addresses the distribution of inordinate amounts of compounded drug products interstate and provides for appropriate investigation by a state agency of complaints relating to compounded drug products distributed outside such state, FDA must explain what the terms *distribution* and *inordinate amounts* mean and provide a mechanism for addressing distribution of inordinate amounts of compounded human drug products interstate. Thus, in order to fulfill the statutory requirement to develop the MOU in section 503A(b)(3)(B) of the FD&C Act, and to implement the prescription requirement in section 503A(a) of the FD&C Act, FDA is necessarily interpreting the terms *dispense* and *distribute* to have different, but overlapping meanings, with the requirement to have a prescription for an identified individual patient as the common thread.

Consistency with the prescription requirement precludes a definition of *distribution* like that implied by Petition, which excludes dispensing pursuant to a prescription. If FDA were to interpret the word *distribution* to apply only if a compounded drug is provided without a prescription, as suggested by the Petition, it would mean that drug products compounded under section 503A of the FD&C Act that are considered to be dispensed pursuant to a prescription are excluded from regulation under the MOU and the 5 percent limit. The text of section 503A(b)(3)(B)(ii) of the FD&C Act is clear on its face that Congress specifically contemplated that prescription orders could be "distributed" when it directed the Agency to count "the total prescription orders dispensed or *distributed*..." (emphasis added). Further, a definition of *distribution* that includes dispensing is also consistent with the ordinary meaning of *distribute*; it is natural to say that an entity compounding under section 503A of the FD&C Act distributes the drugs it makes pursuant to prescriptions, just as the manufacturers of other regulated articles are said to distribute their products to their customers.

To the extent that legal norms are modified, and new laws, rights, and duties are imposed regarding compounders who seek for their drugs to qualify for the exemptions in 503A of the FD&C Act, they are imposed by the statute itself. The definitions in the final standard MOU merely implement the conditions set forth in section 503A of the FD&C Act.

(2) Section 503A of the FD&C Act indicates when rulemaking is required and specifically contemplates a different process for implementing section 503A(b)(3)(B)

Contrary to the Petition's suggestion, section 503A(c) of the FD&C Act does not require the Agency to implement section 503A(b)(3)(B) of the FD&C Act through rulemaking. Section 503A(b)(3) of the FD&C Act specifies the process for FDA to follow for developing a standard MOU:

360eee(5)), which applies to Title II of the DQSA, and 21 CFR 208.3, which applies to 21 CFR part 208 of our regulations. Section 503A of the FD&C Act does not contain a similar definition, or a similar specific direction, to exclude *dispensing* from the meaning of *distribution*. We also note that these definitions were adopted for provisions that focus on conventionally manufactured drug products, which assign different obligations to dispensers than to wholesalers, packagers, or other intermediaries in light of the different role that dispensers play with respect to product labeling and the drug distribution chain. In contrast, section 503A of the FD&C Act focuses on compounded drugs, and the reasons for defining *distribution* to exclude *dispensing* in Title II of the DQSA or part 208 do not apply.

> The Secretary shall, in consultation with the National Association of Boards of Pharmacy, develop a standard memorandum of understanding for use by the States in complying with subparagraph (B)(i).[6]

There is no indication that Congress intended to require that FDA define terms used in the MOU through regulation, as opposed to defining those terms in the MOU itself. The Conference Report for the 1997 version (H. Rept. 105-399) stated:

> The memorandum of understanding described in Paragraph (b)(3)(B)(i) shall provide guidance on the meaning of inordinate amounts, including any circumstances under which the compounding of drug products for interstate shipment in excess of 5 percent of total prescription orders would be included in a 'safe harbor' of interstate shipments of compounded products that shall not be deemed inordinate.

In contrast, Congress was explicit that rulemaking is required to implement certain other provisions of 503A of the FD&C Act. Section 503A(b)(1)(A)(i)(III) of the FD&C Act provides that the list of bulk drug substances that may be used in compounding, although they are neither the subject of an applicable United States Pharmacopeia (USP) or National Formulary (NF) monograph nor components of FDA-approved drugs, is to be "developed by the Secretary through regulations issued by the Secretary under subsection (c)." Similarly, section 503A(b)(1)(C) of the FD&C Act provides that the list of drug products that have been withdrawn or removed from the market because such drug products or components of such drug products have been found to be unsafe or not effective is to be "published by the Secretary in the Federal Register." Section 503A(b)(3)(A) of the FD&C Act excludes compounded drug products from qualifying for the exemptions under section 503A of the FD&C Act if they are "identified by the Secretary by regulation" as presenting "demonstrable difficulties for compounding that reasonably demonstrate an adverse effect on the safety or effectiveness of that drug product." There is no comparable statutory rulemaking requirement in section 503A(b)(3)(B) of the FD&C Act.

Even if the statute was not clear that the implementation of section 503A(b)(3)(B) of the FD&C Act does not require rulemaking, FDA is not required to undertake notice-and-comment rulemaking here because the standard MOU is not a legislative rule.

As an initial matter, it is not clear that the standard MOU is a "rule" at all under the APA. The standard MOU represents an agreement between FDA and state agencies concerning certain actions states will take and information they will share related to compounded drug products. It is nonbinding and does not purport to regulate conduct.[7] Thus, the MOU does not obviously fall within the definition of a *rule*.[8]

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[6] Section 503A(b)(3) of the FD&C Act.

[7] See, e.g., FDA Staff Manual Guide 2820.1 at 2 ("MOUs are non-binding collaborative instruments").

[8] See 5 U.S.C. 551(4) (defining a rule as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"); Attorney General's Manual on the Administrative Procedure Act at 14 (1947) ("Rule making is agency action which regulates the future conduct of either groups of persons or a single person").

Even assuming the standard MOU were a rule, it is not a legislative rule subject to notice and comment rulemaking under the APA.[9] The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has explained that a legislative rule is "[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties." See *National Mining Assn. v. McCarthy*, 758 F. 3d 243, 251-252 (D.C. Cir. 2014).

No final standard MOU under section 503A of the FD&C Act executed by FDA and a State will have the force and effect of law or impose obligations on regulated parties. As mentioned above, the MOU represents a nonbinding agreement between FDA and state entities describing the circumstances under which states will share information with FDA and the actions they will take related to certain drug products compounded in their state. The MOU explains the meaning of the statutory phrase "distribution of inordinate amounts of compounded human drug products interstate" for purposes of certain information-sharing. This agreement, however, does not affect legal norms, laws, rights, or duties related to compounding. In fact, the MOU specifies that FDA and the state entities "retain the statutory and regulatory authorities provided by the FD&C Act, other Federal statutes and attendant regulations, and State statutes and regulations" and that "the agreement does not restrict FDA or any other Federal agency from taking enforcement action . . . or prevent the [state entity] from taking enforcement action." It also provides that "[t]his MOU does not create or confer any rights for or on any person." The agreement provides for coordination and cooperation between FDA and the states, but does not have the type of legal effect that triggers notice and comment requirements under the APA.[10] See *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 669 (4th Cir. 1977) (holding that that a memorandum of understanding was not a legislative rule because it did not "make[] a substantive impact on the rights and duties of the person subject to regulation").

The Petition contends that a definition of *distribution* that includes dispensing in the MOU "would require states that enter into the MOU to collect and review information about nearly all of the drugs that pharmacies in their state compound and dispense interstate to individual patients" and "would require compounders located in states that do not enter into the MOU to observe the Five Percent Limit." (Petition at 2). As noted above, the MOU is nonbinding and therefore does not "require" any state actions. Even if the MOU were binding, it would not trigger the need for notice and comment rulemaking because the MOU would not "impose legally binding obligations or prohibitions *on regulated parties*."[11] Finally, with respect to the Petition's argument concerning the Five Percent Limit, it is the statute rather than the MOU that requires compounders located in states that do not enter into the MOU to observe the Five Percent Limit in order for their drugs to qualify for the exemptions in section 503A of the FD&C Act. *See* Section 503A(b)(3)(B)(ii) (drug products may be compounded under 503A(a) if they are "compounded in a State . . . that has not entered into the memorandum of understanding described in clause (i) and the [compounder] distributes (or causes to be distributed)

[9] See 5 U.S.C. 553(b)-(c). Legislative rules are those which have "the force and effect of law." See Attorney General's Manual at 30, n. 3.

[10] While we recognize that the *existence* of an MOU under 503A(b)(3) fulfills one of the conditions for exemption under 503A(a), and thus has legal effect, that effect is created by the statute and does not mean that the MOU's contents constitute a legislative rule.

[11] See *National Mining Assn. v. McCarthy*, 758 F. 3d 243, 251-252 (D.C. Cir. 2014).

compounded drug products . . . in quantities that do not exceed 5 percent of the total prescription orders dispensed or distributed…").

FDA has followed the process set forth by Congress to implement section 503A(b)(3)(B) of the FD&C Act, including explaining the meaning of applicable terms included in the statute consistent with the prescription requirement in Section 503A of the FD&C Act. Even though notice and comment rulemaking is not required here, as the Petition suggests, in addition to implementing the statute as Congress intended, FDA has voluntarily solicited feedback from the public through multiple *Federal Register* notices, reviewed the comments, made changes, and explained those changes in a process similar to rulemaking.

(3) FDA has provided ample opportunities for comment on the MOU

The Petition asserts that the 2015 draft standard MOU, the 2018 revised draft standard MOU, and notices of availability "failed to provide interested persons adequate notice and a meaningful opportunity to comment . . . [and deprived] small businesses, the states, Congress, the Office of Management and Budget ("OMB"), and the public more generally of the opportunity to fully evaluate the damaging impact of the proposed definition and suggest less detrimental alternatives." (Petition at 14.)

As explained above, section 503A(b)(3)(B) clearly sets forth parameters for developing the MOU outside of rulemaking. Nonetheless, the Agency has voluntarily provided ample notice and opportunity to comment on the draft MOUs and related issues. FDA issued the 2015 draft standard MOU for public comment on February 19, 2015 (80 FR 8874). The Agency issued the 2018 revised draft standard MOU for public comment on September 10, 2018 (83 FR 45631). In developing the MOU, FDA has made significant changes based on careful consideration of comments received. As noted by Petition, FDA received numerous comments regarding the relationship between distribution and dispensing.[12] FDA carefully considered these comments and has explained how the Agency addressed comments received with each notice accompanying the draft MOUs, and plans to provide explanations in the notice accompanying the final MOU for significant changes from the 2018 revised draft MOU.

(4) Because rulemaking is not required here, analyses that generally accompany rulemaking are not applicable.

The Petition asserts that rulemaking is required and that the MOU and NOA failed to comport with the RFA, UMRA, CRA, PRA, and Executive Orders 12866 and 131332, thereby depriving small businesses, the states, Congress, OMB, and the public more generally of the opportunity to fully evaluate the "damaging impact" of the proposed definition and suggest less detrimental alternatives. (Petition at 14). As noted above, concurrent with this response, FDA is submitting a proposed collection of information to OMB for review and clearance under the PRA in connection with the standard MOU. However, because the standard MOU for use by the states

[12] See, for example, comments from Sentara Home Infusion Pharmacy Services (FDA-2018-N-3065-0041); Professional Compounding Centers of America (FDA-2018-N-3065-0033 and 0034); Reed Smith LLP (FDA-2018-N-3065-0029); American Pharmacists Association (FDA-2018-N-3065-0026).

in complying with section 503A(b)(3)(B)(i) of the FD&C Act is not developed through regulations, the rulemaking requirements referenced in the Petition are not applicable.[13]

B. Requested Enforcement Policy

The Petition also proposes a new guidance that would describe certain enforcement policies applicable to compounders located in states that have not signed the MOU with FDA. (Petition at 23.)

The Petition requests that FDA issue a final guidance describing the conditions under which the Agency does not intend to take action against compounders, including specialty pharmacies, in states that have not signed the MOU, for distributing more than 5 percent of their compounded drug products interstate. (Petition at 2.) The Petition further expresses concern that states interested in signing the MOU

> . . . will need time to promulgate new laws or regulations to require pharmacies to supply the information being requested. Enforcing the Five Percent Limit against pharmacies in such states would be counterproductive when the state is actively working to adopt the necessary authorities to sign the MOU.

(Petition at 23.)

At this time, we are not adopting the Petition's proposed guidance. On July 2, 2014, FDA published a final guidance titled *Pharmacy Compounding of Human Drug Products Under Section 503A of the Federal Food, Drug, and Cosmetic Act* (see 79 FR 37742, announcing the availability of the guidance). The guidance states that FDA does not intend to enforce the 5 percent limit on distribution of compounded drug products out of the State in which they are compounded until after FDA has finalized an MOU and made it available to the States for their consideration and signature.[14] In section 503A of the FD&C Act, Congress enacted several conditions to differentiate compounders from conventional manufacturers and provided that only if compounders meet those conditions can the compounders qualify for exemptions from certain requirements in the FD&C Act. FDA intends to enforce the statutory limitations to address distribution of compounded drug products interstate. FDA intends to apply the statutory conditions to all types of drugs and all categories of compounding.

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[13] See 2 U.S.C. 1532 (statements to accompany significant regulatory actions under the UMRA); 5 U.S.C. 553 (rulemaking provisions of the APA), 603-604 (regulatory flexibility analysis requirements), 801 (congressional review provisions under the CRA); see also Executive Orders 12866 (regarding assessment of costs and benefits of available regulatory alternatives) and 13132 (regarding federalism implications).

[14] The Petition notes that 180 days, as proposed in 2015 and 2018, for states to consider the MOU once the final MOU is made available for signature, before FDA intends to enforce the 5 percent statutory limit, is "far too short a time period." FDA received comments on the 2018 revised draft MOU that this time period was too short, and, in consideration of the comments, FDA intends to increase the amount of time after the final standard MOU is available for signature from 180 days to 365 days before FDA intends to enforce the 5 percent limit in States that have not signed the final standard MOU.

III. CONCLUSION

For the reasons stated above, the Petition is denied.

Sincerely,

Douglas C. Throckmorton -S

Digitally signed by Douglas C. Throckmorton -S
DN: c=US, o=U.S. Government, ou=HHS, ou=FDA, ou=People, 0.9.2342.19200300.100.1.1=1300121270, cn=Douglas C. Throckmorton -S
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Janet Woodcock, M.D.
Director
Center for Drug Evaluation and Research