AMA
AMERICAN MEDICAL ASSOCIATION

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The Honorable Tom Harkin
Chairman
Health, Education, Labor and
Pension Committee
731 Senate Hart Building
Washington, DC 20510

The Honorable Mike Enzi
Ranking Member
Health, Education, Labor and
Pension Committee
379 Senate Russell Building
Washington, DC 20510

Dear Chairman Harkin and Ranking Member Enzi:

On behalf of the physician and medical student members of the American Medical Association (AMA), I appreciate the opportunity to provide comments on the Senate Health, Education, Labor and Pensions (HELP) Committee bipartisan working group's discussion draft concerning drug shortages. The AMA applauds your leadership and efforts to address the alarming increase in drug shortages. While the draft represents a significant step forward, we strongly urge the working group to consider the concerns we have highlighted and adopt the recommendations offered below.

Background

A growing number of physicians from across medical specialties and geographic regions in the country and their patients have struggled to ameliorate the adverse outcomes that result when patients are unable to access needed medication and treatment. Shortages not only impact the well-being of patients, they increase health care costs and divert scarce resources needed to improve quality and patient outcomes. In some cases, previously stabilized patients have not responded well to alternative medication or experienced adverse side effects of varying degrees. Also, some patients have been forced to delay treatment as their condition worsens, while physicians and other members of the patient's health care team have struggled to find viable alternatives. As we grapple with policies, programs, strategies and formulas to improve patient outcomes, widespread concern exists among physicians that the basic tools for providing effective medical care—prescription medicines—are increasingly in short supply. The resources needed to avert or ameliorate the harm are increased when physicians and patients have little to no warning of a shortage.

Early Notification

The AMA supports legislation that would require all manufacturers of Food and Drug Administration (FDA) approved drugs to give the agency advance notice of anticipated voluntary or involuntary, permanent or temporary, discontinuance of manufacture or marketing of such a product. We appreciate the working group's effort to reach a consensus and establish applicable criteria for such advanced notice. We support this approach over an approach that would direct the FDA to generate a

critical drug list that could rapidly become obsolete. However, the decision to only include drugs that are (a) life supporting, (b) life-sustaining, or (c) intended for use in the prevention of a debilitating disease or condition, may exclude drugs essential to basic medical care such as anesthetics or pain medications designed for surgical use or to alleviate human suffering. We strongly urge the working group to require manufacturers of products subject to 21 U.S.C. section 503(b)(1) to provide advance notice of a shortage. By requiring all manufacturers of drugs covered by section 503(b)(1) to report, the potential for ambiguity or confusion is removed. It also maximizes the ability of the FDA to dedicate its limited resources to mitigate or avert shortages that are of greatest concern. Furthermore, it ensures that physicians and patients who are confronted with the shortage crisis are not left at a disadvantage if a drug is not covered by the current draft language. Even though a drug may not appear to meet the proposed criteria, patients with co-morbidities and their physicians who have established a unique and specific balance in the patient's medication regimen may reach a very different conclusion about whether a medication should be covered by the criteria.

We strongly support early notification because it has proven effective in mitigating and averting shortages. The FDA reports that 195 shortages were avoided because of early notification in 2011. We thank the working group for including this in the draft. Nonetheless, we remain concerned that manufacturers may not report because consequences for failing to report are lacking. To ensure compliance, we urge the working group to provide the FDA with the discretion to impose civil monetary penalties (CMPs) where there is evidence that a manufacturer knowingly and willfully fails to report or otherwise provide for an alternative enforcement mechanism to ensure compliance.

Reduction in the Notification Period

The draft outlines exceptions to the early notification process, specifically for a manufacturer certifying to the FDA that good cause exists. This exception could create additional confusion, more bureaucracy, and could limit the FDA's ability to address drug shortages. The exception listed under (D), "economic hardship," would be troublesome if it were a sole source manufacturer of a life saving product that did not have to report to the FDA under the guise of "economic hardship." We agree with other stakeholders that a manufacturer's economic hardship does not outweigh an untimely death or serious adverse outcome due to a medication in short supply that was not mitigated because advance notice was not provided. We ask that the working group reconsider this exception, especially since (E) provides an exception for a bankruptcy filing. However, we defer to the FDA on whether this section would create significant paperwork burdens on the agency due to increased requests for exceptions to the notification requirements.

Task Force

We strongly support the creation of a task force to promote both inter- and intra-agency coordination, communication, planning, and decision-making. We recommend that stakeholders have an opportunity to participate in task force meetings or communications to the extent that this does not compromise proprietary information. We believe it is essential for FDA and other agencies to regularly hear from clinicians, patients and supply chain members, as their participation and input would be extremely valuable.

Congressional Reporting

We support requiring the FDA to also collect the names of manufacturers that did not comply with the early notification requirement. However, if the CMPs are not included in the final version of the legislation, we recommend that this provision require the list of non-compliant manufacturers be made publicly available. Furthermore, to ensure early notification compliance, we encourage Congress to consider language specifying that upon receipt of the list, committees of jurisdiction will receive justification from those non-compliant manufacturers.

Definitions

We urge the working group to consider an alternative to "meaningful disruption" and utilize the "interruption" definition contained in H.R. 2245, "Preserving Access to Life-Saving Medications Act." H.R. 2245 provides that:

> [t]he term "interruption" means a change that—
>
> (A) may result in the total supply of a drug manufactured by the individual manufacturer not meeting average historic demand; and
> (B) consists of—
>
> > (i) a change in the supply of one or more raw materials, including active pharmaceutical ingredients;
> > (ii) an unplanned interruption in ability to produce the drug;
> > (iii) a business decision affecting the manufacture of the drug, such as a merger or a change in production output; or
> > (iv) any other type change that could have the result described in subparagraph (A), as determined by the Secretary.

The H.R. 2245 definition, developed with significant input from industry, provides a bright line rule for when manufacturers are required to report and is based upon average historic demand, rather than the terms "highly likely" and "negligible," which are subjective and open to interpretation.

Public Notification

We strongly urge the working group to mandate that the FDA provide public notice of a shortage and amend the relevant provision by replacing "may" with "shall." Public notification is essential for a physician's advance planning in patient care caused by a drug shortage. Furthermore, we ask that the working group consider adding additional criteria in the distribution of information. For example, the name of the drug in shortage, the name of each manufacturer, reason for the shortage, and anticipated duration of the shortage as determined by the Secretary. We realize that all of this information may not be available to distribute, but to the extent that it's practicable, we ask that it be included.

Inclusion of Biological Products

We strongly support the inclusion of both biologics and biosimilar products within the discussion draft. This will become increasingly critical as the development and approval of biosimilar products

for use in the United States become more prevalent. We commend the working group's efforts to include biological products.

Items Not Included in the Draft

We are aware of the HELP Committee's potential jurisdictional challenges with regard to Drug Enforcement Administration (DEA) issues. Nonetheless, in light of the severity and scope of drug shortages, we urge the working group to work with the Senate Judiciary Committee on this matter in order to address at least one barrier: lack of authorizing language that allows the FDA and DEA to work collaboratively and provide flexibility where needed in the development of quotas for manufacturers producing controlled drugs.

Furthermore, given the additional authority and requirements of FDA to promulgate rules, develop guidance, strategic planning, and convene a task force, we ask that consideration be given to the resource constraints of the FDA. We appreciate that this is authorizing legislation, but we ask that consideration be given to include language that expresses the sense of the Senate that additional resources be allocated to FDA to address drug shortages.

Conclusion

We appreciate the efforts of Congress to identify the underlying causes of prescription drug shortages as well as the working group's efforts to mitigate or avert such shortages. Unfortunately, the preliminary research strongly indicates that current demand will exceed manufacturer capacity. This suggests that averting and mitigating shortages will remain challenging in the foreseeable future. Until the underlying causes of shortages—which appear to be complex and not open to immediate and obvious solutions—are resolved, physicians and patients urgently need as much time and advance notice as possible to prepare for shortages.

Sincerely,

James L. Madara, MD