December 22, 2008

SUBMITTED ELECTRONICALLY

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex F)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Emerging Health Care Competition and Consumer Issues – Comment, Project No. P083901

Dear Chairman Kovacic and Commissioners:

CVS Caremark Corporation appreciated the opportunity to participate in the Federal Trade Commission's Roundtable on Follow-On Biologic Drugs: Framework for Competition and Continued Innovation on November 21, 2008. We are pleased to provide in this correspondence our formal comments concerning the competitive effects of follow-on biologics, in response to the FTC's relevant notice requesting input on certain enumerated issues, 73 Fed. Reg. 51479 (Sept. 3, 2008).

I. Background about CVS Caremark

CVS Caremark is the largest provider of prescriptions and related health care services in the nation. The company fills or manages more than one billion prescriptions annually through its approximately 6,800 CVS retail pharmacy stores, specialty pharmacy division, PBM retail network pharmacies, mail order facilities, and online pharmacy. We are the country's largest specialty pharmacy, serving the needs of people who require complex or ongoing therapies for conditions such as hemophilia, multiple sclerosis, HIV/AIDS, cancer, and organ transplant. Our pharmacy benefit management services deliver effective prescription drug cost-control strategies for numerous *Fortune* 1000 employers, health plans, and other PBM clients. CVS Caremark also offers medical care directly to patients at our more than 500 retail-based acute care health clinics, MinuteClinic™.

CVS Caremark's capabilities and leadership in clinical and health management programs and specialty pharmacy expertise give us perspective on the incentives and operations of pharmaceutical manufacturers and health care payors. In addition, our knowledge of the consumer gained through the four million plus customers who visit CVS pharmacies daily uniquely positions CVS Caremark to respond to the FTC's request for formal

comments and continue to contribute to its study of potential mechanisms for promoting competition and innovation in the field of follow-on biologic drugs.

II. Comments of CVS Caremark about the Promotion of Competition and Innovation in Follow-On Biologics

A. Competition from Follow-On Biologics Will Provide Patients with Affordable Medicines and Generate Cost Savings for the U.S. Health Care System

As the FTC is well aware, biological drugs offer the prospect of addressing major medical needs not met by traditional pharmaceutical drugs (a/k/a small molecule drugs), including cures for anemia and cancer. Although some companies have been producing biologics for approximately twenty years, the biologic market is still in its infancy. Unfortunately, unlike traditional pharmaceutical drugs, there is currently no special legal framework to encourage innovation or competition for biologics. As a result, the number of competing biological products is relatively small, and they are extremely expensive for patients, as well as for and public and private payors.

Experience with the Hatch-Waxman Act passed in 1984[1] and its role in promoting generic pharmaceutical competition clearly demonstrates that a data exclusivity period for innovator drugs, an abbreviated approval process, and limited marketing exclusivity period for generic drugs spur innovation and competition. This balanced approach benefits consumers by increasing available options and substantially lowering the price of drugs. In fact, at least one study has suggested the availability of generic drugs saves consumers approximately $8 to 10 billion each year.[2]

CVS Caremark believes that a regulatory structure that permits the market entry of generic versions of innovator biologic medicines will also be pro-competitive and pro-consumer. CVS Caremark applauds the efforts of the FTC in this area, and encourages the incoming Administration to advocate for, and the new Congress to analyze and adopt, appropriate laws that establish a data exclusivity period for innovator biologics and an abbreviated approval pathway for follow-on biologics.

As many commentators and studies have discussed, the entry of follow-on biologic competitors is likely to create substantial savings for consumers. Indeed, *even the most conservative* studies estimate savings of at least $2 billion over a ten-year time period.[3]

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[1] 15 U.S.C. §§ 68b-68c, 70b; 21 U.S.C. §§ 301 note, 355, 360cc; 28 U.S.C. § 2201; 35 U.S.C. §§ 156, 271, 282.

[2] *See* Congressional Budget Office, *How Increased Competition from Generic Drugs Has Affected Prices and Returns in the Pharmaceutical Industry,* July 1998 ("CBO Report I"), *available at* http://www.cbo.gov/ftpdocs/6xx/doc655/pharm.pdf.

[3] *See* Howrey LLP, CAP Analysis & PhRMA, *The Inflated Projections of Potential Cost Savings from Follow-on Biologics: An Analysis of the Express Scripts and Engel & Novitt Reports*, May 2007 (estimating $2 to $2.8 billion in savings). Other studies have calculated the potential savings as much higher than $2 billion. *See, e.g.*, Robert J. Shapiro, *The Potential American Market for Generic Biological Treatments and the Associated Cost Savings*, February 2008 ("Shapiro Report"), *available at* http://www.insmed.com/pdf/Biogeneric_Savings.pdf (calculating savings of $67 billion to $108 billion

CVS Caremark also believes that large companies with substantial resources will start to enter the market for follow-on biologics if a data exclusivity period for innovator biologics and an abbreviated approval pathway for follow-on biologics are established. Currently there are fewer companies competing or primed to compete in the market for biologic drugs as compared to small molecule drugs, and these companies are generally smaller companies highly dependent on outside investment. Implementation of a data exclusivity period for innovator drugs and a regulatory pathway for follow-on biologics is likely to attract competitors to the market for biological drugs. This process may have already begun, with Merck & Co. recently announcing its entrance into the follow-on biologics market in anticipation of the development of legislative and regulatory incentives in this area.[4] The increased incentives for development for these large companies, as well as for smaller manufacturers, should help spur innovation and the market penetration of follow-on biologics, which will promote competition and price reductions.[5]

B. A Dedicated Regulatory Framework for Follow-On Biologics Is Necessary Given the Dynamics of the Biologics Sector

Although the availability of lower-cost versions of biologics will increase patient access to life-saving medicines, CVS Caremark believes that, for a variety of reasons unique to the biologics sector, the success of follow-on biologics will not equal or be as fast as that of generic small molecule drugs. In fact, regardless of the specifics of a new regulatory structure, market penetration by and cost savings from follow-on biologics are anticipated to be slower and less widespread than that seen with generic small molecule drugs, as studies have shown.[6] The anticipated level of success of follow-on biologics, however, should not deter creation of new authority to promote follow-on biologics, but rather counsel in favor of jump-starting that regime.

1. The High Cost of Follow-On Biologics Will Slow Market Penetration.

Biologic drugs are extremely expensive both for the pharmaceutical companies to develop and patients to purchase, limiting their utilization. This is because biologics are difficult and costly to make. They also require the investment of high fixed costs. As a

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over the first ten years and $236 billion to $378 billion over 20 years); Congressional Budget Office, *S. 1695, Biologics Price Competition and Innovation Act of 2007*, June 2008 ("CBO Report II") (estimating $25 billion in reduction of biologics expenditures over 2009-18 period); *see also* Avalere Health, LLC, *Modeling Federal Cost Savings from Follow-on Biologics*, April 2007 (estimating $3.6 billion in federal savings); Grabowski, Henry, *et al.*, *The Effect on Federal Spending of Legislation Creating a Regulatory Framework for Follow-on Biologics: Key Issues and Assumptions*, Aug. 2007 (estimating similar savings).

[4] *See* Wall Street Journal, *Merck to Develop Biotech Generics*, Dec. 10, 2008. Eli Lilly & Co. recently announced it too is considering entry into the follow-on biologics market. *See* The Star-Ledger (Newark, N.J.), *Eli Lilly Latest to Explore Biologics*, Dec. 12, 2008.

[5] *See generally* Remarks of FTC Comm'r Pamela Jones Harbour at Intellectual Property Antitrust: Strategic Choices, Evolving Standards and Practical Solutions, ABA Sections of Antitrust and Intellectual Property Law, *The Competitive Implications of Generic Biologics* (June 14, 2007), *available at* http://www.ftc.gov/speeches/harbour/070614genbio.pdf.

[6] *See e.g.*, CBO Report II (finding approximately two-thirds of estimated $5.9 billion savings will not occur until last two years of ten-year window).

result, a typical biologic costs tens, or even hundreds, of thousands of dollars per patient per year.[7]

In the small molecule drug market, PBMs have played a significant role in helping generics achieve rapid market penetration, leading to price reductions of 80 percent or more compared to innovator drugs.[8] Given that experience, CVS Caremark stands ready to help make follow-on biologics as accessible and affordable as possible for millions of patients. Unfortunately, the price of follow-on biological drugs is expected to be closer to that of the innovator drugs than the current generic marketing experience, as the manufacturing burdens are unlikely to be substantially reduced, even with more streamlined regulatory approval processes.[9] Moreover, the manufacturing costs of biologics and other specialty drugs are only expected to go up in the future. Given the high cost of follow-on biologics and the anticipated lack of a large-scale price difference with the innovator product, the market penetration rate of follow-on biologics is anticipated to lag behind the pace set by generic small molecule drugs.

2. *The Interchangeability of Follow-On Biologics Will Impact Their Market Penetration.*

As discussed by many commentators, unlike small molecule drugs, follow-on biologics necessarily require different cells and manufacturing processes from their respective innovator products. However, if the Food and Drug Administration is authorized to designate a follow-on drug as therapeutically interchangeable with an innovator drug, that would accelerate the adoption and use of the follow-on biologic, as is discussed in more detail below. It is likely, though, that some physicians might continue to prescribe exclusive use of the innovator drug due to the lack of identicalness, thus reducing potential benefits of follow-on biologic entry.

In any event, given the uncertainty surrounding the equivalence of innovator and follow-on biologics, PBMs, payors, and physicians are more likely to be focused on clinical information and to dialogue about the prudence of switching to a particular follow-on biologic or innovator drug. This ad hoc, non-uniform approach will ultimately drive the adoption of follow-on biologics, but at a slower pace than seen with generic small molecule drugs.

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[7] *See* AARP Public Policy Institute, *Rx Watchdog Report – Trends in Manufacturer Prices of Specialty Prescription Drugs Used by Medicare Beneficiaries, 2004 to 2007*, Sept. 2008, *available at* http://assets.aarp.org/rgcenter/health/2008_15_specialty_q407.pdf (summarizing the increase in manufacturer prices of specialty drugs, including biologics).

[8] Numerous studies and reports have documented the rapid market penetration and substantial price discounts of generic small molecule drugs. *See, e.g.*, Shapiro Report at 2-3 (noting Prozac's loss of eighty percent market share within two months, and that generic version of Zantac sells at about ten percent of the branded drug); CBO Report I at 36 (finding "the average price of a generic prescription was approximately half of the average price of a brand-name prescription").

[9] *See Amgen Comments: Emerging Health Care Competition and Consumer Issues*, at 5 n.5 (Sept. 30, 2008) (listing various reports on cost), *available at* http://www.ftc.gov/os/comments/healthcarecompissues/537778-00011.pdf.

3. *The Treatment Setting Affiliated with Follow-On Biologics Will Affect Their Market Penetration.*

Biologic drugs are primarily injectable and must be combined with many ancillary services, including injection training. Putting aside any issues related to the cost or reimbursement level for the actual drug, these services usually require patient, nurse, and/or physician competency and training. If switching a patient to a follow-on biologic will require re-training by the provider, which is expected, this may dissuade patients, nurses, and physicians from large-scale or immediate switching, particularly for existing patients currently on the innovator drug. This additional training could be a subtle, but real, obstacle to market penetration of follow-on biologics. In addition, because a sizable amount of biologics will be dispensed in inpatient settings as opposed to retail pharmacies, the effect of traditional payor strategies vis-à-vis retail pharmacies will be limited.

4. *The Rapid Growth of Biologic Treatments Will Amplify These Dynamics.*

The portion of drug prescriptions and sales in the United States attributable to specialty treatments, including biologics, has increased dramatically in recent years. CVS Caremark itself has seen the relative share of specialty pharmaceuticals increase from 5.9 percent of its sales in 2004 to almost 10 percent last year. Regardless of the medical benefits available from the development of new treatments, this rapid growth has resulted in substantial increases in health care costs for payors and patients alike. And, as noted, it is likely that such trends will only continue, and increase, in future years. Thus, it is important for attention to be paid to the different factors affecting biologic usage as part of the development of regulatory structures for follow-on biologics.

In sum, although market penetration and adoption of follow-on biologics is likely to occur if the follow-on drug is less expensive and proven to be therapeutically interchangeable with the innovator biologic, CVS Caremark expects market penetration of follow-on biological drugs to be slower than that of generic small molecule drugs due to the unique characteristics of biologics. This limited success makes it all the more important that the new Administration advocate and Congress quickly implement legislation that, among other aspects, clearly establishes an appropriate exclusivity period for innovator biological drugs and a pathway for follow-on biologics to obtain abbreviated approval so that enhanced competition and consumer benefits can be achieved.

C. To Achieve the Benefits of Competition, A New Regulatory Framework for Follow-On Biologics Should Be Tailored to the Different Dynamics of Biologics.

The principles set forth in the Hatch-Waxman Act to encourage generic drugs should apply to the development of follow-on biologics, but the Hatch-Waxman framework will need to be adapted to the particular dynamics of this sector to achieve the maximum benefits of generic competition.

1. *The Exclusivity Period Research and Analysis Conducted by Alex Brill Raises Important Considerations.*

CVS Caremark believes a data exclusivity period should be sufficiently long to incent companies to innovate by providing them with assurance that they will profit by investing in innovation, but short enough so as not to unduly hamper future innovation and access to non-innovator follow-on products. While we do not have a definitive position on the optimal length of regulatory exclusivity needed to encourage innovation in the biologics sector, we view as credible the analysis conducted by Alex Brill in his November 2008 article "Proper Duration of Data Exclusivity for Generic Biologics: A Critique."[10] CVS Caremark notes, nonetheless, that the optimal exclusivity period will depend upon the pace of market share and price erosion affected by the follow-on biologic, which, as mentioned, is likely to be significant but not as extensive as that seen with generic small molecule drugs. Thus, additional study and analysis could show a period shorter than seven years, as is used for small molecule drugs under Hatch-Waxman, might be justified if it could achieve similar beneficial results.

2. *The Abbreviated Pathway for Follow-On Biologics Should Be Clear.*

An abbreviated approval pathway for follow-on biologics will spur competition and innovation, facilitate capital funding of emerging biotechnology companies, and attract new competitors to the market. To best realize this potential, the parameters for successfully navigating the abbreviated pathway and for obtaining FDA approval should be clearly articulated. In addition, periods of marketing exclusivity for follow-on biologics are worthy of consideration.

3. *The FDA Should Be Authorized to Grant Interchangeability Status.*

As discussed above, the option for the FDA to designate that a follow-on biologic drug is therapeutically interchangeable with an innovator drug would certainly increase the adoption and use of the follow-on biologic. In that vein, legislation granting the FDA the authority to determine whether to grant a biologic interchangeability status after properly considering relevant safety issues would be beneficial. That authority should also include the ability to gather the necessary scientific evidence to make that determination, as well as the responsibility to communicate to the public how that determination is made.

With such determinations, the follow-on biologic manufacturers will be able to assure FDA standards for safety and efficacy are met while avoiding inefficient expenditures on additional testing or marketing concerning equivalency, which can lead to cost savings for consumers.

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[10] This article is available at http://www.tevadc.com/Brill_Exclusivity_in_Biogenerics.pdf. Alex Brill is CEO of Matrix Global Advisors, LLC, and a research fellow at the American Enterprise Institute.

4. *Medicare Reimbursement Formulas Will Greatly Impact Any Potential Competitive Gains.*

The reimbursement methodology used by Medicare for biologic drug products will greatly affect the market impact of follow-on biologics and their reference products. Through Medicare Part B, the federal government is the primary payor for a significant amount of the current biologic drug treatments. It will be important that Medicare Part B reimbursement methodologies related to follow-on biologics clearly set forth whether the biologic falls into the same J-Code as the innovator or has a separate code. To encourage use of the lower cost follow-on biologic, they should be placed in the same J-Code as the innovator.

On the other hand, if clinical and prescribing practices dictate the innovator product as the only "appropriate" medicine to be dispensed, reimbursement economics will be insufficient to stimulate generic competition. This is particularly important for those products reimbursed by Medicare Part B for outpatient care. In the event that a physician is writing the prescription, but an outpatient pharmacy is dispensing, there is little incentive for the prescribing physician to consider cost or Average Sales Price when writing, as the pharmacy will incur the economic burden for dispensing the innovator.

Medicare's treatment of "comparable," "similar," or "highly similar" drugs will be of particular importance in driving utilization of follow-on biologics. Medicare should establish a reimbursement methodology that incents the prescribing of similar or comparable follow-on biologics if it wants to spur adoption of follow-on biologics. CVS Caremark also encourages the Centers for Medicare & Medicaid Services (CMS) to code products specifically so that pharmacies are reimbursed for actual products dispensed.

In sum, CVS Caremark encourages the FTC to work with CMS to explore development of reimbursement methodologies that would allow the benefits of follow-on biologic competition to be fully realized.

D. Other Dynamics of the Biologics Sector Should Be Considered in Any New Regulatory Framework for Follow-On Biologics

In addition to adopting follow-on biologics more slowly than generic small molecule drugs, payors and other market participants are likely to respond differently to the entry of follow-on biological drugs. In fact, CVS Caremark anticipates the market for follow-on biologics will develop several unique traits. These traits also should be considered in fashioning the regulatory framework for follow-on biologics.

1. *The Follow-On Biologic, Especially If Not Interchangeable, Is Likely to Behave More Like A Preferred Branded Product.*

Payors inclined to drive adoption of follow-on biologics will likely do so through more complicated tactics versus today's traditional generic substitution solutions. Payors may develop systems incenting physicians to dispense lower cost products. They are also

likely to implement much larger copay differences within certain product categories than those typically seen in the small molecule market in order to drive adoption of what are seen as lower cost alternatives.

2. Payors Are Likely to Focus More on Outcomes.

Whereas payors of small molecule drugs tend to focus on whether a particular generic drug is precisely equivalent to the branded drug, payors of biologics are likely in the future to focus more on the desired outcomes for which they are willing to pay, and then encourage use of the most cost-effective option. Consumers who desire a specific brand, device, or alternative resulting in a higher cost would be responsible for the difference between the preferred alternative and the one chosen.

3. Payors Are Not Likely to Pay for Convenience.

Given the high cost of biologic drugs, payors will continue to look for ways to cut costs without affecting the treatment outcome. In this regard, CVS Caremark expects payors to begin refusing to pay for convenience associated with biologic drugs. For instance, although a payor may desire to pay for growth hormone to assist with growth development issues, that same payor may refuse to pay a premium for products that offer a more exotic packaging or a more convenient injection device if the outcomes are equivalent.

III. Conclusion

Follow-on biologics will offer patients access to affordable life-saving medicines that are now prohibitively expensive. Indeed, savings to the health care system are projected in the billions, and competition from follow-on biologics will spur innovation in the fast-growing biological drug market. For these reasons, CVS Caremark urges Congress to move swiftly to establish an abbreviated approval pathway for follow-on biologics. We commend the FTC for its efforts to further inform the policy discussions surrounding this critical issue. CVS Caremark looks forward to continuing to participate in this effort to strengthen our country's health care system and to facilitate competition and cost reduction of biologic drugs for American businesses and consumers.[11]

Respectfully submitted,

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[11] CVS Caremark is not submitting comments at this time with respect to the other issues and questions raised by the FTC's notice related to this workshop, 73 Fed. Reg. 51479.