Via Online Submission

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The Patented Medicine Prices Review Board
Standard Life Centre, Box L40
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Dear Sir or Madam:

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Bayer Inc. ("Bayer") appreciates the opportunity to provide a written submission[1] in response to the Patented Medicine Prices Review Board ("PMPRB")'s 2022 draft guidelines, published for consultation on October 6, 2022 ("Draft Guidelines"). As explained in greater detail below, Bayer has significant and material concerns that the Draft Guidelines will render the launch of new innovations in Canada untenable.

Despite the PMPRB having previously acknowledged the need to have "clear, uncomplicated, bright lines" to mitigate uncertainty in innovative drug pricing[2], the PMPRB has now, through the Draft Guidelines, created a pricing black box wherein the pricing of a new medicine is determined by investigation triggers led by an agency focused on driving drug prices lower, regardless of consequences. Furthermore, given the interdependencies of list pricing across global geographies, the disordered and ambiguous determination of the non-excessive price in Canada is very likely to further erode the ability of Canadians to access new medicines relative to G7 and peer OECD countries[3], as pharmaceutical companies elect to delay or avoid altogether launching new innovations in Canada for fear of it resulting in a global pricing 'butterfly effect'.

Bayer Aligned with Innovative Medicines Canada ("IMC")

Bayer supports the written submissions provided by IMC in respect of the Draft Guidelines. **Both Bayer and IMC request that the implementation of the guidelines be delayed providing sufficient time for the PMPRB and stakeholders to form a working group to prepare a revised set of guidelines that are lawful and predictable.** Despite close alignment between Bayer and IMC's other positions, Bayer would like to expand on some of the key issues.

[1] This written submission reflects Bayer Inc.'s position in respect of select elements of the 2022 Draft Guidelines and should not be taken as Bayer's acceptance of the PMPRB's mandate and operations, including the Draft PMPRB guidelines. Bayer reserves all of its rights otherwise
[2] http://www.pmprb-cepmb.gc.ca/view.asp?ccid=1442&lang=en
[3] https://innovativemedicines.ca/newsroom/all-news/innovative-medicines-can-transform-lives-but-only-if-theyre-available-to-canadians/

Key Issues Identified by Bayer on the Draft Guidelines

Contrary To Court Rulings, PMPRB Is Still Focusing on Affordability

As a party to the successful court proceedings concerning the PMPRB Regulatory Amendments before the Quebec Court and Quebec Court of Appeal, Bayer is disappointed to see the PMPRB once again attempt to improperly go beyond its mandate. The Federal Court and Quebec Court of Appeal made it clear that PMPRB's mandate is to prevent abuse of the patent monopoly and does not extend to achieving affordable or low pricing.

Despite the clear and express language of the judicial decisions, PMPRB's 2022-2023 Departmental Plan reveals that their Departmental Results Framework is predicated on regulating prices such that patented drugs are ***affordable***[4]. The two indicators used to measure against this objective are the % of patented drugs that are below the median of the PMPRB11 ("MIP") and the % of patented drugs that are within the thresholds set out in the guidelines. The Draft Guidelines, with a list price investigation trigger that cannot exceed the MIP, makes it highly likely that the PMPRB will be successful in achieving their misguided Departmental objective. In other words, these Draft Guidelines are designed to drive new drug prices down to PMPRB's own definition of affordability, contrary to the direction given by recent Court decisions.

The PMPRB has constructed guidelines that attempt to evade judicial scrutiny by focusing on investigational criteria rather than excessive price thresholds. Indeed, the use of median or lowest measures in determining investigation triggers are inconsistent with an excessive price standard and deliberately ignore recent court decisions. These Draft Guidelines are clearly aimed to exert price control and must be revised to ensure that the PMPRB does not stray from its mandate and respects the letter and spirit of the law.

The New Price Regulation Paradigm Likely to Stifle Drug Innovation in Canada

Rather than putting forward pricing guidelines that would readily enable patentees to determine clear and predictable ceiling prices, the 2022 PMPRB Draft Guidelines have become more opaque than past guidelines. The introduction of greater uncertainty and unpredictability only increases the risk that Canadian patients may suffer from more limited access to innovative medicines in the future.

While the PMPRB adopts International Referencing Pricing (IRP) through its use of the PMPRB11, it seemingly chooses to ignore that there are many countries that reference the Canadian price. When a Canadian subsidiary is unable to provide its global parent company with any price certainty, the parent company is left with little choice – it can either forego launching the medicine in Canada or launch in Canada at a time when it no longer poses a threat to global prices. The latter (i.e., delaying the launch of an innovative medicine because of IRP) is at odds with Canada's recent amendments to the *Patent Act* which encourage manufacturers to file for

[4] https://www.canada.ca/en/patented-medicine-prices-review/corporate/transparency/departmental-plan/2022-23-departmental-plan.html

marketing authorization within a prescribed period after a foreign filing to be eligible for a patent term extension.

Health Canada also participates in Project Orbis, an international partnership designed to give cancer patients faster access to promising cancer treatments[5]. In addition, former Health Minister Jane Philpott implemented the Health Canada (HC) - Health Technology Assessment (HTA) organizations aligned review process with the aim to provide more timely access to drugs and devices by reducing time lags between HC market authorization and HTA recommendations[6]. The PMPRB's Draft Guidelines threaten to undo the Canadian government's significant efforts to bring new medicines faster to Canadians.

Excessive Price Tests, Not Investigational Triggers, Are Necessary

The current PMPRB guidelines ("Current Guidelines"), while still flawed, allows patentees to closely determine if their prices are excessive based on clearly articulated excessive price tests provided by the PMPRB. This allows Canadian pharmaceutical companies to launch at prices they are confident will comply with PMPRB's guidelines and provides a high degree of assurance and confidence to their respective global parent companies that the Canadian company will not be subject to significant price decreases which in turn could influence other countries that reference the price in Canada. Indeed, it was the clear articulation of price tests that played a part in Bayer Canada being the first affiliate of the Bayer Group of companies to launch several patented medicines such as Kovaltry® and Adempas®. Guidelines that lack clarity will be a barrier to the early launch of innovative medicines in Canada.

Bayer encourages the PMPRB to create guidelines that clearly outline the excessive price. To do otherwise is likely to result in companies not launching innovative medicines in Canada, and for those that do nonetheless decide to bring new medicines to Canada, they may be forced to challenge the outcomes of PMPRB investigations and Hearings through litigation, due to the ambiguity of the guidelines. Innovative pharmaceutical companies deserve the bright lines that were originally promised.

Recognizing and Rewarding Innovation Is Critical for The Next Generation of Medicines to Be Made Available to Canadians

The decoding of the human genome is ushering in an era of cell and gene therapies (CGT) that are at the forefront of health innovation, initiating seismic shifts on how certain diseases are treated, and potentially cured. The Current Guidelines, while still flawed, have attempted to recognize that those patented medicines that bring innovation to the market could be rewarded with a higher ceiling price. The determination of an excessive price is currently applied against the value of the medicine with respect to its therapeutic benefit, which is consistent with the *Patent Act*'s policy objective of fostering innovation.

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[5] https://www.canada.ca/en/health-canada/services/drugs-health-products/international-activities/project-orbis.html

[6] https://www.canada.ca/en/health-canada/news/2017/05/economic_club_ofcanada-may162017.html

The PMPRB has completely ignored innovation in the Draft Guidelines. The impact will be significant. According to PDCI Market Access[7], an analysis on approximately 400 patented medicines was conducted to determine the impact of eliminating innovation from the guidelines[8]. Their analysis showed that patented drugs that exhibited a higher level of innovation based on Human Drug Advisory Panel's (HDAP) Therapeutic Rating generally faced the greatest negative impact with respect to drug pricing. Slight to No Improvement medicine prices was negatively impacted by 8%, Moderate Improvement medicines by 11 to 13%, and Substantial Improvement medicines by 21%. Not recognizing innovation will remove incentives for the most impactful medicines to launch in Canada. As we are at the infancy of new CGT that can have a transformative effect on healthcare, myopic choices that ignore innovation will only risk innovative treatments being made available to Canadians.

Radical Changes to Current Guidelines Are Not Required

The Current Guidelines have served their purpose. Data published by the PMPRB show that PMPRB has in fact been effective in achieving its mandate. For instance, the PMPRB has indicated that Canadian drug prices at time of introduction to the Canadian market are in line with international pricing levels. Indeed, PMPRB's 2021 Annual Report showed that Canada's drug prices are at the median of the PMPRB7. While still being challenged in the Federal Court, the mere change of PMPRB's reference basket from the PMPRB7 to PMPRB11 is anticipated to impact 1/3 of existing patented medicines in Canada with an average price impact of these medicines of -23%[9]. While the Draft Guidelines' impact to existing medicines is significant, it pales in comparison to the impact that it will have on new medicines.

Challenges To Launch New Medicines in Canada

Any investigation trigger that focuses on a median or lowest measure is misaligned with PMPRB's mandate to "protect consumers from excessively priced patented medicines"[10]. A measure based on the highest price is consistent with the definition of excessiveness. A quick search of antonyms of 'excessive' yields words such as cheap, inexpensive, moderate, reasonable, and sensible[11]. These Draft Guidelines are not designed to curb excessive prices, but rather to drive prices to PMPRB's definition of affordable. The key issues that Bayer has on how new medicines are evaluated are discussed below.

The Domestic Therapeutic Class Comparison (dTCC) Measure as Currently Defined in The Draft Guidelines Will Harm Patients

While the comparison of the patented drugs to comparator medicines is required under the *Patent Act*, it must be done transparently and in the context of establishing an excessive price threshold. This is clearly not done in the Draft Guidelines:

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[7] PDCI Market Access, a division of McKesson Canada
[8] PDCI Webinar, October 17, 2022
[9] PDCI Webinar, October 17, 2022
[10] https://www.canada.ca/content/dam/pmprb-cepmb/documents/consultations/draft-guidelines-2022/Draft-Guidelines-2022.pdf
[11] EXCESSIVE Synonyms: 57 Synonyms & Antonyms for EXCESSIVE | Thesaurus.com

1) **Selection of Comparators in the dTCC** - The dTCC will no longer be determined by the independent HDAP but will be determined by PMPRB Staff. The exclusion and inclusion of therapeutic comparators could have a significant impact on the investigation triggers. Previously stated objectives of the PMPRB to drive patented drug prices down, coupled with the PMPRB Staff having discretion to choose comparators for the drug, risks price investigation outcomes based on PMPRB's desire to reduce drug prices rather than objective therapeutic/scientific rationale. An independent third party, such as HDAP, is critical to ensure objectivity in selecting these comparators.

2) **Multiple Indications** – The Current Guidelines relied on a "primary indication" to determine comparators within the Therapeutic Class. The 2022 Draft Guidelines have removed this concept which adds significant ambiguity to the determination of dTCC. Bayer proposes that the highest priced comparator, regardless of indication, be utilized to adhere to PMPRB's excessive price standard.

3) **New Indication** – Obtaining a new indication for a new patented medicine could embroil the patented medicine with another scientific review and the potential for a new dTCC. Given this uncertainty, the patentee may elect to not seek regulatory approval for new indications should there be a risk of significant price impacts. Once again, this may result in limiting therapeutic launches and reducing patient access to treatments. As many provinces do not reimburse non-indicated treatments, patients will suffer from the changes being recommended by the PMPRB.

4) **dTCC Price Sources** – The PMPRB has indicated that "when there are multiple sellers of a medicine identified as a comparator, the lowest price is used for that comparator."[12] This practice will penalize patented first in class medicines for bringing innovation to disease areas with high unmet need that lagged in therapeutic development, as these areas would be dominated by generic comparators. This is also inconsistent with PMPRB's non-excessive price mandate. While the PMPRB indicated that the dTCC will effectively be the lowest available brand price during its meeting with IMC and BIOTECanada on November 23, 2022, this appears to be inconsistent with the express language in the Draft Guidelines.

5) **Uncertainty on frequency of benchmarking dTCC** – The Draft Guidelines do not indicate if dTCC will be benchmarked on a regular basis, or whether these would be triggered by a new indication or other market event. Such knowledge is critical for the patentee to evaluate whether they should proceed in securing new indications and evaluating the viability of selling the drug in Canada.

[12] https://www.canada.ca/content/dam/pmprb-cepmb/documents/consultations/draft-guidelines-2022/Draft-Guidelines-2022.pdf

The Reasonable Relationship Comparison Could Prevent Pediatric and Other Doses to Be Launched

When a patented drug launches with multiple strengths, a reference strength will generally be selected. The Draft Guidelines indicate that the selection of the reference strength will be based on 'scientific considerations'. The lack of clarity is concerning and gives too much discretion to PMPRB Staff to select the reference strength to subdue pricing. Staff will undoubtedly select the highest strength as the investigation criteria will be based on the proportional relationships between the strengths and thus attribute lower price thresholds to lower dose medicines. This is a significant departure from the Current Guidelines in that lower strengths can price equally to the higher dose. This proportional relationship will lead to unintended consequences. Possible outcomes could be patentees refraining to introduce pediatric doses as low doses would have significantly lower investigation triggers based on the proportional relationship. Conversely, patentees may not launch higher doses for fear that the new higher dose would be reassessed as the reference strength causing concomitant reductions in the investigation triggers for lower doses.

Any Price Test (Or Trigger) Should Include a Buffer Before Being Investigated

Excessive price tests rather than investigation triggers are required. Regardless, any measure will fluctuate based on factors outside of the patentee's control. Variables such as exchange rates will cause variability from period to period. To avoid needless investigations, the PMPRB should continue with their 'does not trigger' measure when the prices slightly exceed the threshold. The Current Guidelines allow a buffer of 5% or $50,000 in excess revenues before an investigation is initiated. Similar reasonable allowances should be implemented.

Other Significant Issues with the Draft Guidelines

"Existing" Patented Medications Not Grandfathered – Existing medicines are still subject to the Highest International Price, but against a reference basket that may be significantly lower due to the exclusion of the US and Switzerland. The prices of these drugs have already been subjected to assessment and negotiation by multiple Canadian bodies and funding decisions based on value for money and affordability. Embroiling existing medicines in the new pricing regime is unfair to patentees and patients because significant investments have already been made based on an existing price control framework. Existing medicines that are 'Within PMPRB guidelines' in the Jan-Dec 2022 period should continue to be deemed compliant under the new guidelines. Only a valid complaint, the list price increasing more than the Consumer Price Index (CPI), or no international prices being filed should be the basis for initiating an investigation for Existing medicines.

***Significant Discretion Given to PMPRB* Staff** – PMPRB Staff has substantial leeway to determine whether the patentee is compliant with the Draft Guidelines as many of the parameters are based on subjective measures. For instance, PMPRB Staff: 1) determine whether to pursue an Investigation or close it without any pre-determined measures that are evident to the patentee; 2) can determine the reference strength under the Reasonable Relationship Comparison; and 3) can

determine the drugs within the therapeutic class and the therapeutic class itself if there is more than one indication. These and many other factors are at the discretion of Staff. PMPRB needs to establish guidelines that do not enter a black box, but rather, provide clear and objective measures of what would constitute excessive pricing. Ambiguity will only foster an environment of litigation or risk-avoidance where all parties, but especially patients, will suffer.

Significant Uncertainties Remain Surrounding the Draft Guidelines - While a webinar was conducted by PMPRB on November 3 to explain the 2022 Draft Guidelines as part of its outreach strategy, questions posed by participants were not visible, and it is unclear how many questions were left unaddressed. This is not in keeping with the spirit of transparency. Many of the answers to these questions are critical to foster a greater understanding of these Draft Guidelines and accessing these critical medicines.

Conclusion

The PMPRB would be better served if its guidelines provided the 'bright lines' that were originally promised. Providing triggers for investigation is insufficient and can be construed as an attempt to obfuscate the law. Clear excessive price tests, consistent with law, that will inform patentees whether their price is excessive in advance of its first sale is necessary for the patented drug ecosystem to function. The flawed investigational paradigm that is proposed under the Draft Guidelines adds significant uncertainty to the ceiling prices in Canada and is very likely to result in delayed or aborted launches.

Changes to the Draft Guidelines are required and this requires proper and fulsome consultation to ensure that the most innovative medicines continue to be made available in Canada. **Bayer therefore requests that the implementation of the Draft Guidelines be delayed providing sufficient time for the PMPRB and stakeholders to form a working group and prepare a revised set of guidelines that are lawful and predictable.** Unilateral decisions made and imposed by the PMPRB without proper and ***meaningful*** consultation with industry and other stakeholders will have a profound and detrimental impact on the availability of new medicines going forward. Canadian patients deserve better.

Yours sincerely,

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