

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
Food and Drug Administration

# Importation of Prescription Drugs

Docket No. FDA-2019-N-5711

Final Regulatory Impact Analysis  
Final Regulatory Flexibility Analysis  
Unfunded Mandates Reform Act Analysis

Economics Staff  
Office of Economics and Analysis  
Office of Policy, Legislation, and International Affairs  
Office of the Commissioner

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## **Executive Summary**

This final rule allows commercial importation of certain prescription drugs from Canada through time-limited Section 804 Importation Programs (SIPs) sponsored by a State or Indian Tribe, and in certain circumstances by a pharmacist or wholesale distributor, with possible co-sponsorship by a State, Indian Tribe, pharmacist, or wholesale distributor. As we lack information about the expected scale or scope of such programs, we are unable to estimate how they may affect U.S. markets for prescription drugs. In particular, we are unable to estimate the volume or value of eligible prescription drugs that may be imported under the SIPs or the savings to U.S. consumers who may participate in such programs.

Costs of the final rule may fall on the federal government, SIP sponsors, importers, and manufacturers of eligible prescription drugs. The federal government will incur costs to implement the final rule and conduct oversight of authorized programs. Sponsors will face costs to prepare proposals, implement authorized programs, and produce records and program reports. Private intermediaries, such as wholesaler distributors or pharmacists, that contract with a SIP sponsor will face business expenses to implement a SIP. If their drugs are imported into the U.S. from Canada, drug manufacturers will have to provide importers with certain information. These costs depend on the number and type of participating importation programs. We lack information to estimate these costs.

Finally, U.S. patients, as well as wholesale distributors, pharmacies, hospitals, and third-party payers may all experience savings, but we lack information necessary to estimate such savings. As drug distributors realize savings in acquiring imported eligible prescription drugs and pass some of these savings to consumers and other payers, it is possible that U.S.-based drug manufacturers may experience a transfer in U.S. sales revenues to these parties.

## **I. Introduction and Summary**

### **A. Introduction**

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, Executive Order 13771, the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 13771 requires that the costs associated with significant new regulations “shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.” This final rule has been designated as a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. This rule does not impose new regulatory requirements on small entities that do not participate in Section 804 Importation Programs (SIPs); however, we cannot anticipate whether sponsors will contract with small entities to implement their authorized SIP proposals or whether, under certain circumstances, a small pharmacist or wholesaler might become a sponsor. We also lack information to quantify the total impacts of the final rule. Because we do not have enough information about the effect of the final rule on small entities, we are not certifying that the final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing “any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$156 million, using the most current (2019) Implicit Price Deflator for the Gross Domestic Product. This final rule would not result in an expenditure in any year that meets or exceeds this amount.

### **B. Summary of Costs and Benefits**

This final rule allows commercial importation of certain prescription drugs from Canada through time-limited SIPs sponsored by a State or Indian Tribe, and in certain circumstances by a pharmacist or wholesale distributor, with possible co-sponsorship by a State, Indian Tribe, pharmacist, or wholesale distributor. If such programs are authorized and implemented, allowing importers to leverage drug price differences between the U.S. and Canada for the eligible prescription drugs identified in the SIP, they will result in cost savings for U.S. consumers.

Costs of the final rule may accrue to the federal government, SIP sponsors, importers, and manufacturers of imported eligible prescription drugs. The federal government will

incur costs to implement the final rule and conduct oversight of authorized programs. SIP sponsors will face costs to prepare proposals, implement authorized programs, and produce records and program reports. Drug manufacturers will have to provide certain information to importers if their drugs are imported into the U.S. from Canada. SIPs may offer cost savings to patients, as well as participating wholesale drug distributors, pharmacies, hospitals, and third-party payers. As drug distributors realize savings in acquiring imported eligible prescription drugs and pass some of these savings to consumers, it is possible that U.S.-based drug manufacturers may experience a transfer in U.S. sales revenues to these parties.

We are unable to estimate the cost savings from this final rule, because we lack information about the likely size and scope of SIP programs, the specific eligible prescription drugs that may be imported, the degree to which these imported drugs will be less expensive than non-imported drugs available in the U.S., and which SIP eligible products are produced by U.S.-based drug manufacturers.

**Summary of Benefits, Costs, and Distributional Effects of Final Rule**

| Category |                                      | Primary Estimate  | Low Estimate | High Estimate | Units        |               |                | Notes |
|----------|--------------------------------------|---|--------------|---------------|--------------|---------------|----------------|-------|
|          |                                      |   |              |               | Year Dollars | Discount Rate | Period Covered |       |
| Benefits | Annualized Monetized \$millions/year |   |              |               |              | 7%            |                |       |
|          |                                      |   |              |               |              | 3%            |                |       |
|          | Annualized Quantified                |   |              |               |              | 7%            |                |       |
|          |                                      |   |              |               |              | 3%            |                |       |
|          | Qualitative                          | Potential cost savings to consumers and third-party payers or entities. This framework does not consider the potential implications of private and government insurance and reimbursement as well as other purchasers in the supply chain including hospitals and physicians. We cannot predict the types and volumes of eligible prescription drugs that will be imported under the final rule, which will influence these payers. Moreover, the prices paid by multiple payers, including those affected by discounts, may be different, unobservable, or both. |              |               |              |               |                |       |
| Costs    | Annualized Monetized \$millions/year |   |              |               |              | 7%            |                |       |
|          |                                      |   |              |               |              | 3%            |                |       |
|          | Annualized Quantified                |   |              |               |              | 7%            |                |       |
|          |                                      |   |              |               |              | 3%            |                |       |
|          | Qualitative                          | Potential costs to federal government, SIP sponsors,  |              |               |              |               |                |       |

| Category  | Primary Estimate  | Low Estimate                  | High Estimate | Units                            |               |                | Notes |
|-----------|---|-------------------------------|---------------|----------------------------------|---------------|----------------|-------|
|           |   |                               |               | Year Dollars                     | Discount Rate | Period Covered |       |
|           | importers, and manufacturers of imported eligible prescription drugs.   |                               |               |                                  |               |                |       |
| Transfers | Federal Annualized Monetized \$millions/year  |                               |               |                                  | 7%            |                |       |
|           |   |                               |               |                                  | 3%            |                |       |
|           | From/ To  | From:                         |               | To:                              |               |                |       |
|           | Other Annualized Monetized \$millions/year  |                               |               |                                  | 7%            |                |       |
|           |   |                               |               |                                  | 3%            |                |       |
|           | From/To   | From: U.S. drug manufacturers |               | To: Importers and U.S. consumers |               | Not Quantified |       |
| Effects   | State, Local or Tribal Government: Potential costs and cost savings to States or Indian Tribes from sponsoring SIPs<br>Small Business: Potential costs to drug manufacturers; potential costs and cost savings to pharmacists and wholesale distributors<br>Wages:<br>Growth: |                               |               |                                  |               |                |       |

We lack information about the likely size and scope of SIP programs, the specific prescription drug products that may become eligible for importation and which SIP eligible prescription drug products are produced by U.S.-based drug manufacturers, and the degree to which these imported drugs will be less expensive than non-imported drugs available in the U.S. to estimate the present and annualized values of the costs and cost savings of the final rule over an infinite time horizon. Therefore, we exclude the Executive Order 13771 summary table from this analysis. This is a deregulatory action because the rule is opening a pathway for legal importation that is not currently allowed.

### C. Comments on the Preliminary Economic Analysis of Impacts and Our Responses

On December 23, 2019, FDA issued a proposed rule to allow importation of eligible prescription drugs from Canada (84 Federal Register 70796). We prepared a preliminary regulatory impact analysis (PRIA) for the proposed rule. In the paragraphs below, we describe and respond to the comments received on the PRIA. Many comments were outside the scope of this rule. The number assigned to each comment is purely for organizational purposes and does not signify the comment's value, importance, or the order in which it was received.

#### 1. General Comments about the PRIA

*(Comment 1)* Some comments requested a quantitative analysis of the economic effects of the proposed rule. A number of comments note that the PRIA does not quantify or even affirm benefits to patients.

*(Response 1)* Costs and benefits of the rule depend on a number of factors about which we lack data and information, including the likely scope and scale of SIPs, operational costs and mark-ups, and policy response by the Canadian government. Data received through public comments are insufficient to conduct a quantitative analysis. For this reason, we discuss costs and benefits qualitatively. As noted in the economic analysis, benefits of the rule, if any, will be in the form of significant cost savings to patients and to third-party payers or entities such as retail pharmacies and hospitals. These cost savings would be economic benefits if they represent reductions in the prices of drugs purchased from foreign-based manufacturers; if they instead represent reductions in prices of drugs purchased from U.S.-based manufacturers, cost savings would be economic transfers from these manufacturers to consumers. If the rule improves access to drugs by lowering costs, it may also result in economic benefits from reduced morbidity and mortality.

*(Comment 2)* One commenter suggested that FDA's cost-benefit analysis should say to what extent we expect true cost savings versus transfers between domestic parties.

*(Response 2)* We lack data on whether imported eligible prescription drugs will be predominantly produced by U.S. or foreign manufacturers and thus cannot estimate reductions in revenue to U.S. drug manufacturers. Lower prices on imported eligible prescription drugs produced by a domestic manufacturer constitute a transfer from the domestic manufacturer to U.S. intermediaries and consumers. Lower prices on imported eligible prescription drugs produced by a foreign manufacturer constitute a benefit to U.S. intermediaries and consumers.

*(Comment 3)* Some commenters requested that FDA estimate the federal government's resource needs for establishing and supporting importation. Relatedly, some commenters noted that regulatory authorities (e.g., FDA) and law enforcement would require resources to implement importation, including foreign inspections, and address potential consequences such as increased counterfeits.

*(Response 3)* Because the proposed rule is designed to give flexibility to SIP sponsors in how to develop their programs, we expect significant variation in proposal scale and scope and, thus, significant variability in potential federal government resource needs. Certain fixed costs will be incurred regardless of SIP scope and scale. Some variable resource needs may be absorbed by current operations at baseline; others may require additional federal government spending. We do not have the information to accurately estimate what the overall costs will ultimately be; therefore, we decline to estimate the cost to the federal government of establishing and supporting importation.

*(Comment 4)* Some commenters expressed concern that the resource needs of importation would adversely affect FDA's effectiveness in performing its other duties, such as drug review and oversight.

*(Response 4)* In the final RIA, we note that state and local law enforcement agencies, as well as FDA, may incur enforcement costs as a result of the rule. We do not believe that these costs will affect FDA's effectiveness in performing its other duties.

*(Comment 5)* One commenter stated that the Unfunded Mandates Reform Act (UMRA) requires FDA to estimate the impacts of the proposed rule on state, local, and tribal governments.

*(Response 5)* Under the UMRA, the economic analysis should include a written statement of benefits and costs when mandates may result in aggregate expenditure by state, local, and tribal governments, or by the private sector, of \$100,000,000 or more in any one year (adjusted annually for inflation). We note that the rule allows for voluntary programs and does not impose mandates, statutory requirements, or direct compliance costs on state, local, and tribal governments. The economic analysis qualitatively discusses potential benefits and costs to States and Indian Tribes should they choose to sponsor or, as applicable, cosponsor a SIP. As with the total benefits and costs of the rule, we lack the information necessary to quantify these costs. Finally, we did not receive public comments on the proposed rule that contained information to support a quantitative analysis of the effects on States and Indian Tribes.

*(Comment 6)* One commenter requested an explanation for why the proposed rule was originally classified as "economically significant" prior to reclassification as "significant."

*(Response 6)* The proposed rule was originally classified as economically significant in a public listing prior to publication because the complete economic analysis and regulatory review had not yet been conducted. After completing the economic analysis, the rule was revised to significant because it raises novel legal and policy issues, but we did not determine that it is likely to impose costs, benefits, or transfers of \$100 million or more in any given year or have adverse material effects. The economic analysis of the rule lacks information to estimate quantitative costs, benefits, or transfers.

*(Comment 7)* One commenter suggested that FDA provide a sample analysis of the cost to taxpayers for a hypothetical state importation program, with the caveat that costs would vary from state to state in reality.

*(Response 7)* We believe that constructing a "representative" state importation program is unlikely to be informative for net benefit-cost analysis. First, it is important to consider the economic implications of multiple states competing for the same drugs. If multiple states plan to import the same drugs, competing demand for a fixed Canadian supply from a small number of foreign sellers may increase prices of those imported drugs and/or limit the supply available to each state. Coordination between states may mitigate such effects, but it is not clear if states will coordinate. Using a representative state for analysis would not account for such dynamics, which could affect total cost savings either through price effects or the cost of additional coordination.



Second, states' initial concept papers, comments, and proposals confirm that there will be significant variability in distribution and population served. These different distribution plans require different baselines for estimating cost savings. For example, Florida's initial concept paper aims to import drugs for consumers served by specific state/government programs,<sup>1</sup> whereas Colorado's draft proposal would import drugs for sale to insured and uninsured consumers in retail pharmacies.<sup>2</sup> In Florida, the state government would seek to realize cost savings relative to its existing contracts with drug manufacturers. In Colorado, cost savings would be intended to accrue to insured consumers via reduced premiums, deductibles, or co-pays, as well as uninsured consumers who could purchase drugs at lower retail cash prices. While one could hypothetically compare the difference between utilization-weighted average prices before and after importation, this approach is unlikely to yield meaningful estimates given the substantial variation in distribution and population served. Such an approach would also need to account for differences in implementation costs, likely to vary substantially by state.

Moreover, while some states could prevent the sale or dispensation of imported eligible prescription drugs outside of the state by limiting importation only to government programs, it is not clear that this is possible when dispensing drugs at retail pharmacies. This may result in spillover effects if imported eligible prescription drugs are purchased by residents of neighboring states without importation programs. The economic impact will depend in part on the markets for those drugs in the neighbor states.

## 2. Comments on Costs

*(Comment 8)* Multiple comments stated that the proposed rule would disincentivize drug development by reducing drug makers' revenues and allowing importers to free ride off of manufacturers' investments. Along these lines, a commenter expressed concern over potential revenue loss among U.S. drug makers specifically. Other comments similarly suggested that the proposed rule would disincentivize development of generics.

*(Response 8)* We note these potential effects in the economic analysis. However, we lack information on the types and volumes of drugs that will be imported, without which we cannot quantify expected revenue losses among drug makers. Moreover, we are also unable to quantitatively characterize the relationship between potential incremental loss of revenue due to this rule and decreased drug development.

*(Comment 9)* One commenter stated that the information the proposed rule would require of manufacturers for authenticity and degradation testing would be costly and time consuming to provide.

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<sup>1</sup> Agency for Health Care Administration. Florida's Canadian Prescription Drug Importation Concept Paper. August 20, 2019.  
[https://ahca.myflorida.com/executive/communications/requested\\_documents/Florida\\_Canadian\\_Prescription\\_Drug\\_Importation\\_Concept\\_Paper.pdf](https://ahca.myflorida.com/executive/communications/requested_documents/Florida_Canadian_Prescription_Drug_Importation_Concept_Paper.pdf)

<sup>2</sup> Colorado Department of Health Care Policy & Financing. Section 804 Importation Program: Colorado's Drug Importation Program – Draft Application. March 9, 2020.  
<https://www.colorado.gov/pacific/sites/default/files/Colorado%20Draft%20SIP%20%20-%20Version%203-9-2020.pdf>

*(Response 9)* The economic analysis of the proposed rule acknowledges that drug manufacturers will face costs related to authenticity and degradation testing of imported products. We lack information to quantify these costs for manufacturers.

*(Comment 10)* One commenter stated that the use of manufacturers' trademarks as well as proprietary trade secrets and confidential commercial information (CCI) will legally require just compensation under the Takings Clause of the Fifth Amendment of the Constitution. As an alternative to provision of manufacturers' trade secrets and CCI, compulsory product testing by manufacturers would also require just compensation. Other commenters suggested that the proposed rule puts proprietary information and intellectual property at risk by requiring manufacturers to disclose such information to importers.

*(Response 10)* As discussed in the economic analysis, the manufacturer of a drug that is imported will need to provide certain information regarding testing methodology to authenticate the SIP drug as well as attestations and/or other evidence to establish that such a drug meets all conditions in the FDA-approved new drug or abbreviated new drug application. The manufacturer will also provide the importer with written authorization for the importer to use, at no cost, the FDA-approved labeling of the eligible prescription drug. Manufacturers might face a cost to transmit this information as well as possibly an unquantifiable loss related to the proprietary value of this property, if any. In other words, it is possible that this labeling and confidential commercial information could help the importer capture a larger portion of the market currently held by the manufacturer and/or any other authorized user of the proprietary name and labeling. However, as discussed in the preamble to the final rule, FDA disagrees that this would constitute a taking for which just compensation would be required.

*(Comment 11)* A number of comments raised concerns about the potential for counterfeit products. Some comments suggested that the rule would increase the cost of healthcare because counterfeit products will cause adverse medical events requiring treatment. Some commenters expressed concern over the potential negative financial impact on emergency rooms and inpatient admissions that may result from increased opioid abuse and counterfeit drugs. Some of these commenters suggested that counterfeit products may contain fentanyl. Finally, a number of commenters expressed concern that finalization of the proposed rule may lead confused consumers to purchase counterfeit drugs from fraudulent online pharmacies.

*(Response 11)* In the final RIA we note that state and local law enforcement agencies, as well as the federal government, may incur enforcement costs as a result of the rule. We expect that this enforcement activity will seek to limit the potential for the introduction of counterfeit products. Moreover, the statute requires that the importation program not result in any additional risk to the public's health and safety. We note that SIP proposals will be carefully reviewed with respect to their distribution procedures to prevent improper use. SIP sponsors will also be required to submit regular reports and monitor

potential issues. As a result, we expect any incremental costs from counterfeits to be negligible.

*(Comment 12)* One commenter suggested that drug importation may increase drug resistance if it is not well-managed, which could result in negative health effects for patients, including those using antiretroviral medications for HIV/AIDS.

*(Response 12)* Certain categories of products that could pose potentially heightened safety concerns are excluded from the scope of the final rule, though we note that at this time FDA is not excluding additional categories from the rule beyond what we originally included in the proposed rule. For products not excluded by the final rule, FDA will determine whether a product can be imported safely in the context of a specific SIP proposal on a product-by-product basis. A SIP sponsor will need to explain in its SIP proposal how it will address any concerns arising from the manufacture, storage, and transport of each eligible prescription drug, including concerns related to controlling contamination, preserving sterility, and ensuring stability. SIP proposals will be carefully reviewed with respect to their distribution procedures to prevent improper use. SIP sponsors will also be required to submit regular reports and monitor potential issues. As a result, we do not expect there to be negative health effects on population sub-groups due to drug resistance as a result of this rule.

*(Comment 13)* A commenter recommended that the following costs be accounted for in the assessment of any SIP proposal: systems for serialization of units, cases, and logistical units, relabeling and repackaging, package artwork, data integration, call centers, recalls, inventory management, and enforcement.

*(Response 13)* These costs are not only relevant for SIP proposal assessments but for net economic effect of the rule. While the preliminary economic analysis generally discusses costs related to relabeling and repackaging as well as monitoring and enforcement, we incorporate additional itemized costs from this comment into our qualitative final economic analysis. However, we note that the comment did not provide quantitative information on these costs, and we do not quantify them due to lack of data.

### 3. Comments on Benefits

*(Comment 14)* One commenter stated that cost savings from SIPs should be measured in actual out-of-pocket costs via co-pays, cash payments, premium reductions, or expansion of coverage, and not using retail cash prices.

*(Response 14)* For the net economic effects of the rule, the necessary metrics to calculate cost savings of the rule will depend on the scope of each SIP. Given this variation, the economic analysis does not quantify potential benefits.

*(Comment 15)* A few comments expressed general support for the proposed rule, affirming that prescription drug price differentials between the U.S. and Canada are large and that importation would increase competition among domestic sellers.

*(Response 15)* The economic analysis acknowledges drug price differentials between the U.S. and Canada and notes that these differentials vary across drug type and class. The economic analysis also notes that it is possible for the rule to increase domestic competition by introducing imported products into the market.

*(Comment 16)* Many commenters noted the relatively small size of the Canadian drug supply in comparison to total U.S. demand, stating that U.S. demand would exhaust Canada's supply of drugs within months. Several commenters stated that manufacturers will lack incentives to increase their supply to Canada.

*(Response 16)* The Benefits section of the economic analysis acknowledges the difference in size between the U.S. and Canadian prescription drug markets, as well as the fact that drug makers may act to limit the supply available for export to the U.S. under the rule. Without further data and information, we are unable to confirm whether there will be significant availability of eligible prescription drugs included in SIP proposals. We note that not all Canadian drugs will be eligible for importation under the rule.

*(Comment 17)* Many commenters also expressed concern that the Canadian government will respond to the rule by restricting or preventing prescription drug exports. Among these, some specifically reference a 2005 Canadian bill enabling the Minister of Health to prohibit the export of a drug or class of drugs. One comment expressed concern that a potential Canadian prohibition on wholesale prescription drug exports could affect current temporary importation policies used to address U.S. drug shortages.

*(Response 17)* The economic analysis notes that action by the Canadian government may prevent importation and, thus, economic benefits from the rule from being realized.

*(Comment 18)* One commenter stated that Canadian price controls will not apply to distributors selling into the U.S.

*(Response 18)* States have indicated that they believe they can achieve cost savings by working with Canadian distributors. While the rule will afford SIPs significant flexibility in sourcing eligible prescription drugs for importation, it is the responsibility of the SIP sponsor to ensure cost savings. Due to uncertainty concerning the likely number, scale and scope of authorizable SIPs and the specific eligible prescription drugs these SIPs will import, we do not quantify expected cost savings of the rule.

*(Comment 19)* Some commenters stated that drug manufacturers will be able to effectively prevent importation of their products into the U.S. from Canada. Relatedly, commenters suggested that manufacturers could respond to the rule by raising prices in Canada.

*(Response 19)* The Benefits section of the economic analysis states that manufacturers may limit importation of Canadian supply into the U.S. It is not clear if manufacturers

could increase Canadian prices in the short-term. As noted in the economic analysis, either of these outcomes will prevent economic benefits from the rule from being realized. No comment provided information that allows us to determine the probability of such a response.

*(Comment 20)* Many commenters noted that certain Canadian stakeholders have expressed opposition to importation. One comment noted that two major Canadian distributors listed in Florida's importation proposal have stated their intention not to participate in importation into the U.S. Commenters also noted that distributors may be bound by agreements not to resell product outside of Canada.

*(Response 20)* We note in the RIA that agreements with manufacturers may prohibit some or all Canadian distributors from selling eligible prescription drugs into the U.S. States have indicated they believe they can achieve cost savings by working with Canadian distributors. While the rule will afford SIPs significant flexibility in sourcing eligible prescription drugs for importation, it is the responsibility of the SIP sponsor to ensure cost savings. Due in part to uncertainty surrounding stakeholder participation, we do not quantify expected cost savings of the rule.

*(Comment 21)* Many commenters suggested that the restrictions of the proposed rule will limit cost savings. In particular, commenters noted that the rule will likely exclude many of the most expensive drugs, such as biologics. Additionally, commenters suggested that the rule's supply chain restrictions (i.e., single manufacturer, foreign seller, importer, etc.) will give suppliers market power. More generally, many comments stated that any savings will be captured by middlemen (e.g., Pharmacy Benefit Managers (PBMs)).

*(Response 21)* We agree that these factors may influence potential cost savings. Due to high uncertainty surrounding these factors, we are unable to quantify benefits. The Benefits section of the economic analysis states that mark-ups by intermediaries will influence potential cost savings.

*(Comment 22)* One commenter recommended amending the Costs and Benefits section of the rule to require importers to provide evidence of cost reductions to the federal government, state government, or a government agency, as opposed to patients directly.

*(Response 22)* We disagree with this comment. The economic analysis studies and summarizes the costs and benefits of the final rule; it does not amend the requirements of the rule.

*(Comment 23)* Many commenters suggested that the logistic and regulatory compliance costs of importation will largely if not entirely erode any potential cost savings. Commenters mentioned costs of repackaging, relabeling, testing, complying with the DSCSA workaround, and developing recall and adverse event reporting systems. Additionally, one commenter stated that pharmacies will need dual inventories to ensure proper tracking and billing of domestic versus imported products. One commenter

claimed that SIP sponsors will need to save 15-20% on acquisition via importation versus domestic channels in order to break even on regulatory and logistical expenses.

Similarly, some comments stated that the requirements of the proposed rule on SIP's are prohibitively burdensome. In particular, at least one state will not be able to establish a SIP if required to specify supply chain partners in the application process. Another commenter suggested that the testing requirements, severability clause, and the requirement to apply for renewal after only two years will limit cost savings. Other commenters suggested that requiring the use of labs with FDA inspection histories could increase costs and lead to delays for imports.

*(Response 23)* The RIA acknowledges SIP costs as a significant factor in the realization of any potential cost savings. As we are unable to predict the likely number, scale and scope of authorizable SIPs and the specific eligible prescription drugs these SIPs will import, we cannot estimate the magnitude by which these costs will decrease benefits of the rule.

*(Comment 24)* Some commenters suggested that the price differences between American and Canadian drugs are generally not large enough to support significant cost savings from importation. Among these, some commenters noted that generics compose the largest share of prescriptions and are generally as or more affordable in the U.S. than in Canada.

*(Response 24)* As acknowledged in the RIA, the magnitude of price differences varies by drug, with some drugs having lower prices in Canada and others having lower prices in the U.S. The most appropriate price measure may also vary according to the intended beneficiaries in each SIP. As we are unable to predict the likely scale and scope of authorizable SIPs and the specific eligible prescription drugs these SIPs will import, we do not quantify expected benefits of the rule.

*(Comment 25)* Several commenters referenced past studies on the costs and benefits of drug importation. Some commenters highlighted that Congressional Budget Office's (CBO's) estimates of H.R. 2427 (2004) and S. 1392 (2005) show that importation would reduce annual spending on prescription drugs by only one percent. Commenters also referenced CBO's findings of minimal potential cost savings from Canadian drug importation specifically. Relatedly, several commenters noted that past importation programs (e.g., ISaveRx) failed to produce significant cost savings and have been discontinued.

*(Response 25)* Savings from importation will be highly sensitive to the specific eligible prescription drug products included in a SIP as well as the prices of those products, which can fluctuate substantially over short time periods. Past analyses operated under substantially different criteria than this rule. Moreover, the net economic effects from national importation are likely to differ substantially from limited subnational importation due to differences in both potential cost savings as well as costs of implementation.

Therefore, earlier studies will not likely yield reasonable projections of savings from this rule.

*(Comment 26)* Many commenters expressed uncertainty regarding if and how imported products might affect drug prices through government programs that involve drug rebates or other reimbursement calculations, including Medicare, Medicaid, and 340B programs.

*(Response 26)* This rule is not intended to address how agencies that administer other government programs, such as Medicaid, Medicare and 340B programs, may apply their authorities to drugs imported under a SIP. We also cannot predict the types and volume of eligible prescription drugs that will be imported under the final rule. We note this point in the final economic analysis.

*(Comment 27)* Some commenters suggested that the draft importation plans and proposals, for example those of Vermont and Florida, do not project sufficient cost savings to justify the public health risks of importation.

*(Response 27)* These draft proposals provide lists of potential drugs for importation and anticipated quantity, along with their domestic and Canadian prices, to demonstrate possible cost savings. They do not provide sufficient quantitative information on the potential costs of implementing these plans and thus their net economic effects. Moreover, the statute requires that the importation program not result in any additional risk to the public's health and safety.

*(Comment 28)* Some commenters noted that patient savings will depend on whether and how coupons and discounts might apply to imported drugs. One commenter noted in particular the Centers for Medicare and Medicaid Services' (CMS') proposed Notice of Benefit and Payment Parameters for the 2021 benefit year, which may limit how insurance companies apply coupons toward enrollee cost-sharing.

*(Response 28)* Whether and how coupons and discounts might apply to imported eligible prescription drugs depends on the individual SIP and how the SIP plans for imported drugs to be distributed. Because we lack information on the scope and scale of each SIP, the economic analysis notes the potential impact on patients and payers qualitatively.

#### 4. Comments on Distributional Effects

*(Comment 29)* One commenter suggested that the mostly likely population to benefit from the rule will be the uninsured, who purchase drugs out-of-pocket. Most patients pay co-insurance or co-payments, rather than the drug's acquisition cost, as part of their insurance plans. These patients may see less direct benefit if savings are captured by the insurer or plan, PBM, or pharmacy.

*(Response 29)* The most likely beneficiaries of the rule will depend on the scope and scale of SIPs, which may target different populations through different channels and

payers. Because we lack details on how each SIP will operate, we cannot predict the most likely populations to benefit from the final rule.

*(Comment 30)* Some comments expressed concern that the proposed rule might negatively impact access to medicines in marginalized populations. Specifically, some comments suggested that low-income individuals might disproportionately bear any adverse health and safety consequences of importation if they are only able to afford imported drugs. Another comment stated that marginalized communities may face barriers to accessing drug available through importation programs. Some comments also noted that importation based on state-run programs may increase gaps in healthcare access between residents of different states.

*(Response 30)* In the Distributional Effects section of the final RIA, we note that the potential for SIPs to operate in some states and not others, as well as possible differences between SIPs, may result in different levels of benefit to residents of different states. The statute requires that the importation program not result in any additional risk to the public's health and safety.

#### 5. Comments on International Effects

*(Comment 31)* Many comments noted that Canada faces ongoing drug shortages, which could be exacerbated by importation and thus harm public health in Canada.

*(Response 31)* The RIA acknowledges that SIPs resulting from the rule may risk exacerbating drug shortages in Canada. As we are unable to predict the likely number, scale and scope of authorizable SIPs and the specific eligible prescription drugs these SIPs will import, we do not estimate impacts of the rule on the Canadian drug supply.

#### 6. Comments on Small Entities

*(Comment 32)* One commenter stated that since FDA cannot estimate the impacts of the proposed rule on small entities, we should not certify that the rule will not impact a significant number of small entities.

*(Response 32)* We agree with this comment. This rule does not impose new regulatory requirements on small entities; however, we cannot anticipate whether sponsors will contract with small entities to implement their authorized SIP proposals or whether, under certain circumstances, a small pharmacist or wholesaler might become a sponsor. We also lack information to quantify the total impacts of the final rule. Because of the uncertainties, we are unable to certify that the rule will not impact a significant number of small entities.

*(Comment 33)* Some comments stated that importation will harm small domestic pharmacies and local businesses, who may not have equal access to imported products, particularly if insurers prefer imported products on their formularies.



(Response 33) We lack information to predict which pharmacies will have access to imported eligible prescription products because distribution channels will depend on each SIP.

#### D. Summary of Changes

Compared to the preliminary economic analysis of impacts, this final analysis qualitatively notes additional factors that may affect benefits and costs, including federal and local law enforcement activity and additional costs to importers. It also includes a more detailed discussion of transfer payments. Finally, we have revised the Regulatory Flexibility Analysis in section III to correspond with the fact that, due to lack of information, we cannot certify that the rule will not impact a significant number of small entities. There are no other changes to the preliminary analysis.

## **II. Final Economic Analysis of Impacts**

### A. Background

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 amended section 804 of the Federal Food, Drug, and Cosmetic Act to allow for drug importation from Canada. Section 804 directs the Secretary of the Department of Health and Human Services (DHHS), after consultation with the United States Trade Representative and the Commissioner of Customs (now U.S. Customs and Border Protection (CBP)), to promulgate regulations permitting pharmacists and wholesalers to import Canadian prescription drugs into the United States. However, implementation of section 804 requires the Secretary to certify, first, that any importation program must “pose no additional risk to the public’s health and safety,” and, second, that importation must “result in a significant reduction in the cost of covered products to the American consumer.” Since section 804 was enacted, no Secretary has certified that these criteria can be met.

Several state governments are considering or developing commercial drug importation programs to expand access to Canadian drugs. According to the National Academy for State Health Policy, 28 states pursued some form of legislative action related to wholesale drug importation.<sup>3</sup> For example, Colorado, Florida, New Mexico, and Vermont passed laws to allow importation of prescription drugs from Canada.

### B. Need for the Rule

Some prescription drug products are priced much higher in the U.S. than abroad, raising questions about the adequacy of competition in U.S. markets for these drugs and whether new policy approaches, such as importation under section 804, might effectively put downward pressure on prices in U.S. markets and provide consumers with access to lower cost products. As described in section III of the preamble of this final rule, FDA has further considered the question of whether section 804 could be implemented in a manner consistent with the requirements for the Secretary’s certification. FDA has

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<sup>3</sup> The National Academy for State Health Policy’s reports this information in a legislation tracker and accompanying reports: <https://nashp.org/rx-legislative-tracker-2019/>. Accessed July 16, 2020.

determined that implementation of section 804 through time-limited programs, overseen by states or Indian tribes (and in certain circumstances by a pharmacist or wholesale distributor), with possible co-sponsorship by a wholesaler or pharmacist or another state or Indian tribe, could enable importation to occur in a manner consistent with the certification criteria. This implementation could potentially provide relief to some American consumers from the burden of high prescription drug prices.

### C. Purpose of the Final Rule

This final rule allows importation of certain prescription drugs from Canada.<sup>4</sup> It describes detailed procedures for time-limited commercial drug importation programs by states or Indian tribes and, in certain circumstances, by pharmacists or wholesale distributors.

First, the final rule describes necessary procedures and precautions for the implementation of these time-limited SIPs. The final rule will help to ensure drug safety and efficacy through pre- and post-importation requirements, including: the provision of detailed proposals, Pre-Import Requests, supply chain security requirements, statutorily-prescribed testing, re-labeling with FDA-approved labels, recordkeeping, recall action plans, and adverse event reporting. Entry and arrival of a shipment containing an eligible prescription drug is limited to the CBP port of entry authorized by FDA to import eligible prescription drugs under section 804, so the FDA can ensure that it has adequate resources at the port to process admissibility determinations and perform sampling of any shipment containing eligible prescription drugs, if necessary.

Second, the final rule requires SIP sponsors to show that a program will result in a significant reduction in the cost of covered products to the American consumer. SIP sponsors will provide such information as part of their initial proposal, ongoing reporting, and requests for extension. As a result, any SIPs implemented under the final rule will be expected to result in a significant reduction in the cost of covered products to the American consumer.

When the final rule becomes effective, states, Indian tribes and, in certain circumstances, pharmacists and wholesale distributors, could submit SIP proposals to the Secretary of DHHS.

### D. Baseline Conditions

We adopt a baseline that reflects our best forecast of the world without the final rule. As described above, the Secretary will allow the importation of eligible prescription drugs by certifying that importation poses no additional risk to the public's health and safety and achieves significant cost savings for the American consumer.

Previously, these conditions had not been certified, and U.S.-authorized commercial importation of Canadian drugs does not occur. Though some states have pursued

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<sup>4</sup> This final rule establishes a new part 251 of Title 21 of the Code of Federal Regulations to implement section 804(b)-(h) (21 USC 384(b)-(h)).

legislation that would allow for such importation under state law, there is no federal program to accept proposals for importation projects. No federal government resources are allocated to consider or authorize such proposals or to monitor adherence to any requirements that such proposals must follow. Moreover, no resources are allocated to facilitate, enforce, and monitor potentially authorized importation programs in a way that ensures both safety and cost savings.

As described above, some states have developed or are developing legislation and proposals for the wholesale importation of prescription drugs, but implementation of such plans is not permitted in the absence of this rule. We therefore use a baseline in which no states, Indian tribes, pharmacists, or wholesale distributors implement plans to import prescription drugs.

The regulatory baseline is subject to uncertainty, as there is a CMS proposed rule currently undergoing regulatory review that may, if it includes a proposed pilot program similar to that discussed in an associated advance notice of proposed rulemaking, reduce drug producers' ability to price-discriminate between the U.S. and Canada. If the CMS proposed rule is finalized, it could substantially reduce the scope of the potential impacts of this rule, depending on the overlap between the sets of drugs eligible under the two policies.<sup>5</sup>

#### E. Benefits of the Final Rule

We do not have information to allow us to estimate quantitatively the benefits of this final rule. Benefits of the rule, if any, will be in the form of significant cost savings to patients and to third-party payers or entities such as retail pharmacies and hospitals. To the extent the rule improves access to drugs by lowering costs to the American consumer, it may also result in economic benefits from reduced morbidity and mortality. Less expensive drugs may benefit public health through increased uptake of therapies by sick individuals with low willingness or ability to pay for prescriptions, or through increased adherence to prescribed treatments.

It is important to note that cost savings would be economic benefits if they come from reductions in the prices of drugs purchased from foreign-based manufacturers. The decrease in foreign manufacturers' revenue benefits U.S. patients and payers. If savings

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<sup>5</sup> The CMS advance notice of proposed rulemaking (<https://www.federalregister.gov/documents/2018/10/30/2018-23688/medicare-program-international-pricing-index-model-for-medicare-part-b-drugs>) targets certain Medicare Part B drugs administered in physician offices or hospital outpatient departments and defines the set of eligible drugs as single source drugs, biologicals, biosimilars, and multiple source drugs with a single manufacturer. In contrast, Section 804(a)(3), and thus FDA's final rule, excludes from the definition of "eligible prescription drug" biological products, as well as controlled substances, infused drugs, intravenously injected drugs, and drugs that are inhaled during surgery. FDA's final rule also excludes additional categories of drugs, including intraocularly and intrathecally injected drugs, drugs that are subject to Risk Evaluation and Mitigation Strategies (REMS), and drugs that do not meet the definition of a "product" for purposes of section 582 of the FD&C Act. The CMS proposed rule is currently undergoing regulatory review (<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=0938-AT91>). Accessed July 14, 2020.

represent reductions in prices of drugs purchased from U.S.-based manufacturers, cost savings would be considered economic transfers from U.S.-based manufacturers to consumers. In other words, the reduction in price is a redistribution of monetary payments between domestic parties, potentially including intermediaries in the supply chain.

Developing estimates of such economic benefits from SIPs and distinguishing them from transfers would require information about the likely scale and scope of authorizable SIPs and the specific manufacturers these SIPs will involve, among other information.

FDA is aware of several studies estimating the potential savings from commercial drug importation [1] [2] [3]. However, these studies consider importation at a much broader scope than the final rule, analyzing national aggregates for prescription drugs in general as opposed to subnational programs involving specific drugs and distribution channels. In addition, savings from specific programs will be highly sensitive to the eligible prescription drug products included in a SIP as well as the prices of those products, which can fluctuate substantially over short time periods. Therefore, earlier studies will not likely yield reasonable projections of savings from this final rule. We note that in 2017 the CBO issued a one-page report with preliminary estimates of S.469, the Affordable and Safe Prescription Drug Importation Act<sup>6</sup> [4]. S.469 is generally much broader in scope than this final rule, including importation of prescription drugs from other high-income countries in addition to Canada. The estimates thus consider a much larger quantity of potential drug imports than will be possible under this final rule. Because of these issues, we do not consider results outlined in these studies applicable to this final rule.

In this section, we note the factors influencing potential benefits.

- U.S.-Canada drug price differences:  
Existing price differences for some drugs can be large. Several studies indicate relatively large differences in prices between the U.S. and other countries, including Canada [5] [6] [7]. These studies note, however, that the magnitude of international price differences typically varies with the specific set of drugs studied and that many drugs are not available in the same dosage form and strength in different pairs of countries. Estimated price differences can also vary according to how comparable products are identified (e.g. the definition of a drug) and how prices are measured (e.g. per milligram, dose, or package). The point of sale at which prices are captured (e.g. manufacturer, wholesale, retail) may also mask likely markups, discounts, and rebates. Finally, the most appropriate price measure for forecasting savings may vary according to the intended beneficiaries in each SIP.
- SIP costs and mark-ups:  
By contracting with SIP sponsors, importers and private intermediaries will face costs to implement SIPs and use markups to cover these costs and profit. Existing

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<sup>6</sup> The full text of the bill is available at <https://www.congress.gov/bill/115th-congress/senate-bill/469/text>.

prices may provide a limited basis for forecasting savings to consumers without information on the likely markups applied at each stage in the supply chain. These markups depend on the management of individual SIPs and the eligible prescription drugs authorized for import.

- Canadian drug supply and potential regulatory response:  
Increases in competition in U.S. prescription drug markets may be limited. The Canadian drug supply is smaller than the U.S. drug supply<sup>7</sup> [8] [9], and the Canadian supply of eligible prescription drugs for import is controlled by the same manufacturer as controls the U.S. supply. In addition, Canadian regulatory agencies and/or manufacturers may also limit supply to be exported to the U.S., for example, via agreements with Canadian distributors prohibiting distribution in the U.S. For all these reasons, there is a question as to whether this final rule could yield non-zero benefits.
- Affected drug manufacturers:  
We lack data on whether imported eligible prescription drugs will be predominantly produced by domestic or foreign manufacturers and thus cannot estimate potential reductions in revenue to domestic drug manufacturers that may occur with importation. This information is necessary to distinguish economic benefits from transfers. Lower prices paid by U.S. intermediaries and consumers for imported eligible prescription drugs produced by a domestic manufacturer would come at the expense of the domestic manufacturer. In other words, some of the revenue the domestic manufacturer would have received without importation transfers to intermediaries, payers, and consumers through lower prices. We cannot estimate potential reductions in revenue to U.S. drug manufacturers. Lower prices paid by U.S. intermediaries and consumers for imported eligible prescription drugs produced by a foreign manufacturer constitute economic benefits to the U.S.

There are many payers in the U.S market, but this framework does not consider the potential implications of private and government insurance and reimbursement as well as other purchasers in the supply chain including hospitals and physicians. We cannot predict the types and volumes of eligible prescription drugs that will be imported under the final rule, which will influence these payers. Moreover, the prices paid by multiple payers, including those affected by discounts, may be different, unobservable, or both. Finally, this framework does not consider the response of the manufacturer with regard to supplying the Canadian market.

#### F. Costs of the Final Rule

We do not have information to allow us to estimate quantitatively the costs of this final rule. Costs of the final rule may accrue to the federal government, SIP sponsors, importers, and the manufacturers of imported eligible prescription drugs. Developing

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<sup>7</sup> In 2018, roughly 700 million prescriptions were dispensed from Canadian retail pharmacies, compared to 5.8 billion in the U.S.

estimates of such costs from SIPs would require information about the likely number, scale, and scope of authorizable SIPs and the specific eligible prescription drugs these SIPs will import, including whether the manufacturers of these imported eligible prescription drugs are domestic or foreign.

Though we note that 28 states have pursued some form of legislative action related to wholesale drug importation,<sup>8</sup> we cannot predict how many states or Indian tribes might submit authorizable SIP proposals. We additionally do not know if and when pharmacists or wholesale distributors might submit proposals. We also lack information to predict the potential timing of proposal submissions, implementation, and extensions. Moreover, we note that the final rule is designed to give flexibility to sponsors in how to develop their programs. Not only will the number and timing of proposals vary, but the scope and scale of proposals may be subject to significant variability. Due to these information constraints, we discuss costs qualitatively.

## 1. Costs to Federal Government

To implement the final rule, FDA will incur costs related to set-up prior to importation, proposal review and management, and compliance, monitoring, and enforcement. Because the final rule is designed to give flexibility to sponsors in how to develop their programs, we expect significant variation in proposal scale and scope and, thus, significant variability in potential resource needs.

- **Pre-importation set-up:**  
To prepare for importation by authorized SIPs, FDA will incur costs to alter existing import computer systems and educate importers on procedures for filing entry of SIP drugs. FDA will also face costs to establish necessary monitoring and compliance resources at the specified port of entry.
- **Proposal management and review:**  
All SIP sponsors will go through a review process to ensure that SIPs pose no additional risk to public health and safety and result in significant cost savings to the American consumer. This assessment will include corresponding with SIP sponsors and importers as well as reviewing SIP proposals, Pre-Import Requests, quarterly reports, SIP proposal and/or Pre-Import Request updates, and extension requests. Review costs could be incurred even if no SIP is ultimately authorized.
- **Import compliance, monitoring, and enforcement:**  
Upon finalization of the rule and authorization of a SIP, FDA will face costs associated with the compliance, monitoring, and enforcement of these importation programs. FDA staff will perform review of testing plans and activities during the pre-importation and importation stages. Such responsibilities include reviewing the importer's testing plan in the Pre-Import Request, reviewing testing results

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<sup>8</sup> The National Academy for State Health Policy's reports this information in a legislation tracker and accompanying reports: <https://nashp.org/rx-legislative-tracker-2019/>. Accessed July 16, 2020.

from the importer or manufacturer including complete laboratory records, and, potentially, performing testing of eligible prescription drug samples collected by FDA. Staff at the port of entry will perform admissibility review and make admissibility determinations of entries containing an eligible prescription drug. FDA will also undertake a variety of monitoring and compliance activities, including label review and post-marketing surveillance, audits of SIP sponsors and participants, potential appeals processes, recall review and effectiveness, and monitoring of adverse event reporting. As part of its ongoing compliance efforts, FDA may conduct inspections of foreign sellers, qualifying laboratories, and relabelers. FDA will draw on all of this information about individual SIPs and imported eligible prescription drugs to monitor and evaluate the overall impacts of importation under Section 804. Finally, FDA will conduct surveillance for entries falsely submitted as entries of compliant prescription drugs under a SIP, as well as monitor for any potential unintended consequences related to implementation of the final rule.

## 2. Costs to Section 804 Importation Program Sponsors

SIP sponsors will face set-up costs such as reading the final rule, SIP proposal development and submission, and contracting with importers and foreign sellers. Once a program begins, sponsors will face possible costs of extension and an annual reporting burden for each year the SIP operates. SIP sponsors will also incur costs of educating affected consumers and other parties in the drug supply chain about the SIP and developing a system for reporting adverse events and effectuating recalls. State and local law enforcement agencies may face costs to interdict counterfeit prescription drug traffic. Some non-federal governmental entities may face a cost of developing and passing legislation before developing a SIP proposal. However, we recognize that some sponsors may choose to contract the development of proposals to a third party and thus incur costs related to contracting. Alternatively, some government entities may sponsor a proposal with a wholesaler, a pharmacist, or other non-federal governmental entities. Because we lack information to predict how each SIP might operate, we cannot quantify these costs to sponsors. Some of these impacts—such as costs of SIP proposal development and submission by early adopters—will be incurred even if no SIP is ultimately authorized.

We note that the net financial impact on sponsors may be positive or negative. As undertaking a SIP is a voluntary activity, sponsors interested in reducing their own expenditures on prescription drugs will likely undertake SIPs only if they anticipate ultimately recovering all program costs directly from the resulting cost savings. Hence, the rule will likely leave such sponsors with net financial benefits. However, a non-federal governmental entity might also choose to develop a SIP as a public service to reduce the prescription drug expenditures of its residents. In this case, the sponsor may deliberately incur costs of developing and implementing the program that it does not plan to recover, thus operating at a net financial loss.

## 3. Costs to Drug Manufacturers

As U.S. drug distributors realize savings in acquiring imported drugs and pass some of these savings to consumers and other parties in the drug supply chain, it is possible that U.S. drug manufacturers may experience declines in U.S. sales revenues. It is also possible that U.S. manufacturers of imported eligible prescription drugs may incur certain compliance costs if their drugs are imported into the U.S. from Canada.<sup>9</sup> Because we lack information on the type and quantity of eligible prescription drugs that will be imported through SIPs, we cannot predict which manufacturers, domestic or foreign, might face these costs.<sup>10</sup>

The final rule requires the U.S. manufacturer to provide importers with certain information regarding testing methodology, as well as an attestation and other information, to authenticate the eligible prescription drug, to ensure that it is not degraded, and to establish that it meets all conditions in the FDA-approved new drug or abbreviated new drug application. Alternatively, the manufacturer could choose to conduct the required testing itself and may incur costs for this additional testing. Manufacturers will have to provide the information regarding testing methodologies or conduct the testing and provide attestations and other information throughout the course of the program. Manufacturers may incur costs to conduct this testing and/or provide these attestations and information to the importer. However, the magnitude of these costs may depend on the eligible prescription drugs imported in each SIP.

The manufacturer of an eligible prescription drug that is imported will also need to provide the importer with written authorization for the importer to use, at no cost, the FDA-approved labeling of the eligible prescription drug. Manufacturers might face a cost to transmit this information as well as possibly an unquantifiable loss related to the proprietary value of this property, if any. In other words, it is possible that this labeling and confidential commercial information could help the importer capture a portion of the market that is currently held by the manufacturer and/or any other authorized user of the proprietary name and labeling.

#### 4. Costs to Importers and Other Intermediaries

Private intermediaries, such as wholesaler drug distributors or pharmacists, that contract with a SIP sponsor to implement a SIP will face business expenses, including but not limited to the purchase of drugs from Canadian foreign sellers, systems for serialization of units, cases, and logistical units, relabeling (including affixing the product identifier), repackaging, compliance with proposal, pre-importation, and importation requirements, data integration, call centers, recalls, and testing by third-party laboratories. Importers'

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<sup>9</sup> We note that foreign drug manufacturers face the same costs, but we do not consider foreign manufacturers in our account of costs to U.S. society.

<sup>10</sup> SIPs that significantly reduce the profits of drug manufacturers globally may disincentivize investment in research and development of new drug products. Any benefits of such investment (e.g., patients whose lives are extended or improved by new therapies) will be lost to society as a cost of the final rule. Because SIPs will be limited both in scope and duration, we believe the potential for effects on research and development will also be limited. We did not receive public comments or feedback on the potential for research literature on optimal patent length to be matched with an analysis of which pharmaceuticals have the most import potential.



annual reporting burdens will include submission of Pre-Import Requests and fulfilling importation requirements. Importers will also face recordkeeping burdens to demonstrate compliance with secure supply chain and post-importation requirements.

However, importers will only undertake these costs if they ultimately expect to profit from the sale of imported eligible prescription drugs. An importer's expenses reduce the portion of cost savings passed on to the American consumer. However, this net transfer should be positive because the importer recovers its expenses and earns some profit by selling the drug down the supply chain.

We lack information about the potential number of participating importers, given that a single importer could contract with multiple SIPs, as well as the potential costs and profits importers might face. We describe these considerations in the benefits section. While we thus cannot include estimated importer costs quantitatively, we note that incurring these costs should always result in a net positive impact to the importer.

#### G. Distributional Effects

To the extent that this final rule is effective at leading to importation of eligible prescription drugs that will be sold at less than current U.S. prices, it may provide benefits to American consumers unable and/or unwilling to pay for their prescribed medications. Depending on the program details of authorized SIPs, the rule may result in different levels of benefit to residents of different states or Indian tribes. If wholesale distributors or pharmacists sponsor a SIP in certain circumstances, patients of these sponsors would benefit while non-patients would not.

We lack data on whether imported eligible prescription drugs will be predominantly produced by U.S. or foreign manufacturers and thus cannot estimate reductions in revenue to U.S. drug manufacturers. Lower prices on imported eligible prescription drugs produced by a domestic manufacturer would be a transfer from the domestic manufacturer to U.S. intermediaries and consumers. Lower prices on imported eligible prescription drugs produced by a foreign manufacturer constitute economic benefits to the U.S.

As noted earlier, we are not able to estimate the scale and scope of importation under authorized SIPs, and thus we are unable to assess distributional effects quantitatively.

#### H. International Effects

The final rule will have potentially adverse effects on manufacturers selling drugs in Canada and on Canadian consumers.

As with other members of the supply chain, we assume that a Canadian foreign seller will not enter into an agreement with an importer unless it is profitable to do so.<sup>11</sup> The Canadian foreign seller will thus capture some portion of the manufacturer's initial U.S. sales revenues. The foreign seller's additional profit is a cost of the final rule if imported eligible prescription drugs are produced by a U.S. manufacturer.

Any SIPs resulting from the final rule may risk creating or exacerbating drug shortages in Canada.<sup>12</sup> If the Canadian government responds to shortages by relaxing price controls, Canadian consumers may face higher drug prices. Due to lack of information regarding the types and volumes of eligible prescription drugs that potential future SIPs might successfully import into the U.S., as well as the scope of possible responses by the government of Canada (e.g., a ban on wholesale prescription drug exports<sup>13</sup>), we cannot quantify potential impacts on Canadian consumers. In general, any costs imposed on Canadian consumers may be larger on an individual basis than corresponding benefits received by U.S. consumers, due to the comparative magnitudes of U.S. demand and Canadian supply with respect to most, if not all, drugs.

### **III. Final Small Entity Analysis**

FDA has examined the economic implications of the final rule as required by the Regulatory Flexibility Act. If a rule would have a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any adverse impact of the rule on small entities.

This rule does not impose new regulatory requirements on small entities that do not participate in SIPs; however, we cannot anticipate if sponsors will contract with small entities to implement their authorized SIP proposals or whether, under certain circumstances, a small pharmacist or wholesaler might become a sponsor. We also lack information to quantify the total impacts of the final rule. As noted in Section I.C.6, (Comments on Small Entities), because we do not have enough information about the effect of the final rule on small entities, we are unable to certify that the rule will not

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<sup>11</sup> Each foreign seller must register its name and place of business with the Secretary. It must provide the name of the SIP sponsor with which it works and relevant contact information. It must also register the name of its United States agent and follow all specified requirements for wholesalers. Additionally, the foreign seller will have to ensure that a section 804 serial identifier ("SSI"), which is a unique alphanumeric serial number of up to 20 characters, is affixed or imprinted to each package and homogenous case of drugs for import. Foreign sellers will also incur costs from FDA inspections.

<sup>12</sup> In 2019, for example, the Canadian Pharmacists Association discussed the current issue of drug shortages in Canada: <https://www.pharmacists.ca/news-events/news/drug-shortages-have-greatly-increased-over-the-past-3-5-years-say-canadian-pharmacists/?lang=en>. Moreover, the Health Canada Minister held a roundtable with healthcare industry stakeholders in August 2019, at which there was consensus that the proposed rule would exacerbate drug shortages in Canada.

<sup>13</sup> In 2007, following a proposal in Congress to import prescription drugs from Canada, the Canadian government introduced a bill to restrict exportation of drugs marketed in Canada. While neither the American nor Canadian bills were passed, the Canadian government could respond similarly to the final rule. Other possible responses include creating a licensing and permitting process or collecting fees from SIPs or entities participating in a SIP, which would increase the costs of participating in a SIP.

impact a significant number of small entities. This analysis, as well as other sections in this document, serves as the Final Regulatory Flexibility Analysis, as required under the Regulatory Flexibility Act.

#### A. Description and Number of Affected Small Entities

The final rule will commence agency review of SIP Proposals submitted for authorization, initially by states and Indian tribes. According to the Bureau of Indian Affairs, there are currently 573 federally recognized American Indian and Alaska Native tribes and villages.<sup>14</sup> According to the most recent (2017) Census of Governments, among “general-purpose local governments” there are 3,031 county governments, 19,495 municipalities, and 16,253 townships. We expect state governments to be the most likely non-federal governmental entities to prepare proposals, and hence to incur any direct costs from the submission of proposals.

Pharmaceutical manufacturers, drug wholesalers, pharmacies, and drug stores may also be affected by the rule. Under the current (2017) Small Business Size Standards published by the U.S. Small Business Administration, pharmaceutical preparation manufacturing firms (NAICS code 325412) qualify as small businesses if they employ fewer than 1,250 employees. According to the most recent (2016) Statistics of U.S. Businesses (SUSB), at least 939 of 1,017 firms classified in the pharmaceutical preparation manufacturing industry employed fewer than 1,250 workers. We observe that at least 92% of firms in this sector qualify as small businesses, which is understated due to data limitations. Similarly, at least 95% of drug wholesalers (NAICS code 424210), or 6,542 out of 6,833 firms, fall under the threshold of 250 employees to qualify as small businesses. According to data from the 2012 SUSB survey, the most recent to include revenue information, at least 98% of pharmacies and drug stores (NAICS code 446110), or 18,490 out of 18,852 firms, fall under the revenue threshold of \$27.5 million dollars and thus qualify as small businesses.

#### B. Description of the Potential Impacts of the Rule on Small Entities

If any SIP proposals are submitted and authorized, resultant programs may possibly affect wholesalers and pharmacies to the extent that these parties profit from access to lower-cost, imported eligible prescription drugs, are undercut by others with such access, or sponsor a SIP proposal themselves. Any authorized SIP that successfully introduces lower-cost, imported eligible prescription drugs may also decrease the profits of pharmaceutical manufacturers.

We do not have information to quantitatively estimate the impacts of the final rule on small entities. Namely, we cannot predict how many states or Indian tribes, or in certain circumstances pharmacists or wholesale distributors, might submit authorizable SIP proposals. We also lack information to predict the potential timing of proposal

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<sup>14</sup> <https://www.bia.gov/frequently-asked-questions>

submissions, implementation, and extensions. Moreover, we note that the final rule is designed to give flexibility to sponsors in how to develop their programs. Not only will the number and timing of proposals vary, but the scope and scale of proposals and their intended distribution channels may be subject to significant variability.

### C. Alternatives to Minimize the Burden on Small Entities

As described above, we lack information with which to quantitatively estimate the impacts of the final rule. We therefore cannot estimate the impacts of any regulatory alternatives that may minimize the burden to small entities. One potential alternative to minimize the burden on small entities would be to exempt drugs produced by small manufacturers from importation. However, because the majority of pharmaceutical manufacturers are small entities, this alternative was not selected because it might exclude a significant number of drugs from being imported under a SIP. Another possible alternative could be to delay implementation of the rule to a later date. This alternative was not selected because it would delay the rule's potential benefits.

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