January 26, 2018

Division of Dockets Management (HFA-305)
Food and Drug Administration
Department of Health and Human Services
5630 Fishers Lane, Room 1061
Rockville, MD 20852


Dear Sir or Madam:

Thank you for the opportunity to submit comments on FDA-2017-N-5101 for “Review of Existing Center for Drug Evaluation and Research Regulatory and Information Collection Requirements.”

IACP is an association representing more than 4000 pharmacists, technicians, students, and members of the compounding community who focus on the specialty practice of pharmacy compounding. Compounding pharmacists work directly with prescribers including physicians, nurse practitioners and veterinarians to create customized medication solutions for patients and animals whose health care needs cannot be met by manufactured medications.

IACP understands and supports the need to protect public health. However, patient access is a patient safety issue and as such, it is essential that FDA adheres to the plain language of Statutes and Congressional intent that preserve patient access to vital, and often life-saving, compounded medications. It is also essential that the physician-patient-pharmacist triad and the right of a provider, when working with the patient, to choose the best medication for the patient’s well-being be preserved.

Type of Product or FDA Center Regulating the Product: The Guidance for Industry (GFI) was prepared by the FDA’s Center for Drug Evaluation and Research (CDER) and sets forth the FDA’s policy concerning certain prescription requirements for compounding human drug products.
Citation to Code of Federal Regulations and statutory citation (as applicable): Because this policy was established by the FDA as a GFI rather than through the formal rulemaking process pursuant to the Administrative Procedures Act, there is not an applicable citation to the Code of Federal Regulations. However, the GFI represents the FDA’s current regulatory policy under Section 503A of the Food, Drug and Cosmetic Act as amended by the Drug Quality and Security Act of 2013. The applicable statutory citation is 21 U.SC. §353a.

Approved information collection and OMB Control Number (as applicable): N/A

Brief Description of Concern: IACP continues to be concerned about the FDA’s use of this GFI in enforcement actions against state-licensed pharmacies operating in compliance with state pharmacy laws and regulations in a way that has jeopardized patient access to critical compounded medications and created undue and unnecessary regulatory burdens on pharmacies and prescribers. These concerns were raised in comments submitted by IACP to Docket No. FDA-2016-D-0269 on July 18, 2016, on the draft form of the GFI. A copy of those comments is included as an attachment to this submission. Unfortunately, the concerns raised in those comments to the draft GFI were not addressed in the final GFI.

As stated on page 1 of the GFI, the document is not binding on the FDA or the public and represents the current thinking of the FDA. However, FDA continues to use the GFI in agency inspections of and enforcement actions against pharmacies as if it had the weight of law or final agency regulation. We believe the FDA has misinterpreted the DQSA in finalizing the GFI. Specifically, we are concerned that FDA’s policy of prohibiting all “office-use” compounding by 503A pharmacies, even where expressly authorized by state pharmacy laws or regulations, is contrary to the language of the statute, congressional intent expressed during and after passage of the DQSA, and multiple congressional directives in the reports accompanying the bills providing appropriations for the FDA.

Statutory Language of Section 503A FDCA (21 U.SC. §353a):

Similar to most, if not all, state and federal statutes governing the practice of pharmacy, the statutory language of Section 503A of the FDCA requires that drug products compounded by pharmacies must be “for an identified individual patient based on the unsolicited receipt of a valid prescription order...” However, this language does not speak to the timing of the prescription, and there are always statutory and regulatory exceptions to the prescription requirement based on the realities of medical practice and the needs of patients.

Indeed, Section 503A also clearly allows for “anticipatory” compounding “in limited quantities before the receipt of a valid prescription order for such individual patient.” Additionally, Section 503A gives the FDA regulatory authority over the “distribution of inordinate amounts of compounded drug products interstate...” in the form of an FDA-developed MOU between states, or a default cap on interstate distributions equal to 5% of the “total prescription orders dispensed or distributed by such pharmacy or physician.” Notwithstanding FDA’s attempt to redefine the terms in Footnote 7 of the GFI, it is clear from the plain language of the statute that Congress intended for the terms “distributed” and “dispensed” to be treated as the distinct activities they are in law and in medical/pharmacy practice and that Congress recognized there are limited instances where it is appropriate and medically necessary for a pharmacist to “distribute” compounded medications to a physician or other prescriber prior to the receipt of a valid prescription order, including for administration to patients in an office or clinical setting.
Given this context and the statute’s plain language, together with the fact that Congress did not in Section 503A of the FDCA expressly preempt state pharmacy laws and regulations that allow for limited quantity office-use compounding, FDA has misinterpreted the law to prohibit office-use compounding. When inspecting 503A compounding pharmacies, FDA continues to use the fact that a pharmacy is doing office-use compounding prior to receipt of a prescription, including where expressly authorized by state law, to remove the exemptions provided to pharmacies in the law and inspect them under current Good Manufacturing Practices (cGMPs) rather than under standards adopted by state pharmacy boards under state law. This is drastically reducing patient access to vital, and often life-saving, compounded medications.

FDA’s proposed solution that outsourcing facilities registered under Sections 503B of the FDCA can provide medications to prescribers for office-use ignores the statutory requirements placed on outsourcing facilities and realities of medical practice that make this unworkable. As prescribers have repeatedly told the FDA in stakeholder listening sessions and through direct correspondence with the agency, the outsourcing facilities are not capable of providing the limited quantities of compounded medications to prescribers for office-administration in the short time frame and small quantities needed for their patients.

**Congressional Intent and Directives (in statements and letters) and in FDA Appropriations Acts:**

During consideration of the DQSA in 2013, IACP expressed concerns that if Congress did not include in the bill language amending the FDCA to authorize office-use compounding where allowed under state law, the FDA would use the ambiguity in Section 503A to prohibit office-use compounding and attempt to regulate state licensed and compliant compounding pharmacies like drug manufacturers. FDA made assurances to the Congress that this was not the agency’s intention and that they would use “enforcement discretion” when allocating limited resources and not enforce against otherwise compliant pharmacies for compounding for office-use when authorized by state pharmacy law. That congressional intent was clearly expressed, on a bipartisan and bicameral basis as multiple members in both chambers submitted statements into the congressional record upon passage of the bill so stating. A summary of those statements has been included as an attachment to this comment.

Subsequent to passage of the DQSA, Congress has continued to let the FDA know the agency is interpreting and enforcing the statute contrary to congressional intent as it relates to office-use compounding. In addition to questions asked and submitted in congressional hearings, bipartisan letters expressing this were sent to the FDA both before and after the FDA finalized the GFI on the prescription requirement under 503A (June of 2016 and May of 2017). The more recent letter, signed by 65 House members, asks that the GFI be rescinded and that a proposed rule be issued “that provides a meaningful opportunity for stakeholder input and that adheres to the plain language and congressional intent behind the underlying statute.” Copies of both letters have been included as attachments to this comment.

House and Senate appropriators have been clear with the FDA as well. Directives in the reports accompanying the bills funding the FDA dating back to 2016 have told the FDA that the agency is interpreting and implementing the DQSA incorrectly as it relates to office-use compounding, with language in the 2018 House report directing FDA to rescind the GFI and issue a proposed rule. A chart showing the appropriations report language on compounding from 2016-18 is included as an attachment to this comment. Unfortunately, the FDA continues to ignore the clear congressional intent behind the DQSA as it relates to office-use compounding and substitute its
own preferred regulatory authority for the authority actually given to the agency under the statute.

**Available Data on Cost or Economic Impact:** While there is currently no quantitative data on cost of economic impact of this GFI, there is clear qualitative evidence that FDA’s enforcement actions based on the GFI have created an unnecessary regulatory burden on compounding pharmacies being treated like drug manufacturers based on the FDA policies contained in the GFI. Additionally, prescribers face an unnecessary regulatory burden and expense as FDA continues enforcement actions that have led to fewer 503A pharmacies providing compounds for office stock resulting in prescribers increasingly unable to find the compounded medications they need in limited quantities and in short time frames from 503B registered outsourcing facilities. This is especially true in the “non-sterile” compounding space as outsourcing facilities must by statute be compounding some sterile drugs to register. Lastly, the impact is and will continue to be felt by patients who either cannot get their compounded medications administered in an office setting or must make multiple appointments and risk safety by transporting their own compounded medications from the pharmacy to the prescriber for office administration at the cost of a subsequent appointment.

**Proposed Solution:** IACP strongly recommends, consistent with the congressional directives discussed above, that the FDA rescind the current GFI and issue a proposed rule that after stakeholder input is finalized in a way that is consistent with the congressional intent behind the statute and that better balances patient safety with access to critical compounded medications.