Merck Frosst Canada Ltd.
P.O. Box 1005
Pointe-Claire - Dorval
Quebec, H9R 4P8
Telephone: (514) 428-2638
Facsimile: (514) 428-2662
www.merckfrosst.com

SENT VIA E-MAIL (sdupont@pmprb-cepmb.gc.ca)

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Ms. Sylvie Dupont
Secretary to the Board of PMPRB
Box L40
Standard Life Centre
333 Laurier Avenue West Suite 1400
Ottawa, Ontario, K1P 1C1

Dear Ms. Dupont

The purpose of this document is to provide the views and recommendations of Merck Frosst Canada Ltd. on the PMPRB's Notice & Comment: Draft Revised Excessive Price Guidelines released on March 26, 2009. We would also like to highlight our support of Canada's Research-Based Pharmaceutical Companies (Rx&D) submission to the PMPRB Board.

Merck Frosst, through participation in Rx&D activities, has been actively engaged in the consultation around the PMPRB proposed Guideline changes. We are encouraged by the series of meetings with representatives from the Rx&D and PMPRB Boards. Mutual understanding of each other's issues is essential in ensuring that the Guidelines remain relevant and uphold the principle of fairness, transparency, openness and predictability as voiced in the Preamble. We would also like to thank the Board Staff for being available to answer questions regarding the proposed changes.

We are pleased by the Board's decision to revert back to several key provisions of the current Guidelines, most notably, provisions governing the Reasonable Relationship test. It appears, however, that, although there is greater clarity on the fundamental issues proposed in the January 2008 Discussion Paper, the proposal has still not addressed some key recommendations and submissions by either Rx&D or the stakeholder working groups. We have concerns that the day to day commercial operations of the biopharmaceutical industry and the intricacies of its market have not been fully taken into account. A globally competitive and predictable pricing environment would support industry to compete for new R&D investments in Canada and drive discovery and innovation. This would result in creating jobs for Canadians as well as improving the quality of life for Canadians and enhancing the overall health care system.

There are four main points of concern that we would like to emphasize:

1. The Therapeutic Class Comparison Test, as written, could result in pricing comparisons against non-transparent prices, which would violate the principles of fairness, transparency and predictability highlighted in the preamble. The pharmaceutical market has become more competitive than ever with Payers demanding benefits.

2. The DIP methodology is an attempt by the PMPRB to recognize benefits provided by patentees. However, with a growing fluctuation of average prices in the 17 proposed markets, the proposed DIP methodology is too complex and will produce serious unintended consequences. For example, not allowing a patentee to rebound back to its highest previous ATP including CPI will trigger investigations without a reasonable cause. Consequently, although the Board states that, "it does not wish to unduly create a disincentive to the offering of the benefits to customers", both its current and proposed Guidelines clearly create a disincentive for patentees to offer benefits to customers including discouraging rebates to provincial formularies. This will have a perverse effect of putting an upward pressure on price. Full de-linking of the ATP from the NEAP was proposed by many stakeholders in the October 2008 submissions.

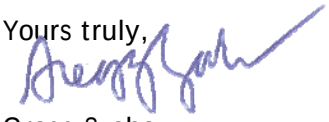
3. Full de-linking would be consistent with the mandate of ensuring non-excessive price and would establish a model that is much simpler and less cumbersome than the DIP methodology for both the Board and the patentee. Market forces, including review of drugs by the Common Drug Review and provincial committees, and the reimbursement decisions by public and private plans, ensure that prices are cost-effective and in practice fall below the Maximum Average Potential Price (MAPP) threshold.

4. Although the PMPRB has attempted to clarify the methodology of the proposed any market price review, there are several outstanding concerns. Reviewing prices in 17 proposed markets rather than one will clearly increase the workload for both PMPRB Staff and patentees. The proposals would create an additional regulatory burden for patentees that contradict the policy objectives set out in the federal *Cabinet Directive on Streamlining Regulation* issued on April 1, 2007. The proposals also could have the effect of increasing the number of hearings. In today's economy, patentees may be forced to shift human resources away from other critical business functions to address this additional administrative burden.

In closing, we understand that after a lengthy consultation process, there is a desire to finalize the new Guidelines. Nonetheless, Merck Frosst agrees with Rx&D that the implementation of these Guidelines in the middle of a reporting year will create problems and confusion for both patentees and staff. We propose the continuation of the discussions between Rx&D and PMPRB until a more viable solution is reached. Also, given that the resolution of the ongoing judicial review could have further implications on the guidelines, we recommend implementation of Guidelines no earlier than January 2010.

The attached appendix sets out some specific issues and concerns to illustrate the difficulties with the proposed revisions to the Guidelines. We also include our solutions to the issues and concerns. Due to the complexity of the proposed revisions, we hope to be able to make further submissions.

Yours truly,



Gregg Szabo
Executive Director, Policy, Reimbursement & Communications

Appendix: Merck Frosst Technical Submission to PMPRB

This appendix addresses the issues and concerns of Merck Frosst resulting from the PMPRB's Notice and Comment on Proposed Revisions to the Excessive Price Guidelines published March 26, 2009. Due to the complexity of the proposed revisions, we hope to be able to make further submissions.

Reasonable Relationship Test

Merck Frosst would like to acknowledge the Board in its decision to revert back to the original Reasonable Relationship Test #3, hence not creating any disincentives for patentees to making available titration doses for patients.

Merck Frosst also agrees with Rx&D that restricting the RRT to those instances where the products have the same chemical entity and same indication and use, introduces a new level of uncertainty for patentees. Therefore, we also recommend that this provision be removed.

Therapeutic Class Comparison

Patentees require fairness, predictability and transparency for planning and pricing strategy decisions. The proposed methodology does not offer a predictable comparator price that protects confidentiality and treats all patentees fairly and consistently. For example, the Guidelines are proposing using a public price that would be "sufficiently close to the non-excessive average price (NEAP) of the patented product used for comparison purposes". How should patentees interpret "sufficiently close" and how can patentees predict a competitors NEAP in their planning process?

Another issue with the PMPRB stating that a price is "sufficiently close to the NEAP" is that it does not adequately protect pricing confidentiality. Without realizing it, the use of this terminology could indicate to a patentee that a competitor's list price of a comparator drug product is not "sufficiently close" to the NEAP.

Using "sufficiently close to the NEAP" may also cause unintended harm to a patentees' corporate reputation. If a patentee uses the public list price to price its own product that it believes conforms to the PMPRB Guidelines, the Board could still determine that this publicly available list price was not an appropriate comparator and force the patentee to lower the price of its product. If such an instance were to occur, it may be perceived by the public that the patentee intentionally tried to sell its product at an excessive price when this was clearly not the intent.

In the TCC test as well as for line extensions and combination products, there is still no explanation for using a patentee's own national ATP. Under the proposed 17- market system, a NEAP in a market that did not receive any benefits may be "non-excessive" but the present and proposed Guidelines force a price decrease on a line extension down to the national ATP of its comparator in order for it to be considered non-excessive. This unduly punishes a patentee for offering benefits, especially given the Board's position on reporting all benefits. It provides a double standard in that a competitor could use the patentee's list price in a similar situation. It also creates unfairness because timing of launch could produce two different introductory prices. A new product could receive a higher or lower price depending on whether or not the comparator product has rebounded from a "dip".

Example: Suppose Market A for the existing comparator is non-excessive at $10 and Market B is at $6 because of a benefit being offered. The resulting national ATP for the existing product is $8. According to the Guidelines, the same patentee is only allowed to introduce a new line extension (or combination product) at the comparator's market combined ATP of $8 even though the existing comparator is already considered non-excessive at $10. The new line extension (or combination

product) priced at the same $10 is considered excessive because of the comparator benefit being offered in Market B. The PMPRB should not require the price of the new line extension to reflect the national ATP because there is no guarantee that the new product would negotiate or be awarded the same contracts as the existing comparator.

Vaccine case: The Guidelines for the TCC test are also not well suited for vaccine products, which are primarily sold through competitive tenders & contracts. As a result, they have a tender and non-tender price and not a price by class of customer. Price is largely determined by guaranteed volumes, duration, and terms and conditions of the resulting contract. On average, 75-90% of sales are generated via contracts. As a result, a publicly available list price would never be "sufficiently close" to the NEAP of the patented vaccine product used as a comparator. Furthermore, a line extension of a vaccine product would only receive the National ATP of its comparator, which would be a price close to the tender price rather than the actual non-tender price of its predecessor. Under the proposed guidelines, a line extension would only be able to offer this lowered tender price across all markets to remain non-excessive, regardless of guaranteed volumes and duration. This would interfere with the Government's tendering process and will create a huge disincentive for vaccine manufacturers to offer benefits to Governments.

The modification of the Maximum Non-Excessive Price to the Maximum Average Potential Price (MAPP) and the Non-Excessive Average Price (NEAP) now provides greater clarity around the terminology. As comparator's prices should be fair, transparent and predictable and must protect confidentiality of transaction prices, regardless of who owns the patent, the MAPP would be useful for the purposes of the various pricing tests, such as the TCC test. **For the introductory price of all new medicines we therefore recommend that the Board Staff use the MAPP as the public source for the TCC test.**

Recognizing Benefits – DIP Methodology

The proposed DIP-methodology will be a challenge to implement and does not fully reflect the actual variations that exist in benefits. Benefits are provided to some but not all customers in a particular class and over different periods of time not during a particular calendar pricing period. Some benefits get renewed over multi-year contracts. Some may involve volume purchasing. Benefits may be offered directly or provided via group purchasing organizations with different purchasing patterns. To add to the complexity, some benefits are paid in years in which the benefit was not provided.

It is unclear how a scenario in which a patentee provides multiple benefits to customers over different time horizons would be addressed. There is no explanation to how a benefit will be accounted for if it is not terminated. For example, for a reasonable relationship test or a therapeutic class comparison test, how will the Board determine the "previous highest ATP" when not all benefits are terminated? What if there is disagreement? What is the resolution process? This is very unclear and very concerning, as a patentee could be forced to price newly launched products below the actual ATP without benefits. Furthermore, if a drug is sold only in one market, i.e. hospital market, patentees would not have any incentive to offer benefits during the introductory period.

Another major concern is the ability to take allowable price increases. A fundamental flaw of the current definition for the DIP methodology is that once a benefit expires, the "rebound" is only to the previous highest ATP without CPI considerations. This may be interpreted that the price is frozen at a point prior to offering benefits with no allowance for price increases in other markets until the benefit ends. Otherwise**,** this could force a company to unfairly price lower in one customer class over another.

The DIP methodology has potential to become very cumbersome and increase workload for both PBPRB Staff and patentees. For example, patentees will be forced to create numerous price lists for various markets as well as for sub-markets within markets.

Example: The Guidelines only recognize sales-mix shift across classes but not those within a class. Consider the situation in which an oncology drug is sold only in hospitals as follows:

	Hospital (benefits)	**Hospital (no benefits)**	**MS-ATP**	**MS-NEAP**
Year 1	$1.00	$1.00	$1.00	$1.00
Year 2	$0.80	$1.02	$0.91	$1.02
Year 3	$0.80	$1.04	$0.92	$0.94
Year 4	$1.00	$1.06	$1.03	$1.00
*** Assuming 50% of unit sold at benefit price and 50% at non-benefit price**				

In Year 4, the benefits ends and according to PMPRB draft Guidelines, the Market Specific-NEAP could only rebound to the "highest previous ATP", i.e. $1.00 in Year 1. However, in Year 4, because price increases were taken annually in the hospital market that did not include benefits, the ATP becomes $1.03 automatically triggering an investigation without cause. Again, this unnecessarily increases workload for both PBPRB Staff and patentees. Furthermore, the proposed guidelines are suggesting that the patentee would now need to have one price list at $1.00 and another at $1.06.

A patentee could also potentially be put at a disadvantage versus a competitor just for providing benefits.

Example: Two companies launch competing products in the same class at the same price. Company A sells product A for $10 but provides benefits that drop its ATP to $8 over a three year period. Company B sells product B but provides no benefits but take annual CPI increases of 2%. At the end of three years, Company A, no longer provides a benefit and is forced to sell its product at $10, while company B could sell its product for $10.61.

Merck Frosst recommends that the DIP methodology be redrafted to allow "rebounds" to the previous highest non-excessive ATP in any class of customer adjusted for changes in CPI over the relevant time period. This would avoid unintended consequences as well as minimize unnecessary workload and regulatory burden on Board Staff and patentees. *We* agree with the Rx&D suggestion *that given the requirements outlined for the DIP methodology, patentees will likely have to amend their contracting approach and require contracting partners to provide more detailed information. PMPRB need to consider the number, level and scope of the contracts in place across Canada, and assess the impact on patentees but also on the broader set of stakeholders.*

Any Market Price Reviews

The PMPRB is proposing to expand their review to include 16 sub-markets: 3 customer classes and 13 provinces and territories. The evidence presented in the May 2006 Discussion guide showed that prices for all drugs by class of customer, and by province and territory, were overwhelmingly within the range of 5% of the national MNE price or lower. Under the proposed guidelines patentees will need to monitor their compliance in all 16 submarkets on an ongoing basis in order to avoid the risk of enforcement action by the Board. There is no evidence to suggest that these provisions are necessary as they could result in unsubstantiated claims of excessive pricing.

Merck Frosst agrees with Rx&D that although PMPRB has made an attempt to clarify the language and rationale behind its any market price review proposal there are still several outstanding issues that require clarification:

1. *The rationale for wanting to significantly increase the regulatory burden and increase the reporting complexity for patentees given the majority of cases are in the same range.*

2. *Not clear or defined as to the criteria which will be used determine how the PMPRB views the appearance of a national excessive price.*

3. *Not clear as to what defines a complaint – how transparent will this process be – for instance will the patentee be informed of the scope and nature of the complaint?*

4. *Not clear nor is it adequately explained how excessive revenues would be calculated if there is a problem.* Furthermore, how will offset revenues will be calculated especially in situations where benefits exist?

5. *It appears from the way the proposal is worded that at one point in time the PMPRB could rule a price non-excessive but at a later date changes its opinion and then demand the payments of excessive revenues dating back to the original ruling.*

6. *Sales mix-shift across and within all classes of customer must be considered. The PMPRB has not provided any examples or explained how all of the various provincial/territorial ATP's will impact within an individual customer class. For example, the hospital class could have tender versus non-tender pricing. It is not clear then how a patentee can expect to manage all of the ATPs across all the class and market levels.*

7. *Clarification is required that market specific ATPs are compared to market specific NEAP and not a national NEAP.*

Confidentiality

Merck Frosst has concerns around the protection of confidential information:

1. As mentioned in the TCC Test section, PMPRB is proposing to use public prices "sufficiently close to the NEAP of the patented product used for comparison purposes". This approach can reveal information about a competitor's average price that is highly confidential.

2. PMPRB is proposing to make Form 2, Block 5 information publicly available. The PMPRB has the right to publish pricing information which is publicly available. However, some companies provide pricing data that may not be in the public domain. In general, the confidentiality provisions of the Act protect commercial prices filed by patentees, so information that is not obtained in the public domain should remain confidential.

3. The PMPRB has abandoned, in these Draft Revised Excessive Price Guidelines, the following principle that is in the current guidelines: "*Accordingly, the governing principle is that of confidentiality*." (Preamble, Section 4.2 – Protection of Confidential information; PMPRB's Compendium of Guidelines, Policies and Procedures; March 2008).

4. The PMPRB has abandoned, in these Draft Revised Excessive Price Guidelines, the following principle that is in the current guidelines: "*Privileged or confidential information will not be included in the report except to the extent that such information has been made public in a proceeding*." (Chapter 2, Section 7.8 – Voluntary Compliance Undertaking; PMPRB's Compendium of Guidelines, Policies and Procedures; March 2008).

Merck Frosst recommends that the PMPRB revise its current proposals to protect confidential information according to the Patent Act.

"Superior Comparators"

For slight to no improvement products without direct comparators, the use of a price test that will look at the price of lowest priced "superior" products (potentially including generics), is not reasonable. Defining a "superior" product will be problematic, and goes against the principles of fairness, transparency, openness and predictability.

We agree with the Rx&D recommendation for the PMPRB to c*ompletely remove Part III: Chapter 2: Section 2.9 (and related Section 2 from Schedule 8) from the draft guidelines. Should no comparator be found for that category, Section 2.10 in the new guidelines would be the test (or section 8 in Schedule 8). This is the practice as stipulated in the current guidelines and there is no compelling reason to depart from this approach.*

International Therapeutic Class Comparison Test (ITCC)

Regarding the ITCC, it is not clear why PMPRB is selecting the median instead of the top of the TCC. In the domestic TCC, the patentee is allowed the top of the class so the same rule should apply to the ITCC. This way, the inclusion of generics in the ITCC test would not be an issue.

Merck Frosst agrees with Rx&D multi-stakeholder and the Working Group on International Therapeutic Class Comparison *that all generics should be excluded. Otherwise, any generic comparison will significantly skew the results of the test.*

Resetting the NEAP after Introduction

MFCL agrees with the Rx&D recommendation that *patentees provide the required product information once a Notice of Compliance has been issued by Health Canada. This will encourage patentees to make drugs available under Special Access Program thus benefiting patients.*

PMPRB Mandate

MFCL support Rx&D's comments on the on the origin, revised mandate statement and structure of the PMPRB.

Conclusion:

Merck Frosst realizes that the Notice and Comment package deals with several complex and interrelated issues. We are concerned that these proposed changes could have unintended consequences on the pharmaceutical industry as well as stakeholders in general, especially patients. A more fair, transparent and predictable pricing environment would support industry to compete globally for new investments in Canada, which would also created jobs for Canadians. Merck Frosst remains optimistic that a solution can be reached to ensure an alignment between the objectives of the pricing provisions of the *Patent Act* and the PMPRB mandate and the objectives of the biopharmaceutical industry to ensure Canadian have access to innovative medicines.