FDA Confirms Alternative Pathway for Drug Approval; Leaves Certain Key Scientific Issues Unresolved

The Food and Drug Administration ("FDA") has made clear that it believes an applicant seeking approval of a new drug product may rely on the agency's findings of safety and efficacy for another company's previously approved product *even though that product may not be the same as the applicant's product.* Under Section 505(j) of the Federal Food, Drug, and Cosmetic Act ("FDCA"), FDA has long been authorized to rely on information about the safety and efficacy of a previously approved drug to approve a generic version. That provision, however, only applies where the two products are identical and bioequivalent. The FDA has now confirmed its view that Section 505(b)(2) of the statute also allows an applicant to rely on the agency's findings of safety and efficacy for another manufacturer's previously approved but different product. In such applications, the sponsor need only develop additional information to address the issues raised by the differences between the two products. This interpretation is significant because it could allow an applicant to avoid another manufacturer's patents on a product without being required to develop a full set of clinical data to gain approval of its product.

Specifically, in a consolidated response to four citizen petitions issued on October 14, 2003, FDA reaffirmed its interpretation of 505(b)(2) as follows. A 505(b)(2) applicant: (a) may rely on FDA findings of safety and effectiveness of an approved drug even where those findings are based on confidential and proprietary information submitted to the agency by another company; (b) may rely on FDA's findings of safety and effectiveness for an approved drug to the extent that its product shares characteristics (active ingredient, dosage form, strength, route of administration, indications, conditions of use) in common with the approved drug; (c) need not await approval of a generic version of the product before filing or gaining approval of its application; (d) also need not wait for FDA to "clear" its interpretation of the FDCA with the public before availing itself of this approval mechanism; and (e) may not expect to receive an "A" therapeutic equivalence rating for its product.

In light of this interpretation, there are essentially four ways that an applicant can secure approval of its drug product and each is distinguishable by the nature and amount of data that the applicant develops on its own. An applicant may submit: (1) a New Drug Application ("NDA") that contains full reports of investigations of safety and effectiveness conducted by the applicant; (2) an NDA under § 505(b)(2) where the applicant need only develop preclinical or clinical data to support differences from an approved product; (3) an Abbreviated NDA ("ANDA") accompanied by a suitability petition under § 505(j) demonstrating that a change in dosage form, route of administration, or strength does not require submission of preclinical or clinical studies (other than bioavailability studies); or (4) an ANDA that contains sufficient information to show that the proposed product is the same as, and bioequivalent to, a previously approved drug product.

While clarifying the legal framework governing approval of drug products, the agency deferred ruling on two key scientific issues raised by the petitions. The first of these centered on whether the scientific complexities associated with biologically derived products (including recombinant protein products) may preclude approval of follow-on versions of such products otherwise eligible for approval under 505(b)(2). The agency indicated

that such issues would be addressed in a subsequent response. The second issue focused on whether 505(b)(2) should apply where an applicant seeks approval of a product whose active ingredient contains a different salt than the active ingredient in the approved drug product. The FDA stated that this type of application may not be suitable for approval and it reserved for further review the issues raised by this "narrow use" of 505(b)(2). Nevertheless, on October 31, 2003, FDA approved just such an application. As a result, that issue, and the larger question concerning FDA's reliance on 505(b)(2) to approve non-identical products, will now almost certainly be headed to the courts.

If you have any questions or would like to learn more about this issue, please contact the Ropes & Gray lawyer who normally represents you.