ROPES & GRAY

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Congress Authorizes Abbreviated Regulatory Pathway for FDA Approval of Biological Products

With the enactment of health care reform legislation, Congress has authorized the Food and Drug Administration ("FDA") to approve biological products through an abbreviated regulatory pathway that does not require such products to undergo full clinical testing. Although an abbreviated pathway has been in place for generic drug products under the Hatch-Waxman Amendments since 1984, Congress had not previously established an analogous scheme allowing for approval of so-called "follow-on biologics" or "biosimilars."

This new regulatory framework is contained in the Biologics Price Competition and Innovation Act (the "Act"), which is included within the body of the Patient Protection and Affordable Health Care Act (H.R. 3590) that was signed into law by the President on March 23, 2010. While the new biosimilars legislation and the Hatch-Waxman Amendments share certain concepts, they also differ considerably. This reflects the distinct nature of the categories of products—biologics and drugs—regulated under each statute.

Major features of the new Act include the following:

Different Biosimilar Products: The Act allows for approval of two types of products: biosimilar products and interchangeable products. Interchangeable products are arguably analogous to A rated products under the Hatch-Waxman Amendments, while biosimilars are distinct products that are not viewed as identical to, or the same as, innovator's products.

> **Biosimilarity**: FDA is authorized to approve biosimilar products based on, among other things: analytic studies which show that the product is "highly similar" to an innovator or "reference product" that was approved based on full clinical studies; animal toxicology studies; and one or more human studies that assess immunogenicity, pharmacokinetics or pharmacodynamics. FDA may waive these requirements, and others, in connection with its review of an application.
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> **Interchangeability**: FDA may also approve a biosimilar product as "interchangeable" with the reference product. To make this finding, FDA must first find that the product satisfies the biosimilarity requirements. It must then determine that the biosimilar product is likely to produce the same clinical results as the reference product, and that switching between the reference product and biosimilar does not result in diminished safety or efficacy.

Exclusivity: The Act affords both reference product sponsors and interchangeable biosimilar manufacturers with certain periods of statutory exclusivity.

> **Exclusivity for Reference Products:** The Act provides for 12 years of data exclusivity for innovator products. Unlike Hatch-Waxman, exclusivity is only available for new products, and is not available for new indications, changes in dosage form, dosing regimen, strength, or changes to the structure of the product that do not impact safety or effectiveness. Pediatric exclusivity is available for the first time for biologics.
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> **Exclusivity for Interchangeable Biosimilars:** Interchangeable biosimilars are entitled to exclusivity against other biosimilar products seeking approval as interchangeable products. Generally, exclusivity is for one year after first commercial marketing of the interchangeable product, but it can vary widely depending on the status of any patent litigation. Biosimilars which are not interchangeable are not eligible for exclusivity.

Patent Dispute Provisions: Under the Hatch-Waxman, the FDA approval process and patent litigation are intertwined. The new biosimilars legislation takes a different approach, with issues surrounding patent litigation falling largely outside of the FDA. Nonetheless, the patent litigation scheme established under the new Act is even more complex, and relies on a series of required exchanges of information between the biosimilar manufacturer and the innovator.

Bifurcation of Patent Disputes: The Act establishes a bifurcated scheme in which certain innovator patents may be litigated early in the biosimilar application process, while other patents may not be litigated until much later when the biosimilar product is close to approval. To determine which patents are litigated and when, the new legislation establishes a complex scheme governing the exchange of information between the reference product sponsor and the biosimilar applicant.

Number of Patents Litigated: These patent dispute provisions give the biosimilar applicant the final word on how many patents are subject to early litigation and which may only be disputed in later litigation. Specifically, the Act allows the biosimilar applicant to dictate how many patents may be included in the innovator's complaint in actions brought in early litigation.

Penalties for Mistakes: The Act imposes stiff penalties on innovators who make mistakes in the process. For example, if an innovator were to fail to include a patent in its response to a biosimilar applicant's request for information in a timely manner, it would forever be barred from bringing an infringement action relating to that patent. Moreover, for the patents that can be enforced under the Act, if an innovator does not file suit in a timely manner, it would be limited to a reasonable royalty rather than injunctive relief.

Guidance Documents: The Act authorizes FDA to issue guidance documents that explain the approval criteria for biosimilar products. It should be emphasized, however, that FDA need not issue a guidance document to approve a biosimilar or interchangeable product. The guidance process is open to public comment.

Miscellaneous Provisions: Other noteworthy provisions include application of certain REMS provisions to biosimilar manufacturers; a requirement that FDA develop a proposal for user fees for biosimilar products; and approval of biological products under Section 505(b)(2) of the Federal Food Drug and Cosmetic Act is gradually phased out.

If you have any questions about the new requirements or related issues, please contact your usual Ropes & Gray attorney.