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# Life Sciences 2022

USA: Law & Practice

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## Law and Practice

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## 1. LIFE SCIENCES REGULATORY FRAMEWORK

### 1.1 Legislation and Regulation for Pharmaceuticals and Medical Devices

The primary legislation governing the authorisation, marketing, sale and supply of pharmaceutical products by the US Food and Drug Administration (FDA) is the Federal Food, Drug, and Cosmetic Act (FD&C Act), which has been amended many times over the years to reflect increasing FDA mandates for the regulation of pharmaceutical products. The Public Health Service Act (PHS Act) is the specific authority utilised to approve or license biologic (including biosimilar) products. The primary FDA regulations governing drugs and biologics are found at Chapter 21 of the Code of Federal Regulations. Controlled substances, such as opioids, are also scheduled, and subject to quotas and distribution controls, under the Controlled Substances Act administered by the Drug Enforcement Administration (DEA).

A drug is defined as:

- a substance recognised in the US Pharmacopoeia, Homeopathic Pharmacopoeia or National Formulary;
- a substance intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease;
- a substance (other than food) intended to affect the structure or any function of the body;
- a substance intended for use as a component of a drug, but not a device or a component, part or accessory of a device.

A biologic is defined under the PHS Act as “a virus, therapeutic serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product, protein, or analogous product, or arsenamine or derivative of arsenamine (or

any other trivalent organic arsenic compound), applicable to the prevention, treatment, or cure of a disease or condition of human beings”. Notably, a protein is any alpha amino acid polymer with a specific, defined sequence that is greater than 40 amino acids in size. Biological products are also included within the drug definition and are generally covered by most of the same laws and regulations, but differences exist in the regulatory approach.

Medical devices are also regulated by the FDA under the FD&C Act, and, although subject to similar intent standards, such products generally are primarily intended to act via mechanical rather than chemical or biological modes of action. Medical devices are classified by risk, and may be exempt from FDA review, subject to a “510(k)” pre-market notification process based upon a showing of substantial equivalence to a “predicate” device, subject to down-classification via the de novo submission process, or eligible for full approval via a pre-market approval application (PMA).

Although the FDA has traditionally been given significant independence as an agency, and the Commissioner is confirmed by the Senate, the FDA is part of the Department of Health and Human Services (HHS).

The government agencies touching on pricing and reimbursement vary, depending upon the payer programme, and include the Centers for Medicare & Medicaid Services (CMS) (also part of HHS), the Veterans Health Administration, and state Medicaid agencies. In addition, the HHS Office of Inspector General oversees laws governing fraud and abuse in the sale of biomedical products and healthcare services. The Federal Trade Commission (FTC), an independent agency, regulates the advertising of non-prescription drugs and non-restricted medical devices.

## 1.2 Challenging Decisions of Regulatory Bodies that Enforce Pharmaceuticals and Medical Devices Regulation

Agency decisions may be challenged either informally, via guidance-driven processes governing informal dispute resolution, or via more formal regulatory processes specified under FDA regulations. In addition, a general-purpose vehicle for bringing issues before the agency is the Citizen Petition, which allows the petitioner to bring a request before the agency and initiate a public docket in which comments can be lodged. The FDA also maintains ombudsmen in the various centres reviewing products, whose role is intended to facilitate the resolution of disputes. Although procedures for dispute resolution vary by the specific statutory provisions at issue and the FDA Center responsible for the category of products, such processes generally follow APA standards for permitting due process and creation of an administrative record.

Once administrative processes are exhausted, parties with appropriate standing may challenge FDA agency decisions in court under the Administrative Procedure Act (APA). Although administrative processes vary by category, APA requirements are largely the same across products, and typically involve a demonstration that an agency action was arbitrary or capricious or otherwise not in accordance with governing law.

## 1.3 Different Categories of Pharmaceuticals and Medical Devices

Although the default status for drug approvals is technically over the counter (OTC), ie, non-prescription, most initial drug approvals specify that new drug products are subject to prescription drug controls. Prescription drugs must be labelled as such and are subject to physician prescribing and pharmacy dispensing and substitution controls under state law.

However, it is possible to seek an initial FDA approval for the sale of a drug product OTC, or seek to “switch” a prescription product to OTC status by demonstrating that the condition is capable of self-diagnosis and treatment in accordance with labelling. Moreover, over the decades, the FDA has also developed OTC monographs that permit the marketing, without approval, of certain OTC drugs that meet the specific terms – ingredients, dosing, directions for use, etc – for that class of drug under the relevant monograph. Such drugs remain subject to establishment registration, listing, labelling and current Good Manufacturing Practice (cGMP) requirements. Recent legislation liberalised the processes for amending OTC monographs, which could help reinvigorate OTC product development in the US.

Medical devices may also be restricted to non-restricted (including OTC) or restricted status, depending on their classification and the FDA’s determination as to appropriate status under clearance and approval processes.

## 2. CLINICAL TRIALS

### 2.1 Regulation of Clinical Trials

For drugs and biologics, unless subject to specific exemptions, an investigational new drug application (IND) must be submitted to obtain FDA clearance prior to engaging in clinical research. Such submissions typically include extensive pre-clinical data, information on chemistry, manufacturing and controls, prior human data and the proposed protocol(s). The FDA has 30 days either to allow the clinical study to proceed or to impose a clinical hold until outstanding issues are resolved. Similar rules apply to medical device research and, depending upon the risk posed by the device, a device study may require the submission of an investigational device exemption (IDE) prior to initiat-

ing clinical research. Non-significant risk device studies may be conducted with just Institutional Review Board (IRB)/Ethics Committee approval. The FDA maintains an array of good clinical practice regulations governing clinical research, including study sponsor, IRB, and investigator responsibilities.

## **2.2 Procedure for Securing Authorisation to Undertake a Clinical Trial**

As noted, in addition to obtaining clearance to proceed with clinical research by filing an IND or IDE, as appropriate, virtually all studies must be reviewed by one or more IRBs prior to initiation. FDA regulations specify the requirements applicable to the composition and activities of IRBs.

## **2.3 Public Availability of the Conduct of a Clinical Trial**

The US National Institutes of Health maintains a database at [www.clinicaltrials.gov](http://www.clinicaltrials.gov), and most controlled, interventional clinical investigations, other than Phase I clinical investigations, of drugs or biologic products subject to FDA regulation, must be registered with the site. While there is no general requirement to publish clinical trial data in journals, as a practical matter the industry has pledged to seek such publications where possible.

## **2.4 Restriction for Using Online Tools to Support Clinical Trials**

Online tools may be used as long as they comply with applicable requirements (eg, privacy, data security, informed consent and other good clinical practice requirements, and establishing lawful status if such tools incorporate certain regulated medical device functionalities). Particular requirements apply to recruiting subjects for clinical studies, whether online or otherwise.

## **2.5 Use of Resulting Data from the Clinical Trials**

The personal data resulting from clinical trials would be considered protected, although in certain scenarios the sponsor and the FDA will have access to such information, including patient-identifiable information, in order to conduct and analyse the data from the study properly.

As long as any transfer of resulting data to a third party or an affiliate is consistent with contractual obligations, informed consent, and privacy protections, such transfers are permitted.

## **2.6 Databases Containing Personal or Sensitive Data**

A database containing personal or sensitive data may be subject to both contractual and statutory protections obliging maintenance of data security and privacy.

# **3. MARKETING AUTHORISATIONS FOR PHARMACEUTICAL OR MEDICAL DEVICES**

## **3.1 Product Classification: Pharmaceutical or Medical Devices**

Such determinations are typically made by assessing the primary mode of action of the product and whether it works by chemical, biological, mechanical, or other means. If the product has both chemical/biological and mechanical modalities, a Request for Designation may be submitted. A recent decision in the *Genus v FDA* case has recently changed the FDA's historical approach, requiring compliance with device requirements in certain cases in which the FDA has previously treated certain products solely as drugs.

### **3.2 Granting a Marketing Authorisation for Biologic Medicinal Products**

Drug products are approved via New Drug Applications (NDAs), and additional indications, dosage forms, etc. may be added via NDA supplements. Biologic products are approved via a virtually identical process via Biologics License Applications (BLAs). The standard for approval is “substantial evidence” of safety and effectiveness, based upon at least one, and typically several, adequate and well-controlled clinical studies. The typical drug or biologic review process takes ten months after initial acceptance for filing (a 60-day period), although a priority review of six months is given to certain drugs and biologics intended to treat serious or life-threatening conditions.

Substantial user fees are required to facilitate a review of applications, at the high end currently ranging to approximately USD3.1 million for an NDA or BLA containing clinical data.

### **3.3 Period of Validity for Marketing Authorisation for Pharmaceutical or Medical Devices**

There is no mandatory re-authorisation process for approved products. However, the FD&C Act and FDA regulations include processes for the withdrawal or revocation of an approval based upon non-compliance with approval requirements, or a significant safety or effectiveness issue. Such processes can be expedited in the event of an imminent hazard, but processes for challenging a revocation may be invoked in most cases. Such actions are rare, and in most cases a manufacturer will withdraw a product voluntarily rather than pursue a formal hearing. In general, a marketing authorisation may not be revoked merely because the product has not been placed on the market, although a failure to market an orphan drug could result in a loss of orphan exclusivity.

### **3.4 Procedure for Obtaining a Marketing Authorisation for Pharmaceutical and Medical Devices**

As noted, the pathways for approval of drugs consist of the submission of an NDA (including a 505(b)(2) NDA relying on data for which the applicant does not have a right of reference), and the Abbreviated New Drug Application (ANDA) for generic products, which demonstrates equivalence to a reference listed drug. A biologic is licensed via the submission of a BLA, although that process is largely the equivalent of an NDA submission. A biosimilar application demonstrates that the biosimilar is, based on the totality of the evidence, either “highly similar” to, or interchangeable with, a reference biologic.

The FDA is authorised to require paediatric studies of drugs or biologics when other approaches are insufficient to ensure that the products are safe and effective for use in children. The Agency may also issue a written request for paediatric research, and if the sponsor fulfils the data request, it may obtain six months of paediatric exclusivity.

As noted, changes to an existing marketing authorisation may be obtained through supplements or amendments to existing applications. With respect to medical devices, the submission of an additional 510(k) submissions can result in the clearance of significant changes to previously cleared device products, and a PMA may also be supplemented or amended.

In many cases, the transfer of a clearance or approval without manufacturing site or significant product changes requires only fairly simple notifications to the FDA.



### **3.5 Access to Pharmaceutical and Medical Devices without Marketing Authorisations**

The FDA maintains regulations permitting expanded access to investigational products. Such expanded access INDs and IDEs may relate to an individual patient (often called a “compassionate use”) or may allow broad use by patients not eligible for controlled clinical trials, depending upon the seriousness of the disease and the availability of alternative treatments. Sponsors of such INDs may not charge patients for the investigational drug without specific authorisation from the FDA permitting cost recovery only.

In addition, the 2018 “Right to Try” Act permits certain eligible terminal patients to have broad access to eligible investigational drugs in certain circumstances. To date, most companies have shown a reluctance to permit their products to be used via this pathway in lieu of the more traditional IND pathway.

There is also a very limited Humanitarian Device Exemption (HDE) pathway for approval of a Humanitarian Use Device (HUD) intended to benefit patients in the treatment or diagnosis of a disease or condition that affects or is manifested in not more than 8,000 individuals in the USA per year.

### **3.6 Marketing Authorisations for Pharmaceutical and Medical Devices: Ongoing Obligations**

Every drug, biologic or device product is subject to ongoing requirements relating to establishment registration, product listing, compliance with cGMPs/quality systems, track and trace requirements, and safety/adverse event reporting regulations. In certain cases, the FDA may require closer, ongoing oversight of a drug or biologic under a Risk Evaluation and Mitigation

Strategy (REMS), or mandate post-market studies or trials.

### **3.7 Third-Party Access to Pending Applications for Marketing Authorisations for Pharmaceutical and Medical Devices**

While the FDA does release approval letters and – after review for redaction of confidential and trade-secret information – summary review and approval documents, the FDA does not currently publish “Complete Response Letters” that reject an application under review. Available information on approved products may be obtained via the FDA’s Drugs@FDA website. Often, extensive information about pending applications is released in the form of briefing papers and presentations used at FDA Advisory Committee meetings. The FDA does not reveal the existence of pending INDs or IDEs unless the sponsor has publicly acknowledged the filings.

Third parties may submit requests for information under the Freedom of Information Act (FOIA), although there are a variety of exceptions from disclosure, and there is a major FDA backlog of requests. Most importantly, the FDA has an obligation under the FOIA to refrain from publication of trade secrets or confidential commercial or financial information. Sponsors/applicants are afforded an opportunity to review potential releases of information and request confidential treatment under those FOIA exceptions.

### **3.8 Rules against Illegal Medicines and/or Medical Devices**

The Drug Supply Chain Security Act (DSCSA) mandated a system to identify and trace certain prescription drugs as they are distributed in the USA. The objective is to enhance the FDA’s ability to help protect consumers from exposure to drugs that may be counterfeit, stolen, contaminated, or otherwise harmful, and improve detec-



tion and removal of potentially dangerous drugs from the drug supply chain.

Although for medical devices a Unique Device Identification System is being implemented, that identification system serves various purposes, including providing a standardised identifier that will allow manufacturers, distributors and health-care facilities to manage medical device recalls more effectively, and providing a foundation for a global, secure distribution chain, helping to address counterfeiting and diversion.

The FDA's Office of Criminal Investigation (OCI) has primary responsibility for policing drug and medical device counterfeiting and diversion, and at times companies will approach the OCI and other law enforcement bodies to seek an investigation and enforcement action.

### **3.9 Border Measures to Tackle Counterfeit Pharmaceutical and Medical Devices**

The FDA and Customs and Border Protection work together to identify and detain counterfeit medical products, and it is possible to work with those agencies to seek enhanced surveillance with respect to potential importation of such products. The FDA has extensive powers to stop products at the border if they are suspected of being adulterated or misbranded. In addition, companies may file actions seeking an investigation under Section 337 of the Tariff Act with respect to unfair acts in the importation of articles, although such actions may fail if positioned as an attempt to enforce the Federal Food, Drug, and Cosmetic Act (FD&C Act) privately.

## **4. MANUFACTURING OF PHARMACEUTICAL AND MEDICAL DEVICES**

### **4.1 Requirement for Authorisation for Manufacturing Plants of Pharmaceutical and Medical Devices**

In general, manufacturing plants are not subject to a separate authorisation from the related product approvals, although they must be registered with the FDA (and the products produced at the facility must be listed as associated with the establishment). Moreover, in most cases, the FDA will conduct a pre-approval inspection of the facility before approving a drug or device, and such establishments are also subject to both routine (typically every two years) and for-cause (eg, in response to a product defect and recall) inspections.

## **5. DISTRIBUTION OF PHARMACEUTICAL AND MEDICAL DEVICES**

### **5.1 Wholesale of Pharmaceutical and Medical Devices**

In general, wholesale activities are subject to licensure requirements at the state level and registration as distributors at the federal level. The requirements and length of such licences vary by state.

The FDA may inspect any facility holding drugs for shipments, and state inspection activities and fees vary greatly. Significant additional requirements administered by the Drug Enforcement Administration and states apply to wholesale trade in controlled substances.

The authorisation to trade in pharmaceuticals varies greatly by state, but most pharmaceutical distributors must hold a state licence. Such

requirements often do not apply to entities that are not physically handling drug products.

## 5.2 Different Classifications Applicable to Pharmaceuticals

Drugs may be either prescription (as defined under state law, generally subject to prescription by a designated healthcare practitioner and dispensing by a licensed pharmacist), or over the counter (permitting sale without intervention by a healthcare practitioner or pharmacist). Certain products (pseudoephedrine) are required to be kept behind the pharmacy counter due to specific statutory requirements, and the FDA is exploring methods for expanding direct availability of products with pharmacist-only involvement, such as via use of mobile apps and kiosks in pharmacies permitting education and diagnostic screening.

## 6. IMPORTATION AND EXPORTATION OF PHARMACEUTICALS AND MEDICAL DEVICES

### 6.1 Governing Law for the Importation and Exportation of Pharmaceutical Devices and Relevant Enforcement Bodies

The FD&C Act and general import and export administration laws govern the import/export of pharmaceuticals and medical devices. In general, imported medicines and medical devices must be subject to an approval or clearance, if applicable, in the USA. Only the original manufacturer of a drug may reimport a drug product back into the United States, subject to limited programmes to demonstrate that the importation of certain drugs can be accomplished in an attempt to reduce prices, which may nor may not proceed in the coming years. The importation of even an identical drug produced at a facility that is not inspected in the course of

the US approval would be considered unlawful. Limited exceptions are permitted for individuals to engage in personal, physical importation of foreign products for their own use based upon a prescription from a healthcare professional and a lack of alternatives in the USA.

At the border, the primary regulators are the FDA, administering the FD&C Act for potential violations, and US Customs and Border Protection, administering the broad array of US laws governing customs matters. Other agencies, such as the Department of Commerce and Department of Agriculture, may have responsibilities as well, depending on the nature of the imported article.

### 6.2 Importer of Record of Pharmaceutical and Medical Devices

Importers of record may be designated by the manufacturer or distributor, and they have specific responsibilities. A US importer of record (ie, the owner, purchaser, or licensed customs broker designated by the owner, purchaser, or consignee) files entry documents for the goods with the port director at the goods' port of entry. It is the importer of record's responsibility to arrange for the examination and release of the goods. Initial importers may also be responsible for registration and listing requirements. Customs requires the importer of record to file an importation bond, typically, at least equal to three times the invoice value of the goods.

### 6.3 Prior Authorisations for the Importation of Pharmaceuticals and Medical Devices

A drug or medical device must be cleared or approved (and the product properly listed in association with a registered establishment), or the subject of an active IND or IDE, in order to be lawfully imported. Exceptions are made for importation of a very limited amount of a product for personal use, and the FDA will work

with potential importers in certain situations (eg, compassionate use, short supply) to expedite satisfaction of regulatory requirements.

## 6.4 Non-tariff Regulations and Restrictions Imposed upon Importation

Upon entry into the USA, declarations and information must utilise the Customs Harmonized Tariff Schedule codes according to the Harmonized Tariff Schedule of the US (HTSUS), and FDA product codes. Such declarations are subject to specific regulations issued by Customs and the FDA. A failure to classify a product properly may result in an improper payment of Customs duties, and associated penalties.

## 6.5 Trade Blocs and Free Trade Agreements

The USA is a member of the World Trade Organization and has free-trade agreements in effect with 20 countries. Some are re bilateral agreements, but others are multi-lateral in nature. The USA is also a party to Trade and Investment Framework Agreements that provide frameworks for governments to discuss and resolve trade and investment issues at an early stage, as well as bilateral Investment Treaties to help protect private investment, develop market-oriented policies in partner countries, and promote US exports. The US FDA is also a party to various memoranda of understanding and mutual recognition agreements to facilitate global discussions and risk assessments with respect to, for example, inspections.

# 7. PHARMACEUTICAL AND MEDICAL DEVICE PRICING AND REIMBURSEMENT

## 7.1 Price Control for Pharmaceuticals and Medical Devices

The USA has little in the way of price controls for pharmaceutical products and medical devices.

Therefore, in most cases, the manufacturer of a product sets the initial price and adjusts prices (including rebates and other price concessions) over time in response to market conditions. However, there are a few federal laws that cap pharmaceutical prices to certain purchasers or require minimum rebate levels:

- subject to ongoing litigation over the scope and terms of the programme, manufacturers sell their outpatient drugs to “covered entities” (generally, certain clinics and hospitals thought to serve safety-net functions) at or below a statutorily set ceiling price under the section 340B drug-discount programme;
- manufacturers must sell brand name drugs to four federal agencies (the Department of Veterans’ Affairs, the Department of Defense, the Public Health Service and the Coast Guard) at or below a “federal ceiling price” determined by a statutory formula; and
- manufacturers must pay a rebate set by a statutory formula on each unit of their outpatient drugs paid for by the Medicaid programme. This is not literally a “price-control” programme because it only controls the rebate paid to Medicaid after the drug has been dispensed or administered – the price that Medicaid pays up front to the dispensing pharmacy or to a physician’s office or clinic that administers a drug is not affected by the Medicaid rebate programme.

## 7.2 Price Levels of Pharmaceutical or Medical Devices

The price level of a pharmaceutical or medical device does not depend on the prices for the same product in other countries. Programmes developed in the previous Administration that would incorporate international reference pricing have now been abandoned in favour of other approaches.

### 7.3 Pharmaceuticals and Medical Devices: Reimbursement from Public Funds

The largest healthcare programme in the United States today is the Medicare programme, which provides healthcare coverage for people who are 65 and older, disabled (for two years or more), or have end-stage renal disease. Medicare accounts for roughly 20% of US health spending. Most pharmaceutical products are eligible for some form of Medicare coverage, either through:

- Part B (Medicare's traditional outpatient benefit, which covers a small but important set of drugs, such as physician-administered drugs);
- Part D (the new Medicare drug benefit that started in 2006, which provides broad coverage for pharmacy-dispensed oral drugs); or
- Part A (Medicare's inpatient benefit, which covers drugs furnished as part of covered inpatient hospital stays and in certain other inpatient settings).

The second-largest healthcare programme today – accounting for roughly 17% of US health spending – is the Medicaid programme, which is a joint federal-state programme providing coverage for certain low-income individuals (with the specific eligibility criteria varying by state). Medicaid is run chiefly by states, with federal government oversight, and state Medicaid programmes generally provide broad coverage for prescription drugs. Medicaid programmes have sometimes imposed coverage restrictions on high-cost drugs that arguably conflict with their statutory obligations.

### 7.4 Cost-Benefit Analyses for Pharmaceuticals and Medical Devices

The process and evidence that US payors use to make decisions about pharmaceutical and medical device coverage varies widely by payor (and

is not always entirely transparent). These variations can include the criteria considered appropriate for evaluation (eg, whether a product's cost or cost-effectiveness is taken into account in coverage decisions), the scientific rigour of the evidence considered, and the weight placed on the types of evidence considered, the decision-making body and the processes for making coverage decisions, and the legal standards that apply to the coverage decision-making process and the resulting package of covered products and services. There are several organisations engaged in developing value-assessment tools of various sorts, which essentially are tools designed to help payors, healthcare providers and patients compare certain demonstrated outcomes of competing pharmaceuticals on a systematic basis and thus reach conclusions about their value in a more systematic and rigorous way than is common today.

### 7.5 Regulation of Prescriptions and Dispensing by Pharmacies

Pharmacists are paid for dispensing prescriptions by the patient's insurer (assuming the patient is insured, and the product is covered) and the patient. The circumstances in which pharmacists may dispense a substitute for the prescribed product without obtaining the prescriber's authorisation are governed by state law. State laws on this issue can vary, but generally they permit pharmacists to substitute a product approved by the FDA as a generic equivalent for the prescribed product (unless the prescription specifically states "dispense as written" or a similar phrase indicating no substitution).

Over the past several years, the standards for permitting pharmacists to substitute a "biosimilar" product for a prescribed biological have been a topic of considerable debate. The provisions of these laws vary, but often they permit biosimilar pharmacy-level substitution only if the substituted product has been designated as

“interchangeable” with the prescribed biological by the FDA, which has not occurred to date, the prescriber and the patient are both notified of the substitution, and the pharmacist maintains records of the substitution.

## 8. DIGITAL HEALTHCARE

### 8.1 Rules for Medical Apps

The FDA has been very active in providing guidance in this area and has carved out large categories of apps and platforms from regulation. The US Food and Drug Administration (FDA) has issued several guidance documents designed to “encourage innovation” and “bring efficiency and modernisation” to the agency’s regulation of digital health products. The guidance documents address, in part, the important changes made by Section 3060 of the 21st Century Cures Act (Cures Act) to the medical device provisions of the FD&C Act that expressly excluded from the definition of medical device five distinct categories of software or health products. The FDA’s extensive guidance documents in this area include guidance on Clinical and Patient Decision Support software, regulation of software as a medical device (SaMD), and general wellness products, which establishes common principles for regulators to use in evaluating the safety, effectiveness, and performance of SaMD. The FDA has also issued a Discussion Paper on the regulation of SaMD incorporating artificial intelligence.

### 8.2 Rules for Telemedicine

The FDA does not regulate the practice of medicine, and the Agency generally defers to the states to determine what is a valid physician-patient relationship and prescription. Although telemedicine has expanded enormously in the US due to the pandemic, and more and more physician consultations are being provided online via chat-based or video examinations,

the regulation of such activities varies by state. Various laws govern issues such as the corporate practice of medicine, minimum rules for a genuine patient relationship, cross-border prescribing and lab orders, privacy, and payments and referrals to telemedicine physicians. The availability of electronic prescribing also varies by state, although states generally permit online dispensing of approved drug and medical device products pursuant to valid prescriptions.

### 8.3 Promoting and/or Advertising on an Online Platform

Medicinal and medical device products may generally be promoted online, on company websites, and via social media. However, such media present special challenges to ensure that the promotion is fairly balanced, truthful and non-misleading, transparent as to the company’s involvement, and adequately provides safety information in particular. The FDA has developed several guidance documents in this area to provide information to a company regarding when the Agency considers user-generated information on a company’s webpage or social media to be promotional (largely based on the level of control over the site and placement of information) and how to convey information properly in a character-limited social media environment. Additional rules apply to online marketing practices, such as the FDA and FTC requirements pertaining to endorsements and testimonials in online promotion.

### 8.4 Electronic Prescriptions

Electronic prescribing of drug products is governed by state laws and Board of Pharmacy rules. Most states do permit some form of electronic prescribing, although the specific rules (such as for specifying use of the brand-name drug, etc) vary by state. Special rules may apply to interstate prescribing, particularly with respect to controlled substances, and licensure in multi-

ple states may be required where reciprocity in licensure recognition is not provided.

### **8.5 Online Sales of Medicines and Medical Devices**

Online sales of prescription drug and device products are permitted if there is otherwise a valid prescription for the product and the pharmacy is duly licensed in the states to which the products are shipped. Special rules apply to certain controlled substances. To the extent that prescribing of the drug or device also occurs online, the prescriber must satisfy state requirements pertaining to valid physician-patient relationships and telemedicine-based prescribing. Online sales of drugs into the United States from ex-US pharmacies, whether or not pursuant to a valid prescription, are generally prohibited.

### **8.6 Electronic Health Records**

In addition to FDA rules, addressed previously, regarding digital tools that convey health records and images, there are many other aspects to the regulation of electronic health records in the US. In particular, the HHS Office of the Co-ordinator for Health Information Technology (ONC) is responsible for implementing statutory provisions relating to advancing inter-operability, clarifying the Health Insurance Portability and Accountability Act (HIPAA) privacy rules, prohibiting information-blocking, and enhancing the usability, accessibility, and privacy and security of health IT. The Health Information Technology for Economic and Clinical Health (HITECH) Act of 2009 provided the HHS with the authority to establish programmes to improve healthcare quality, safety, and efficiency through the promotion of health IT, including electronic health records and private and secure electronic health information exchange.

## **9. PATENTS RELATING TO PHARMACEUTICALS AND MEDICAL DEVICES**

### **9.1 Laws Applicable to Patents for Pharmaceutical and Medical Devices**

The statutory framework for US patent law is generally set out in United States Code Title 35. The Leahy-Smith America Invents Act (AIA) effected sweeping changes to US patent law; one of the most significant of these changes was to bring the USA largely into compliance with the rest of the world with respect to prior art determinations. Pre-AIA, the USA was considered a “first inventor” jurisdiction (ie, the first person to invent the invention was entitled to the patent); post-AIA, the USA is a “first-inventor-to-file” jurisdiction approaching the “first-to-file” methodology employed virtually everywhere else in the world.

As explained in further detail below, in the USA, patent protection and certain regulatory exclusivities may share certain traits but are distinct. The Drug Price Competition and Patent Term Restoration Act, commonly known as the Hatch-Waxman Act, amended the FD&C Act and affected the government’s regulation of generic drugs. Hatch-Waxman provides for both brand product exclusivities as well as 180-day exclusivity to companies that are the “first-to-file” an ANDA against branded drug patent-holders. This regulatory exclusivity is in addition to the patent term of patents claiming the branded drug and a statutory, 30-month stay of approval permitted in the event of patient litigation.

Similarly, the Biologics Price Competition and Innovation Act of 2009 (BPCIA) amended the Public Health Service Act to create an abbreviated licensure pathway for biological products that are demonstrated to be “biosimilar” to or “interchangeable” with an FDA-licensed biological product.



To be patentable under US law, an invention must be: (i) patentable subject-matter, (ii) novel, and (iii) not obvious. Patentable subject-matter includes “any new and useful process, machine, manufacture, or composition of matter” (35 U.S.C. §101). Novelty requires that the invention has not previously been “patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention” (35 U.S.C. §102). Finally, an invention must not be obvious – ie, it cannot be the case that “the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains” (35 U.S.C. §103).

In addition to these requirements, a patent must “contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor or joint inventor of carrying out the invention” (35 U.S.C. §112).

There are no requirements specific to pharmaceutical products or medical devices, but various claim-drafting structures and statutory requirements are commonly at issue in cases involving pharmaceuticals or medical devices.

In the wake of two 2012 US Supreme Court decisions regarding what constitutes patentable subject-matter, companies have sought to distinguish their inventions from laws of nature and unpatentable phenomena through narrower claim drafting. The case law in this area is evolving. As of the beginning of 2022, method-of-treatment claims involving treatment steps are

patent-eligible even if they also recite diagnostic steps. Nonetheless, method-of-diagnostic claims remain patent-ineligible, while certain method-of-preparation claims have been held patent-eligible.

## 9.2 Second and Subsequent Medical Uses

Patent protection is available for new uses of known compounds, processes, manufactures, etc, that satisfy the general requirements for patentability (including novelty and non-obviousness). As previously noted, claims may be directed to “methods of treatment”.

A new dosage regime may be patentable if it satisfies the requirements for patentability; however, such claims are often subject to obviousness challenges.

A claim could be directed to a method of treating a patient suffering from new disease X by administering an effective amount of known compound Y to the patient. A claim could also be directed to a method of treating a selected patient having disease X by administering compound Y at dose Z to the patient, wherein the selected patient is tested positive for a biomarker.

Direct or indirect infringers as well as inducers of infringement may be sued, although induced infringement can be found only when one “party” performs every step of a patent. In *Limelight Networks Inc v Akamai Technologies Inc et al*, the Supreme Court held that induced infringement can be found only when one party performs every step of a patent.

## 9.3 Patent Term Extension for Pharmaceuticals

35 US Code §§ 154 and 156 address certain adjustments and extensions of patent term, with Section 156 being particularly applicable to drugs and biologics. Certain medical devices



may also be eligible for patent-term extension; however, such devices must be reviewed and approved via pre-market approval. The FDA assists the United States Patent and Trademark Office (USPTO) in determining a product's eligibility for patent-term restoration and provides information to the USPTO regarding a product's regulatory review period. The USPTO is responsible for determining the period of extension, subject to statutory requirements.

A third party may file a due diligence petition challenging the FDA's regulatory review period determination by alleging that an applicant for patent-term restoration did not act with due diligence in seeking FDA approval of the product during the regulatory review period.

#### **9.4 Pharmaceutical or Medical Device Patent Infringement**

Infringement may occur if the defendant has made, used, sold, offered to sell or imported an infringing invention or its equivalent. A generic applicant may file an ANDA, which allows that applicant to rely on the safety and efficacy studies supplied by the brand name manufacturer if the generic manufacturer shows that its generic product contains the same active ingredient as, and is bio-equivalent to, the brand-name drug listed in the Approved Drug Products with Therapeutic Equivalence Evaluations publication, commonly known as the "Orange Book". In doing so, the generic applicant must make one of four certifications with respect to any patents associated with the drug. The fourth is that the "patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted" (21 U.S.C. §355(j)(2)(A)(vii)). Such a "paragraph IV" certification is deemed a constructive act of infringement, and the patent-holder then has 45 days to file an infringement lawsuit against the ANDA applicant. If such a lawsuit is filed, the FDA generally may not grant final approval of the ANDA

for 30 months after the filing date or until the ANDA filer prevails in litigation. If patent validity and infringement remain unresolved after the 30-month stay, the FDA may approve the ANDA.

The BPCIA provides a conceptually similar (though procedurally very different) framework by which the filing of a biosimilar application by an applicant is an artificial act of infringement giving rise to a statutorily prescribed process governing subsequent patent-infringement litigation and biosimilar regulatory approval. A BLA sponsor is required to provide certain patent information regarding the reference product to FDA within 30 days of when such information is provided to the biosimilar applicant as a part of the "patent dance." The FDA is then required to include this patent information when it updates the Purple Book every 30 days. There is no equivalent statute and regime for medical devices.

For patent infringement, the threat of infringement can form the basis of a declaratory judgment action, which can examine the validity of patents and whether the action constitutes infringement. Because this action is brought by the alleged infringer, the alleged infringer can select the venue for the case, which can have great strategic value in US patent litigation. However, because many patent-owners desire to avoid a declaratory judgment action, notice letters and cease-and-desist letters are not as commonly used as in the past, and patent-litigation suits are often filed before the alleged infringer could claim that the threat of infringement exists.

#### **9.5 Defences to Patent Infringement in Relation to Pharmaceuticals and Medical Devices**

Under 35 U.S.C. § 271(e)(1), it is not an act of infringement to make, use, offer to sell or sell within the USA or import into the USA a patented

invention “solely for uses reasonably related to the development and submission of information under a federal law which regulates the manufacture, use, or sale of drugs or veterinary biological products”. In *Merck KGaA v Integra Lifesciences I, Ltd*, the US Supreme Court held that the statute exempts from infringement all uses of compounds that are reasonably related to submission of information to the government under any law regulating the manufacture, use or distribution of drugs. This safe harbour continues to be narrowed in recent District Court decisions. For example, in an early 2022 decision, the District Court of Delaware excluded the use of patented host cells to produce gene therapy product from safe-harbour protection, reasoning that the patented host cells are merely tools used in the preparation of the product to be approved.

Compulsory licences are available only in very specific situations, and generally not under patent law. For example, the US National Institutes of Health may, under certain circumstances, threaten to issue a compulsory licence if a licensee has failed to take effective steps to pursue the government-licensed invention or in certain scenarios involving public health need, but has never done so.

## **9.6 Proceedings for Patent Infringement**

Typically, the patent-owner brings the suit alleging patent infringement. Depending on the wording of the licence agreement, an exclusive licensee may also have standing to enforce the licensed patent.

Remedies may include a temporary or permanent injunction, destruction of infringing articles, the award of damages (including the infringer’s profits) and, in certain limited circumstances, attorneys’ fees.

Patent litigation is much like other civil litigation in the federal district courts in the USA (including a very high settlement rate). First, the plaintiff files a complaint alleging infringement of one or more US patents. Then, the plaintiff serves the complaint on the defendant, who typically answers by alleging non-infringement and asserting defences such as patent invalidity and other equitable defences. Common invalidity defences include invalidity based on ineligible patentable subject-matter, combination of prior art references, and double patenting. The defendant may also assert a counterclaim, such as a declaratory judgment of non-infringement. The defendant may also file a motion to dismiss for improper venue in view of *TC Heartland LLC v Kraft Food Group Brands LLC* and *Valeant Pharmaceuticals North America LLC v Mylan Pharmaceuticals Inc*. A case-management conference regarding scheduling, among other matters, is required. Certain district courts may also have local patent rules that set forth additional requirements. Next, fact and expert discovery are conducted, which typically includes depositions, document requests, interrogatories, expert reports and the like. Often, a claim construction hearing (also known as a Markman hearing) occurs, in which the parties ask the court to interpret certain terms of claims in the patent(s) at issue. The parties also typically file various motions, such as a summary judgment motion of patent invalidity.

If the case proceeds, pre-trial briefing and then trial (by judge or jury) and post-trial practice occur. A jury may render an opinion as to whether the patent is invalid. An appeal may be taken to the Federal Circuit and then to the Supreme Court if the Supreme Court grants a petition for certiorari.

In addition to raising invalidity as a defence in court, a potential infringer (or any third party) can challenge the validity of a patent in proceed-

ings before the Patent Trial and Appeal Board (PTAB). A “post-grant review” permits a person who is not the owner of a patent to challenge a patent’s validity on any ground that could be raised under §282(b)(2) or (3) no later than nine months after the date of the grant of the patent (35 U.S.C. §321). An “inter partes review” (IPR) may be requested by a person who is not the owner of a patent after the later of nine months after the grant of the patent or the termination of a post-grant review, if one has been instituted (35 U.S.C. §311(a), (c)), but may not be filed more than one year after the complainant has been served with a complaint alleging infringement. The validity of a patent subject to an IPR can only be challenged on a ground that could be raised under §§102 or 103, and only on the basis of prior art consisting of patents or printed publications (35 U.S.C. §311(b)).

In *SAS Institute Inc v Iancu*, the Supreme Court did away with the PTAB’s prior practice of “partial institutions” of IPR challenges – going forward, the PTAB must decide the validity of all challenged claims when it institutes review of a patent. In *Arthrex v Smith & Nephew, Inc*, the Supreme Court agreed with the Federal Circuit ruling that the statutory scheme for appointing PTAB Administrative Patent Judges (APJs) violated the Appointments Clause of the US Constitution but saved the IPR proceedings by providing the Director authority to review any final decisions unilaterally. The USPTO has since implemented an interim director review process to rehear cases.

## 9.7 Procedures Available to a Generic Entrant

As previously described, an ANDA filer must make one of four certifications with respect to any patents associated with the drug. It is possible that, after making a Paragraph IV certification, the patent-holder may elect not to file an infringement lawsuit. If the patent-holder does

not bring suit, the FDA may approve the ANDA. An ANDA filer may not file a declaratory judgment suit during the 45-day period in which the patent-holder may elect to bring a suit. If the patent-holder files suit against the generic applicant within the 45-day period, the generic may file a declaratory judgment counterclaim, as long as an actual case or controversy continues to exist. A generic drug-maker may be able to request correction or delisting of a patent claim from the Orange Book as part of a counterclaim or non-infringement declaratory judgment action.

An ANDA filer and the patent-holder may also reach a licensing or other agreement, although such “reverse payment” settlements can be subject to antitrust scrutiny.

The phrase “clearing the way” is not a term of art in US patent law, but a generic drug manufacturer may launch “at risk” if patent validity and infringement remain unresolved after the 30-month stay and the FDA approves its ANDA. In such cases, the generic may be liable for damages if the patent(s)-in-suit are ultimately held to be valid and infringed.

An NDA includes patent information for listing in the FDA Orange Book and the FDA considers patent listing as part of the approval process for brand drug applications. If a patent that covers the drug exists and is listed, marketing approval will not be granted to a generic until the patent has expired or is found to be invalid or not infringed.

## 10. IP OTHER THAN PATENTS

### 10.1 Counterfeit Pharmaceuticals and Medical Devices

Trade-mark and trade-dress owners can sue manufacturers and sellers of counterfeit phar-

maceuticals and medical devices for infringement. Additionally, a general exclusion order can be sought in the International Trade Commission (ITC), which can help to combat counterfeits that are being imported into the USA. Under the general exclusion order, any such infringing articles would be seized at the border by customs.

The possession, trafficking, and purchasing of counterfeit pharmaceuticals and medical devices can also be criminally actionable on the federal or state level.

## **10.2 Restrictions on Trade Marks Used for Pharmaceuticals and Medical Devices**

Other than general trade-mark requirements, the controls on trade marks are usually regulatory in nature. For example, trade marks that could be deemed claims must not be false or misleading, ie, may not misbrand the product. In addition for prescription drugs, the trade-marked brand name – known as the “proprietary name” – is subject to approval by the FDA as part of the drug and biologic approval process. This is done to ensure that it does not misbrand or create a risk of medical errors.

## **10.3 IP Protection for Trade Dress or Design of Pharmaceuticals and Medical Devices**

Trade-dress protection is available for colour, shape (including pill shape) A “US adopted name” (USAN), which is a non-proprietary name reviewed by the World Health Organization, is necessary to market a pharmaceutical in the USA. The USPTO reviews and registers federal trade marks (pursuant to the Lanham Act). In doing so, the USPTO considers the likelihood of confusion with other marks and whether the mark is distinctive, along with whether the mark is a surname, likeness, geographically descriptive of the origin of the goods, disparaging or offensive, a foreign term that translates to a

descriptive or generic term or is purely ornamental. The US Trademark Trial and Appeal Board (TTAB) hears petitions related to the status of trade marks (including their cancellation). The TTAB may cancel a mark if it finds that a registrant was using the mark to misrepresent the source of the corresponding goods, or differences with prior marks do not offset the likelihood of confusion.

The FDA has authority under the FD&C Act to determine whether a pharmaceutical is “misbranded” – ie, “its labelling is false or misleading in any particular” (21 U.S.C. § 352(a)), which can be due to the proprietary name of the product, which the FDA must approve as part of the drug application.

The Lanham Act and the Tariff Act may provide a basis to bring claims in a federal district court against parallel importers for damages and injunctive relief. Any resulting injunction would be enforced through the federal courts rather than the Customs and Border Patrol. Sometimes, the district court action is stayed pending the outcome of an International Trade Commission (ITC) proceeding.

Parallel importation may violate Section 337 of the Tariff Act, which grants the ITC jurisdiction to investigate claims of trade-mark infringement. The ITC cannot award damages but can issue exclusion orders that are enforced by the Customs and Border Patrol. The ITC can bar the importation of items that infringe US trade marks, copyrights or patents.

Customs and Border Patrol works with the FDA to prevent parallel import. Trade mark-owners typically contact the FDA and then the FDA contacts the Customs and Border Patrol.

Trade dress protection is available for colour, shape (including pill shape) and packaging that

identifies the source of the product and otherwise distinguishes the product but is not purely functional or likely to be confused with the trade dress of another product.

#### **10.4 Data Exclusivity for Pharmaceuticals and Medical Devices**

For pharmaceuticals, under the Hatch-Waxman Act described previously, there is a period of data exclusivity of five years from the date of approval of data exclusivity for new chemical entities, and a period of data exclusivity of three years from the date of approval for supplemental applications, incorporating clinical studies sponsored by the applicant that are essential to the approval. The first approved biologic may be subject to 12 years of exclusivity, but subsequent supplemental applications for the product will not accrue additional exclusivity without clinically meaningful changes to the structure of the product. Such periods can run irrespective of, but concurrent with, any patent term associated with the drug or treatment using the drug.

Other exclusivities are available for designated orphan drugs (seven years of market exclusivity), designated Qualified Infectious Disease Products (five years of additive exclusivity), 180 days (first generic applicant filing a patent certification), and satisfying paediatric study requests (six months of additive exclusivity).

There is no exclusivity framework for medical devices, and 510(k)-cleared devices may be designated as predicate devices immediately upon clearance. However, subsequent applicants for a class III device generally may not rely on data in PMA-approved medical device products.

## **11. COVID-19 AND LIFE SCIENCES**

### **11.1 Special Regulation for Commercialisation or Distribution of Medicines and Medical Devices**

The FDA relaxed various regulatory requirements relating to COVID-19 countermeasures, as well as FDA-regulated product generally. Many of these policies were intended to provide some flexibility, given the limitations of virtual interactions and similar constraints. A complete directory of the various FDA policies in this area can be found on the [FDA website](#).

### **11.2 Special Measures Relating to Clinical Trials**

The FDA issued and has periodically updated an extensive guidance entitled Conduct of Clinical Trials of Medical Products During the COVID-19 Public Health Emergency, found at [www.fda.gov/media/136238/download](http://www.fda.gov/media/136238/download).

### **11.3 Emergency Approvals of Pharmaceuticals and Medical Devices**

After the issuance of a declaration of a national emergency, the FDA has utilised existing authority to permit unapproved medical products or approved medical products for unapproved uses to be manufactured and distributed under specific conditions and labelling during the period of a declared pandemic or other health emergency. The FDA has issued hundreds of such Emergency Use Authorizations (EUAs) for COVID-19-related therapeutics, devices, diagnostics, and vaccines. These EUAs are only in effect during the period specified in the emergency declaration and an additional time-period specified for ensuring proper disposition of the product. An EUA does not substitute for (and is not intended to delay) applications for actual clearance or approval, and the agency can revoke or terminate an EUA at any time.

## **11.4 Flexibility in Manufacturing Certification as a Result of COVID-19**

The FDA does not provide separate certifications for manufacturing, but rather inspects facilities both prior to product approval/licensure and then on a periodic or for-cause basis. While now actively inspecting, the FDA has faced considerable difficulties in accomplishing inspections during the COVID-19 emergencies and had been relying largely on record reviews and other measures where inspections were deemed too risky, given the pandemic. This has resulted in delays in approval of products and supplements in certain cases, and a large backlog.

## **11.5 Import/Export Restrictions or Flexibilities as a Result of COVID-19**

The Trump Administration had imposed restrictions on the export of masks and other protective equipment, which was modified over time due to a significant backlash, and also prioritised US citizens in the distribution of US-made vaccines. The Biden Administration modified those policies to focus on ensuring an adequate US supply of vaccines and diagnostics, with a selective use of the Defense Production Act, which puts the US government at the “front of the line” as a customer. More generally, there is an ongoing policy debate, subject to some legislation to date, about ensuring a more secure and domestic supply chain for products needed during an emergency.

## **11.6 Drivers for Digital Health Innovation Due to COVID-19**

There has been an extensive relaxation of limitations on virtual and telemedicine interactions during the pandemic, as well as policies fostering the use of digital devices to address public health needs during the pandemic. See the [FDA website](#) for further details.

## **11.7 Compulsory Licensing of IP Rights for COVID-19-Related Treatments**

Under the Bayh-Dole Act, the US government has very limited “march-in” rights with respect to intellectual property licensed from the government. To date, despite some controversies over the use of government intellectual property and pressures due to COVID-19 product pricing, this authority has not been utilised. Unrelated to COVID-19, at this time, the National Institutes of Health is reportedly considering another petition for such a “march-in” on government-licensed patents for a drug product.

## **11.8 Liability Exemptions for COVID-19 Treatments or Vaccines**

The 2005 Public Readiness and Emergency Preparedness (PREP) Act, which has been invoked in a declaration in the case of COVID-19, provides immunity for the manufacture, testing, development, distribution, administration and use of specific covered counter-measures against threats such as COVID-19. Individuals who suffer injuries from administration or use of products covered by the PREP Act’s immunity provisions may seek redress from the Counter-measures Injury Compensation Program (CICP), which is administered by the Health Resources and Services Administration. Immunity protections are broad, and contrary state and local laws and rulings are widely pre-empted; practically, the only time a manufacturer of a COVID-19 counter-measure would not benefit from PREP Act immunity would be if a suit were brought in the US District Court for the District of Columbia by a plaintiff who has suffered a serious injury or death, has rejected a payment from the fund (which is not currently funded for COVID-19-related claims), and has demonstrated by clear and convincing evidence that the manufacturer engaged in “wilful misconduct,” as defined in the statute.



### **11.9 Requisition or Conversion of Manufacturing Sites**

Existing provisions have been used and new ones introduced to allow the requisition or conversion of manufacturing resources due to COVID-19. The Defense Production Act (DPA) is the primary source of Presidential authorities to expedite and expand the supply of materials and services from the US industrial base, including for certain emergency preparedness activities, and protection or restoration of critical infrastructure. Under the DPA, the government can impose “rated” or “priority orders,” pursuant to which the President may compel companies to accept and prioritise contracts for supplies critical to national defence. These orders also flow down the recipient’s supply chain, such that subcontractors or suppliers must also prioritise the rated order over competing obligations. The government can also impose “allocation orders” to compel industry, on a proportional basis, to

allocate resources, for example by reserving manufacturing capability or supplies in anticipation of a rated order or allocating manufacturing capability to a particular purpose. Failure to comply with a DPA order carries a criminal penalty. These authorities have been invoked with respect to certain diagnostic, personal protection equipment, and vaccine production capacity in the US. In other cases, the US government has funded the development of additional production capacity, such as for vaccine vials.

### **11.10 Changes to the System of Public Procurement of Medicines and Medical Devices**

As previously noted, during the pandemic the government has utilised a wide variety of public procurement and funding strategies for needed medical counter-measures, some of them unprecedented and based upon emergency authorities.



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