

I N S I D E T H E M I N D S

Food and Drug Law Settlements and Negotiations

*Leading Lawyers on Complying with Federal
Regulations, Negotiating Contracts with
Manufacturers and Suppliers, and Defending Clients
in Products Liability Litigation*



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Keys to Successful Interactions with Governing Bodies

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The Role of a Food and Drug Lawyer: Adding Value to Clients

As a food and drug lawyer, I advise clients—companies that discover, manufacture, and distribute products in a heavily regulated area, including prescription and over-the-counter pharmaceuticals, medical devices, foods, dietary supplements, and cosmetics—about strategies for product development and regulatory approval, product marketing and promotion, and enforcement issues. I conduct specialized regulatory due diligence for clients on transactions involving products regulated by the Food and Drug Administration (FDA) and undertake internal investigations in defense of corporate practices in the event of government investigations.

The immense costs and risks of marketing FDA-regulated products demands that lawyers add value when assisting clients with the complex regulatory/scientific issues that commonly affect them. In connection with product development and approval, I add value by helping clients organize and present the complex science supporting their products to advance their legal and regulatory positions. In some cases, I help the FDA recognize that the action being requested by my client is similar to precedent and/or does not present unacceptable safety risks. I also add value by explaining to clients the FDA's perspective and, consequently, what questions and concerns to anticipate from the FDA and how best to make presentations to the agency. In sum, I work with my clients to determine—based on my knowledge of the FDA, regulatory precedent, the relevant statutory frameworks, and relevant science—how to best and most persuasively position the client's interests before the FDA and related agencies.

The Major Food and Drug Issues with Which Clients Need Help

Clients generally need FDA legal/regulatory advice in three principal areas: product pathway or pre-market approval issues, product promotion and post-market distribution issues, and product evaluation during corporate transactions. The product pathway issues relate to how to develop and test products to obtain marketing authorization in the most rapid and cost-effective manner. This includes how to obtain a particular regulatory status, such as orphan drug status (a special category for products for rare diseases that affect populations of less than 200,000), or expedited review (for drug therapies for serious or life-threatening diseases without significant treatment options, such

as cancer or HIV), or to consider strategies to maximize the period of market exclusivity of the product.

A second major issue for which clients seek advice is the area of marketing and promotion of drugs and medical devices. Clients need guidance on how to market and promote their products in a legal and compliant manner, including advice on internal controls to facilitate compliance. They also must stay aware of trends in government policy concerning acceptable promotion and be aware of how to respond if their marketing incurs a government enforcement action.

The third major area where clients often need assistances is how to evaluate and anticipate opportunities and challenges from a regulatory perspective for product development or acquisition candidates. For example, clients often pay minimal attention to health care product reimbursement issues when evaluating products for potential acquisition, and then are surprised to learn the government health plans will not pay for the product or will pay more for a different form of the product (i.e., injectable versus parenteral) or when distributed to a particular user group (i.e., to a home health agency rather than to an ambulatory surgical center). These issues have substantial impact on valuation issues in the transactional context.

The Different Components of Food and Drug Law

The various elements of food and drug law can be divided into the distinct categories of: (1) product development, which includes discovery and testing; (2) product approval, which involves data compilation, timing, and strategies concerning negotiation of approvals; (3) product reimbursement strategies, including processing and reporting of pricing and related sales information; (4) product marketing, which incorporates any type of advertising and promotion, including a company's interactions with health care providers; (5) product manufacturing, including the use of facilities, equipment, and processes in compliance with current good manufacturing practices; (6) product life cycle issues, such as development and introduction of second-generation products, authorized generics, or other strategies to maintain market share for the product brand; and (7) product defense issues, including health care fraud and abuse marketing investigations, and product liability and market exclusivity

litigation. Depending on the product category, some or all of these elements will be necessary to manage. Obviously, with less-regulated product categories like over-the-counter drugs and simple medical devices, there are fewer legal components.

As a food and drug attorney, I have a distinct role with respect to helping my clients manage each facet of the product life cycle. With respect to product development and approval, I analyze the FDA regulatory framework for development and testing of the product. I also assist in preparing and, to the extent necessary, negotiating clinical testing documents, including investigational new drug applications, orphan drug designation requests, requests for special clinical trial protocol assessments, protocols, informed consents, clinical trial agreements, contract research organization agreements, and clinical supply agreements. I assist with Institutional Review Board issues, and I strategize with the client concerning scope, content, and timing of meetings with the FDA. Working directly with the FDA is also important at this stage, and it is my role to assist the client to negotiate clinical data requirements with the FDA, draft and prepare for FDA meeting presentations, assist with negotiations and appeals if FDA approval is conditional, and negotiate any phase IV (post-marketing approval) testing requirements or post-market risk management plans the FDA may request as a condition of approval.

When working for a client on the product marketing and promotion component, I assist with the review of advertising and promotional programs on the Web and via other venues, respond to FDA warning letters and other enforcement letters, assist with creating and reviewing programs for interactions with health care providers such as physician advisory boards and for continuing medical education, and help clients write standard operating procedures and codes of compliance for interactions with health care providers. It is often in the scope of my responsibility to train sales and marketing department personnel concerning appropriate regulatory practices and programs. Finally, most companies will ask outside FDA counsel to investigate allegations of non-compliant marketing/promotion practices, including those that have been reported to my client's compliance hotline and by competitors through trade complaints.

As for product life cycle issues, I help clients strategize concerning next-generation products, including their testing requirements. I also develop strategies to address potential generic competition, including the use of authorized generics, and the scope and timing of new drug application supplements.

Finally, with respect to manufacturing issues, I ensure that my clients have strategies to address FDA inspection and enforcement matters. In situations in which FDA inspections find that a firm failed to comply with good manufacturing practices, the firm will be issued a Form 483 notice of inspection deficiencies and must be able to respond promptly to the FDA with an action plan. The preparation of the response and action plan usually involves outside FDA counsel.

Other times, a company's processes result in misbranded or adulterated products that must be recalled. I work with the clients to prepare for such contingencies. I also assist clients when they face similar problems but with a different twist: the product is manufactured by a contract manufacturer. In these cases, there are issues relating to who controls the communications with the FDA about the problems and who bears the financial responsibility for the problems, as well as who ultimately decides how to resolve the problem. Analysis of both regulatory and contract law, including possible insurance coverage, is required to properly analyze these issues.

Financial Implications

The costs of developing and obtaining approval for some FDA-regulated products, such as prescription drugs and biologics, are enormous, approaching \$1 billion by current estimates. In order to avoid negative financial implications for my clients, it is important to identify early on appropriate regulatory pathways that enable my clients to avoid spending unnecessary time and money testing drug products. In addition, I assist clients in developing advertising and promotion that delivers the desired messages but will also withstand regulatory and competitor challenge. By counseling clients for successful (and legal) promotional and advertising campaigns, clients avoid government investigations and whistleblower claims, which always have the potential to result in exclusion of the

company from the federal and state health care purchasing programs such as Medicare and Medicaid. This latter result has particularly significant negative financial implications for companies, because if they are excluded from the government health care programs, they will be precluded from selling any of their products to the government or to any company that does business with the government, such as managed care insurers. The scope of the potential lost revenue would likely undermine any affected company's financial viability. Consequently, proactive behavior to ensure compliance is vitally important in connection with the promotion and sale of medical products.

On the corporate transaction side, it is important for companies to assess the regulatory strengths and weaknesses of the companies and/or products they are considering for cooperative arrangements or acquisition. If these strengths and weaknesses are miscalculated, a client may take on unnecessary debt to make an equity investment in or buy the target company or product without gaining the ability to generate sufficient income. There have been companies that have acquired products only to find out, for example, that the approval for the product was subject to FDA scrutiny because of suspected fraud in the new drug application. In the latter case, once the FDA suspended the new drug application approval, the purchaser had to spend years and significant resources to demonstrate that the underlying data in the application were not fraudulent. Similarly, it is frequently the case that a company will buy a manufacturing facility only to learn, soon after the sale, that the facility has significant good manufacturing practice violations, which will cause the whole facility or at least several production lines to be shut down, significantly reducing facility income. In addition to the immediate cash flow issue to address, the parties also may be litigating among themselves the adequacy of the disclosure of regulatory issues prior to the transfer of the facility.

Common Client Mistakes

There are as many types of client mistakes as there are life sciences companies. However, in general, the reasons for client mistakes often tend to be linked to the size of the company. Small, emerging companies with limited resources and personnel and aggressive timelines tend to make

mistakes because they get caught up in the enthusiasm and “positive science” around their products and usually underestimate the healthy skepticism the FDA brings to product review. Other client mistakes include failure to give FDA personnel sufficient credit as scientists and underestimating the strength of FDA expertise. In this regard, companies frequently fail to prepare adequately for interactions with the FDA by not asking the hard questions the agency is likely to ask. They fail to prepare presentations with data in a form that is compelling and persuasive. Also, because they have aggressive timelines and/or only one or two products to sell for revenue generation purposes, they tend to push the envelope when it comes to product launches and ongoing marketing.

Larger companies with seasoned personnel, strong histories with FDA product review, and an ongoing stream of revenue from other products typically have in place adequate infrastructure and procedures to complete regulatory processes and realistic expectations in terms of the time and cost of product approval. However, large companies tend to make mistakes when there are lapses in or complacency about their existing processes. For example, internal research and development personnel will become too friendly with clinical investigators and allow them to deviate from protocol without consequence or to provide promotional services, potentially jeopardizing the investigator’s independence. Similarly, sales and marketing teams for a product will be allowed to direct the review of advertising copy or will not be routinely monitored for use of unapproved promotional materials, otherwise known as “homemade bread.”

On the manufacturing side, companies can become complacent in following their own procedures, and then rationalize that this is not a problem because the product’s integrity has not been compromised. However, if the FDA finds this lack of control over process during an inspection, the consequences can be significant. (e.g., product recall, facility or line shutdown, fines and penalties). The FDA will not let companies “test” quality into their product; that is, you cannot convince the FDA that the product is safe by testing it at the end of the process. The FDA must be able to see that the process for making the product is controlled and reproducible. When companies forget this principle or choose to ignore it,

they encounter significant and serious good manufacturing practices problems.

Success with Respect to Working with Clients

Success with clients comes from being able to partner with in-house counsel and think creatively to implement their commercial strategies in a compliant and legal approach. It is further important to understand their business needs and objectives.

Having a strong and credible reputation with FDA officials is also extremely critical and can only be accomplished with ongoing, honest, and direct discussions with them. Active participation in industry and legal groups such as the Food and Drug Law Institute and the Regulatory Affairs Professionals Society, either as speaker or attendee, and publishing in the journals of these and other groups, is also important for networking and establishing a public reputation.

Another important element of attaining success in this role comes from the ability to stay abreast of industry trends. I do this by regularly reviewing trade publications, speaking at and attending industry conferences the companies attend (e.g., the Biotechnology Industry Organization annual conference), and working with a broad spectrum of clients (large and small, and across the spectrum of FDA-regulated products) to understand novel and emerging trends. Experience with a broad group of clients also helps you understand how the FDA is regulating other product areas.

In order to help my clients obtain a successful outcome, I have developed a basic strategy to assist them with food- and drug-related issues. My approach is to understand thoroughly the science around my clients' products and familiarize myself intimately with their business model and commercial objectives. Only when armed with a genuine understanding of what my clients produce, melded with experience and understanding of FDA regulation developed in multiple contexts, can I effectively represent them and help them avoid common pitfalls associated with food and drug law.

The Art of Negotiation

Negotiation is truly an art, and it involves a certain skill set that must be honed through practice and experience. One of the biggest challenges inherent to the process of negotiation is the ability to see the other side's perspective and suggest feasible solutions to address the other party's principal, and often legitimate, concerns.

My role on behalf of my client in negotiations is to arrive at a solution as quickly as possible without jeopardizing the client's core commercial or regulatory objectives. It is also in my client's best interest for me to ensure that the opposing side sees and appreciates my client's concerns as reasonable and addressable.

In order to be a successful negotiator on behalf of clients in this area, there are a few basic rules to follow. The most important rule is to not overreact when the government asserts that your client has violated the law. It is also important for the client to understand that in negotiations with the government, the government has very different objectives than private parties—the protection of public health, public relations and possible media spin on the agency's decision, congressional oversight and funding of the agency, ability to collect large fines/penalties, and willingness to use one case or company to “send a message” to an entire industry. Unlike a private adversary, the government has no sensitivity to costs of litigation and no ability to be threatened with counterclaims. Finally, a successful negotiator on FDA issues must always find ways to use science to advance his or her client's position. For example, if you are negotiating with the FDA about the scope of a product recall, it is critical to have a health hazard assessment that quantifies the magnitude of the health risk posed by the recalled product.

The key corporate players in negotiations with the FDA vary depending on the type of case. At a minimum, representatives from the regulatory affairs group, general counsel, and relevant scientists/statisticians from the company will be involved. Recalls and manufacturing-related negotiations will also involve representatives from the company's quality assurance and/or quality control group. Financial representatives almost never attend

agency meetings/negotiations. Senior management usually attends meetings with FDA officials at or above the FDA Division level.

The Most Often Negotiated Points in Food and Drug Transactions

Regardless of the specific circumstances surrounding each case, there are certain points that surface during most negotiations. For unapproved products, the most often negotiated points are the cost, timing, and likelihood of success of clinical trials. Other commonly negotiated issues include who will retain control over the regulatory strategy and filings, and the scope of the intellectual property being negotiated. Further, if there are multiple post-market roles for both parties, a common point of contention is the process for resolving disputes.

Because many deals are negotiated during early-stage clinical development, it is often difficult to predict whether or how effective a product will be, and what kinds of Phase III clinical trials the FDA will require. When negotiating a product transaction, it is always critical to do sufficient due diligence on the product by consulting with scientific experts, asking challenging questions of the client's regulatory and scientific staff, and talking with the FDA to understand what resources and time will be necessary to bring that product to the market.

In partnering deals, especially with emerging businesses, there is a tendency for the small innovator company to want to retain some control and role in the regulatory strategy for the product. For example, these companies often demand to control how and when to have meetings with the FDA, what indications to pursue, how to design the clinical trials, how to prepare the filings, and other related issues. The larger companies tend to want to control this process because they have more expertise and resources to get this done quickly for the company. Depending on whom we represent in the deal, we try to achieve a role for everyone that does not compromise the development timeline for and cost of approval of the product.

The negotiation points that are the hardest to bridge and often have the power to kill a deal usually relate to financials. One party thinks the product is worth more than or has greater potential than the other party; or one

party thinks the intellectual property for the product is more significant or defensible than the other party. Unpredictable liabilities (e.g., product liability claims) are also difficult to address and can cause parties to rethink their enthusiasm for a deal.

Negotiations: Food and Drug Law Compared to Other Areas of Law

Negotiating food and drug law issues within the context of corporate deals is often different from those in other areas of the law, because the science and scientists are so critical and the regulatory context is so complex.

If negotiations are with the federal or state government over an enforcement problem, the lack of leverage by the private party in the negotiation is a serious challenge to easily resolving the issue. In negotiations with the FDA concerning regulatory issues, because administrative law principles require the courts to grant deference to the FDA on the merits of its decision or actions, the FDA does not consider litigation a significant threat to it.

In connection with health care investigations of pharmaceutical and medical device companies by the Office of Inspector General of the Department of Health and Human Services, because the government is able to exclude completely pharmaceutical and medical device companies from participation in federal and state health care programs such as Medicare and Medicaid, if the company is found to have violated the anti-kickback statute, it is impossible to negotiate reasonable settlements. In those cases, the key to a successful settlement is to keep the fines and penalties low, obtain the least burdensome corporate integrity agreement, and avoid exclusion.

Settlements

Historically, there has not been a significant amount of litigation by pharmaceutical and medical device companies against the FDA or against each other outside of the patent area or over-the-counter products. Between parties, economics may demand that a dispute over a product or facility be litigated if there is sufficient money at issue or if the problem that

is causing the commercial dispute has the potential to lead to significant product liability claims.

For the most part, however, I generally prefer that my disputes avoid litigation whenever a reasonable settlement is an option. As mentioned above, in this area of the law, the courts generally defer to the FDA's expertise, pursuant to administrative law principles, so going to court is rarely a productive course of action for my clients. Moreover, a settlement is a success when it allows the company to manage the resulting settlement process rather than having the government micromanage the settlement and resulting corporate behavioral changes and obligations.

Clients' Financial Liability: Judging the Best Course of Action

Because the FDA does not have broad authority to assess penalties against companies, the financial liability that results from FDA action is most often not being able to get products approved in a timely manner or having a facility shut down. In the event of a recall, it could also relate to having to pull products from the market, with the resulting negative public relations effects and likely product liability litigation. The recent Allergan recall of contact lens solution due to contamination was asserted to have caused the company significant damage to its reputation for safe products, and to its brand. Another negative scenario for a client is if the FDA shuts down a facility, as this creates inventory issues and opportunities for competitors to absorb market share while the client is out of the market and trying to resolve its regulatory issues.

My favorite advice for clients with respect to negotiations and settlements in food and drug law is to be creative and flexible as to possible solutions (i.e., narrowing claims to get approval, using alternative advertising to assist in recalling products, having experts assist to re-qualify a manufacturing plant), pay attention to the science and what the government is saying about your processes, and understand that there is very little leverage with the government. The focus is most always on obtaining a prompt and practical resolution that advances the business objectives of the client.

Kathleen M. Sanzo is a partner and practice group leader of the firm's Food and Drug Administration/health care regulation practice group in Washington, D.C., a member of the firm's life sciences interdisciplinary and practice group, and co-editor of the newsletter, Morgan Lewis on Life Sciences.

Before joining the firm, Ms. Sanzo clerked in the Office of General Counsel of the Food and Drug Administration as the Food and Drug Law Institute fellow from 1983 to 1984.

Ms. Sanzo is vice-chair of the consumer product regulation committee of the American Bar Association's section of administrative law and regulatory practice.

Ms. Sanzo's practice focuses on all regulatory and compliance matters of the Food and Drug Administration relating to prescription and over-the-counter drug and biologics testing, manufacture, approval, marketing, and distribution. She routinely advises pharmaceutical companies on development strategies, marketing and promotion programs, product life cycle strategies concerning market exclusivity, compliance codes and training, privacy laws, and federal and state reimbursement for drug products. She has defended pharmaceutical and medical device companies subject to federal and state investigations and has negotiated corporate integrity and similar agreements with federal and state authorities including of the Office of Inspector General of the Department of Health and Human Services, the Centers for Medicare and Medicaid Services, and states' attorney generals. She frequently advises clients on regulatory issues in life science transactions including with respect to product acquisition, licenses, co-promotion, quality, and supply agreements.

Following graduation from Duke University in 1979, Ms. Sanzo received her law degree from Emory Law School in 1982 and her master's of laws degree from the George Washington University National Law Center in 1985, where she was the Food and Drug Law Institute fellow.

Ms. Sanzo was selected as part of an exclusive list of prestigious "Outstanding Fraud and Compliance Lawyers-2004" by Nightingale's Healthcare News. She is also listed as recommended in regulatory (2004-2005 and 2005-2006) and in pharmaceutical fraud and abuse investigations (2005-2006) in the Cross-Border Life Sciences Handbook.



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