

## Life Sciences Regulation To Watch In 2013

By **Jeff Overlay**

*Law360, New York (January 01, 2013, 5:14 PM ET)* -- A wave of new regulation is headed for the life sciences sector in 2013, promising to radically reform how the industry handles drug approvals, plant inspections, promotional activities and interactions with doctors, among other practices.

"2013 could be a big year for regulation," said Areta L. Kupchyk, a Nixon Peabody partner who counsels clients on FDA interactions.

Here's a look at key regulations experts will keep an eye on in 2013.

### **The Biosimilars Waiting Game**

A lengthy wait for detailed guidance on biosimilars might finally end in 2013, giving drugmakers a clear route toward introducing generic competition into the \$140 billion market for biologic medicines.

Congress established a biosimilars approval pathway when it passed the Patient Protection and Affordable Care Act in 2010, and industry has been licking its chops ever since, positively craving clarity on how the U.S. Food and Drug Administration will oversee the nascent field.

Kathleen M. Sanzo, head of the FDA and health care practice at Morgan Lewis & Bockius, said one of the biggest unanswered questions involves so-called eligibility. Since biosimilars are merely similar to original biologics, not identical, how similar must they be in order to be eligible for the abbreviated approval pathway, as opposed to the more arduous application process for new drugs?

Another closely watched subject is interchangeability. While a biosimilar drug can be approved for sale, an interchangeable drug could be switched with the brand-name biologic just as hydrocodone is typically substituted for Vicodin. That would make doctors more likely to prescribe a biosimilar, and it would make biosimilars more profitable.

The issue of what to call biosimilars is yet another unsettled matter. Obviously, they can't carry the original brand name, and giving them the same non-proprietary name might also be problematic.

Take rheumatoid arthritis drug Humira, a biologic that's also known as adalimumab. If a biosimilar version of the drug wins approval, should it also be called adalimumab, or does the fact that it's not precisely the same drug require a different name? And if a new name is needed, how should firms identify the biosimilar as a comparable drug?

“There has to be some ability to differentiate products, but also to indicate that this is a follow-on product,” Sanzo said.

FDA officials in August issued a progress report that essentially said they had no progress to report, and observers were split about whether the agency will kick things into high gear in 2013.

Kupchyk sees good reason for hope, saying FDA officials have placed biosimilars “at the top of their list.”

“I think there’s a lot of pressure on the agency to get those [regulations] out,” Kupchyk said. “We’re not the first country to deal with biosimilars; it’s not like we’re paving the way.”

At the same time, Kupchyk noted that there will be a “tug of war” between innovators and generics makers as they battle over how much data the FDA should require to establish similarity. That tussling isn’t likely to make the agency’s job any easier.

Sanzo counts herself a pessimist, saying there is little incentive for the FDA to pick up the pace because no corporations have submitted applications for biosimilars.

“We haven’t seen any movement, and there’s a lot of skepticism in the industry that they’re going to get regulations out [in 2013],” she said. “We’re hearing that it’s ... certainly not going to be in the first half of the year.”

Daniel A. Kracov, head of the FDA and health care practice at Arnold & Porter, echoed that prediction. “Within the next few months, they’ll probably put out some updated Q&A guidance, but I don’t see regulations coming for quite some time,” he said.

### **The Impending Compounder Crackdown**

Stepped-up oversight of compounding pharmacies is likely in 2013 after Massachusetts-based New England Compounding Center triggered a public health crisis when its contaminated steroid injections led to a meningitis outbreak that killed dozens and infected hundreds across the country. In the aftermath, public debate has centered on who should have stopped the company — the states or the FDA.

Some lawmakers have accused the FDA of possessing sufficient authority and simply being asleep at the wheel, noting that it has unquestioned power to police drug companies engaging in full-scale manufacturing. Nonetheless, there seems to be ample support in Congress for specifically empowering the agency to place compounders under a microscope.

“I think there’s going to continue to be a lot of public policy pressure to address the issue of FDA oversight — the meningitis issue was so dramatic,” said Elizabeth S. Weiswasser of Weil Gotshal & Manges.

Several proposals have emerged for stepped-up scrutiny, including a bill introduced in December that would require compounding pharmacies to register with the FDA and use compound-specific labeling.

Although it’s not yet certain what lawmakers will do, it’s pretty assured they will do something, if only because Americans are demanding a response in the face of such a startling and seemingly preventable tragedy, observers say.

“It is deaths and tragedy like this that always trigger new legislation,” Kupchyk said. “I would be very surprised if there wasn’t new legislation.”

## **Final Rule on Unique Device Identification**

A final rule on unique device identification could be out by May requiring device makers to engrave their products with a code intended to assist with the FDA's postmarket surveillance, allowing the agency to better track problematic equipment.

Compliance deadlines vary, but much of the attention is focused on the two years that implantable devices will have to be directly marked. Industry group AdvaMed has called the implantables rule unnecessary, as codes will be recorded in patient charts and electronic health records, and warned that the new guidelines will cost billions of dollars to implement.

Lina R. Kontos, a Hogan Lovells associate and former reviewer in the FDA's Center for Devices and Radiological Health, noted that many devices, such as tiny metal screws or tissue products, pose real obstacles to direct marking.

Companies can request exemptions, but the short-staffed FDA has said it won't actually approve the applications, meaning manufacturers might have to make a leap of faith and hope the agency doesn't later find that they should have been subject to the rule.

"I'm hoping that the final rule will include more details on what the guidelines are and how exceptions might be achieved," Kontos said.

At the same time, Kontos suggested the direct-marking rule makes some sense because the UDI code may be visible through an X-ray or other technology, and would be obtained in the event an implant is removed due to an adverse event or a faulty implant. And while it will take some time for the new framework to function smoothly, there are "definitely some benefits to the whole system for patient safety," she said.

## **New Rules on Disclosing Doctor Payments**

The Physician Payment Sunshine Act is set to take effect early in 2013, forcing pharmaceutical and medical device companies to report to the Centers for Medicare and Medicaid Services any payments or transfers above \$10 made to doctors.

The act is something of a triple-whammy for manufacturers, as it creates new record-keeping responsibilities, makes it simpler for regulators to spot improper financial arrangements and gives aggrieved patients a new tool to pursue litigation.

Brian K. French, deputy leader of the government investigations practice at Nixon Peabody, said the payment database will allow state government officials to see which companies are paying which doctors and then cross-reference the data with Medicaid reimbursement information.

"One of the things that might be on the horizon because of that is more enforcement activity," French said. "It makes it much easier for the states to identify potential kickback arrangements."

In addition, experts say the rule makes physician payment information more easily available to patients suing drug and device makers for failing to warn about product health risks. Although pharmaceutical companies can normally shield themselves from failure-to-warn claims by informing doctors of risks, that immunity might not hold up if patients can show that the pharmaceutical company was paying large sums of money to the doctor.

Another significant issue that remains to be sorted out is the responsibility of a U.S. corporation to report payments when a foreign affiliate compensates a physician, Kracov said. The question is, how close do the ties between the two units have to be to trigger reporting requirements?

“The way CMS proposed [the rule], they didn’t do anyone any favors in trying to simplify the requirements,” Kracov said.

### **Revisiting Track and Trace**

One measure that didn't make it into the user fee bill was a provision establishing nationwide drug tracking standards. The track-and-trace proposal was written by a coalition of major industry groups representing drug companies, distributors, pharmacies and UPS Inc., which said it would prevent counterfeit or adulterated drugs from entering the supply chain.

Negotiations to make the language acceptable to all stakeholders, including the FDA, fell through after weeks of talks and just ahead of votes on the final legislation. Kracov said that while details remain to be worked out, he sees reasonable odds of the issue resurfacing in 2013.

“At the end of the day, it makes absolutely no sense to have a multiplicity of laws across the country for track and trace, so ultimately I think it’s going to happen,” he said.

### **Guidance for Social and Mobile Media**

The FDA is putting the finishing touches on final guidance for mobile medical applications that can offer an array of benefits, from reminding patients to take medications to allowing individuals to self-check their vital signs, send them in for analysis and have doctors alerted if something’s amiss. The issue, however, has been complicated by the quick pace of technological change.

“This is a daunting task, because medical apps can be produced so quickly,” Kupchyk said. “[There’s] pressure to regulate in a way that doesn’t stifle innovation, but is safe.”

Final guidance from the FDA is also expected in 2013 on how life sciences companies can abide various regulations on social media, but the conundrum is similar because the landscape changes so swiftly.

“They don’t want to antique the guidance before it even issues,” Sanzo said.

That’s on top of special challenges presented by social networking. One troublesome issue is that “the social media dialog is so truncated,” impeding efforts at full disclosure, Sanzo said. Also, companies lack full control over social media, as consumers can easily post items to Facebook pages or mention the companies in Twitter feeds.

### **FDA Rethink on Off-Label Promotion**

On a related front, the FDA’s efforts to complete two guidance documents — one on social media, one on scientific exchange of information — might be complicated in the wake of the Second Circuit’s recent decision in *U.S. v. Caronia*. In that ruling, the appeals court overturned a pharmaceutical sales representative's conviction for misbranding after finding that his truthful off-label promotion of a drug was constitutionally protected speech. That calls into question a great deal of the FDA’s restrictions, and could open the door to greater latitude for drugmakers and device firms to freely discuss uses of their products.

It could be some time before clarity emerges because the Second Circuit could rehear the case and because the matter might eventually be headed to the U.S. Supreme Court. Nonetheless, it tosses a wrench into the FDA's thinking.

“It’s a game-changer in terms of how FDA deals with scientific exchange,” Kracov said. “Having guidance that says ... a speaker, when talking about a study, can’t reply in an open room is just unsustainable for the agency. FDA is just going to have to rethink its approach.”

--Additional reporting by Rachel Slajda and Greg Ryan. Editing by Sarah Golin.

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