Morgan Lewis

Healthcare Reform--New Path for Biosimilars

Washington Legal Foundation
Advocate for Freedom and Justice®

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Kathleen M. Sanzo, Esq.
Ksanzo@morganlewis.com
Washington, DC

What the New Law Accomplishes

- The Affordable Care Act (ACA) provides for a biosimilar pathway that is not based on an ANDA model.
- ACA provides a definite term of exclusivity (12 years) for innovator products.
- ACA provides for “arbitration” of patent disputes.
- By deputizing the Office of New Drugs as the reviewing division for biosimilars, ACA establishes the scientific approach that FDA should use to approve biosimilars.
- ACA provides a transition pathway for biologic products previously regulated like drugs.
- ACA allows for imposition of user fees to review biosimilars.

What the New Law Accomplishes (cont'd)

- Provides FDA with almost complete discretion to approve biosimilars as the Agency sees fit:
  - Can require data or not;
  - Can draft guidelines or not; and
  - Can consider a biosimilar "interchangeable" or not.

What the New Law Does Not Accomplish

- Define what is biosimilar, or how similar to the reference product a biosimilar must be, to be approved or considered interchangeable?
- Describe what scope of data is necessary, if any, to show biosimilarity?
- Define the scope of innovator modifications to a product that can provide a basis for additional exclusivity?
- Discuss how important the manufacturing process is to showing biosimilarity?
- Establish whether a biosimilar needs to provide data in connection with all approved uses of the RD?

Principal Components of New Law

- ACA provides authority for FDA to approve biosimilars:
  - Analytical data showing product is highly similar to reference product, although can have minor differences in clinically inactive ingredients;
  - Animal studies (including for assessment of toxicity); and
  - Clinical study or studies to show safety, purity, and potency for at least one condition for which reference product is approved.
- Same mechanism of action as RP, if known.
- Use(s) of biosimilar previously approved for RP.
- Route of administration, dosage form, and strength of biosimilar are same as RP.
- Facility can produce safe, pure, and potent biosimilar.
- FDA can waive any of the above requirements.

Principal Components of New Law

- Biosimilar can be determined to be "interchangeable" if it is:
  - biosimilar;
  - can be expected to produce the same clinical effect as RP; and
  - if a multi-dose product, does not present any greater safety or efficacy risk from switching between RP and biosimilar, than not switching between products.

Principal Components of New Law

- FDA has REMS authority for biosimilars.
- There will be user fees for biosimilar applications.
- Office of New Drugs will review and approve biosimilar applications (351(k) applications).
- FDA has announced new Acting Associate Director, Dr. Leah Christl, and has announced that it will establish a Biosimilars Review Committee to advise reviewing divisions.

Principal Components of New Law

- Exclusivity:
  - RP receives 12 years of exclusivity from date of first approval;
  - No additional exclusivity for sBLAs or slightly modified products (but no discussion of what is a slight modification);
  - No biosimilar application accepted by FDA for at least 4 years from date of approval of RP; and
  - First biosimilar exclusivity begins at various dates, depending on whether there is patent litigation.

Principal Components of New Law

- Highly complicated patent provisions essentially act to arbitrate the patent litigation process:
  - Defined time lines for exchange of dossier and patent information; and
  - Protection against “other” uses of exchanged information.

Principal Components of New Law

- Transition Products (e.g., biologic-like products approved under NDAs):
  - Can continue to submit NDAs for these types of products for 10 years;
  - Unless there is a 351(k) approved product that could act as a reference product; and
  - Previously approved NDAs shall be deemed a BLA as of March 2020.

Questions

- How will FDA define “highly similar?” Footnote 23 to Omnitrope Citizen Petition may provide some guidance.
- What kind of data and studies will FDA/OND request?
- Under what circumstances will FDA waive data requirements? Can they waive all requirements?
- Will comparative clinical studies be required for all interchangeability determinations?
- Can a biosimilar be better than the RP? If so, is it really biosimilar?
- Will a biosimilar be required to have data for all approved uses? If not, should they have to sign certifications that they will not sell for these uses or have a REMS program that reduces likelihood of off-label use?

Questions (cont'd)

- What will FDA do with pending biologic-like products such as low molecular weight heparins?
- What will FDA do with naturally-occurring and rDNA products? Note a biosimilar can only have one RP.
- When will the transition products like growth hormone and insulin begin to transition, i.e., be deemed BLAs?
- Will FDA prohibit companies from filing 505(b)(2) applications for "generic" protein products?
- How will FDA establish guidelines, and what will be the stakeholder process?
- How will FDA process citizen petitions filed concerning standards for biosimilar products?
- What kind of promotion will be allowed against approved biosimilars?

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