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FTC Workshop Seeks to Spark Biosimilars Competition

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Demand for biologics is growing fast, but even after Congress passed authorizing legislation in 2010, the pace of generic entry appears to have stalled. Seeking to spur increased generic competition, the FTC held an all-day workshop earlier this week to discuss evolving FDA and state regulations, especially on the key issues of substitutability and naming rules for follow-on biologics. While the workshop participants did not reach consensus, the debate was lively and provided much for the FTC to consider as it continues to examine and weigh in on the topic.

FTC Returns to the Follow-on Biologics Debate

Nearly five years have passed since the FTC issued its 2009 report on the potential for increased competition in the "follow-on" biologics marketplace.[1] Since that time, Congress has passed a key piece of enabling legislation, the 2010 Biologics Price Competition and Innovation Act (BPCIA), which incorporates many of the FTC's recommendations.[2] The BPCIA is an attempt to create a viable marketplace for generic or "follow-on" biologic drugs, akin to the one created for traditional small-molecule generic drugs by the Hatch-Waxman Act of 1984.[3] The BPCIA authorizes the FDA to create a "fast track" for approving follow-on biologics as either "interchangeable" (identical in effect to the reference drug) or "biosimilar" ("highly similar" to the

[1] *See* Federal Trade Commission, *Emerging Health Care Issues: Follow-on Biologic Drug Competition* (Jun. 11, 2009) ("2009 Report").

[2] 42 U.S.C. §262 et seq.

[3] 21 U.S.C. §301 et seq.

reference drug, with "no clinically meaningful differences [in] safety, purity, and potency")[4].

Despite the passage of the BPCIA, however, efforts to generate meaningful generic competition in the biologic drug space appear to have stalled. To try to address this issue, the FTC convened a workshop on February 4, 2014 to discuss how best to stimulate competition.[5]

The day-long event opened with remarks from Chairwoman Ramirez that highlighted the FTC's commitment to creating a viable and competitive follow-on biologics marketplace, and featured a diverse group of participants, including representatives from manufacturers of both pioneer and follow-on biologics, insurance, pharmacy and pharmacy benefit management companies, as well as consultants, consumer advocates, academics, and other industry experts.

A Fast-Growing Category of Drugs, But Slow Progress towards Generic Approval

Developed over the last thirty years, biologics are a fast-growing category of drugs that are protein-based and derived from living matter or manufactured in living cells. In contrast to so-called "small-molecule" drugs, which are manufactured using standardized chemical processes, biologics are extremely challenging to manufacture, and are almost impossible to replicate precisely without access to proprietary information from the pioneer manufacturer. These difficulties, combined with the lack of a clear regulatory pathway to market, have hindered the development of a follow-on biologic drug industry in the United States.

Although the United States approved a handful of follow-on biologics under the Food Drug & Cosmetic Act prior to the passage of the BPCIA,[6] no new follow-on biologic drugs have been brought to market in the United States in years and the approval process and marketplace remain underdeveloped. Despite the FDA's issuance of limited draft guidance related to implementing the BPCIA in February 2012 and the filing of a number of follow-on biologic approval applications by drugmakers, multiple key elements of the pathway to follow-on biologic approval remain unresolved. Key open questions include bioequivalence standards, substitutability, and naming conventions.

The View from Abroad

A recurring theme at the workshop was the slow pace of progress in the US follow-on biologics marketplace, in contrast with other jurisdictions which have more vibrant follow-on biologics marketplaces. The EU in particular was cited by many experts as an example of a successful regulatory regime, with more than a dozen biosimilars having been granted approval since the enactment of enabling regulations in 2003.[7] Japan and Australia were also noted as having developed successful regulatory regimes, with Japan having approved its first biosimilar in 2009 and Australia in 2010. But, the panelists drew contrasting lessons from the different experiences, particularly regarding the naming issues discussed below.

[4] 42 U.S.C. §262(i)(2).

[5] The FTC will accept written public comments through March 1, 2014.

[6] *See* 2009 Report at pg. 4 n. 5.

[7] *See* Press Release, European Medicines Agency, *European Medicines Agency Recommends Approval of First Two Monocolonal Antibody Biosimilars* (Jun. 28, 2013), *available at* http://www.ema.europa.eu/ema/index.jsp?curl=pages/news_and_events/news/2013/06/news_detail_001837.jsp&mid=WC0b01ac058004d5c1.

State Law, a Potential Obstacle to Biosimilar Substitution

While US federal regulation appears to be progressing, albeit slowly, state-level developments have emerged that threaten to block or severely delay the creation of a viable follow-on biologics marketplace. Urged on by the manufacturers of pioneer biologic medicines, multiple state legislatures have either considered or enacted bills that would limit the ability of pharmacies to substitute biosimilars for brand-name biologics.[8] While this movement has not yet spread nationwide, consumer advocates have noted that it runs counter to the current practice of permitting automatic substitution of therapeutically equivalent generic medication at the pharmacy level, as is permitted by law in most states for small-molecule generics, and would tend to thwart the intent of the BPCIA, which explicitly provides for automatic substitution for follow-on products approved as interchangeable.

In 2013, 18 states introduced 28 separate bills purporting to regulate the substitution of follow-on biologics. Many of these bills included the requirement that pharmacists report the substitution of any biologic to the prescribing doctor and keep separate records detailing substitution choices for a fixed period of time. Panelists weighed in on these proposals, especially with regard to whether they are likely to restrict competition more than necessary to achieve consumer safety.

During a heated discussion, some representatives pointed to the persistent differences between pioneer biologic drugs and their biosimilar counterparts as evidence that biosimilars should be separately tracked, while others, particularly follow-on biologic manufacturers and consumer advocates, argued that requiring separate tracking and reporting would unnecessarily burden doctors and pharmacists and would stoke unfounded public fears about the perceived safety and quality of follow-on biologics. Panelists from consumer groups also emphasized that such laws are premature, since the FDA process for certifying interchangeable biologics has not yet been established, and that they appear to be a back-door attempt to undermine the creation of a true interchangeable marketplace. Given that the BPCIA explicitly authorizes the designation of interchangeable drugs – which the Hatch-Waxman Act does not – consumer advocates argued forcefully that such attempts to place obstacles in the way of interchangeability run directly counter to the purpose of the law.

Naming Issues, an Additional Complicating Factor for Biosimilars

Finally, the FTC workshop addressed the impact of naming conventions for biosimilar pharmaceuticals. Pioneer drugmakers long have argued that for reasons of consumer safety and drug origin traceability, follow-on biologics should not be marketed under the same non-proprietary name (equivalent to the active pharmaceutical ingredient for non-biologics) as their pioneer biologic counterparts. Others, including consumer advocates and follow-on biologics manufacturers, have countered that using multiple names likely would hinder substitutability and discourage customer adoption of cheaper, therapeutically equivalent generic products. Several participants noted that there is inherent variability with biologics — e.g., detectable variations may exist even among batches produced by the pioneer manufacturer — raising concerns that follow-on biologics may not be sufficiently identical to the reference drug to warrant using the same non-proprietary name.

The FTC staff posed two key questions to the panelists: whether unique names for follow-on biologics would meaningfully improve patient safety, and whether any such advantages would be outweighed by the tendency of multiple names for similar drugs to hinder substitution and therefore competition. Participants from companies that manufacture pioneer

[8] *See* Andrew Pollack, *Biotech Firms, Billions at Risk, Lobby States to Limit Generics*, New York Times, Jan. 28, 2013, *available at* http://www.nytimes.com/2013/01/29/business/battle-in-states-on-generic-copies-of-biotech-drugs.html?hpw&_r=1&.

biologics argued that requiring follow-on biologics (both biosimilar and interchangeable) to carry a unique non-proprietary name would avoid confusion over which drug was actually dispensed, improve adverse event reporting efforts and prevent issues with one drug manufacturer from being misattributed to another, while still allowing drugs to compete fairly based on their individual reputations. As further support, some pointed to the European Medicines Agency's recent mandate that all biosimilars be marketed under distinct brand names because of concerns over misattribution of adverse event reports concerns. Follow-on biologic manufacturers and consumer and payor groups countered that drugs that are certified as clinically substitutable by the FDA should share a common non-proprietary name, as is currently done with small-molecule drugs, and that to do otherwise would breed confusion at the provider level and inappropriately diminish adoption of qualified generic substitutes. Some of these participants pointed to evidence from Australia and Japan, which have required the use of unique non-proprietary names for biosimilars, to support their position that such requirements drive down biosimilar adoption and reduce competition to the detriment of consumers.

Conclusion: FTC Likely to be Active in the Biosimilar Marketplace

In her opening remarks, Chairwoman Ramirez lauded the FTC's key role in fighting against state anti-substitution laws in the 1970s and in favor of the development of a true follow-on biologic marketplace in the lead-up to the passage of the BPCIA. Citing generic competition as a crucial resource for reducing costs to consumers, the Chairwoman expressed optimism about the ability of the Commission to continue to work with stakeholders to deliver the benefits of biologics at affordable prices. While consensus on the appropriate next steps remained elusive at the workshop, the high level of discussion and clear commitment of Commission staff to the issues leaves little doubt that the FTC will continue to advocate for greater transparency and competition in this fast-growing and challenging field.

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