

# FDA Reauthorization Act of 2017: Select Drug Provisions

November 7, 2017

Food, Drugs, and Devices

---

On August 18, 2017, President Donald Trump signed into law the FDA Reauthorization Act of 2017 (FDARA).<sup>1</sup> This law, containing nine titles, reauthorizes and amends the user fee programs for prescription drugs, medical devices, generic drugs, and biosimilars. In addition to the user fee provisions, FDARA amends the Federal Food, Drug, and Cosmetic Act (FDCA) and the Public Health Service Act (PHSA) in ways intended to, among other things, promote the development of drugs for pediatric populations and improve access to generic drugs. This alert summarizes the drug provisions of FDARA other than those in Titles III and VIII (related to improving access to generic drugs). A separate Covington [alert](#) on the medical device provisions of FDARA, including Title II (Fees Relating to Medical Devices), was released previously, and the generic drug provisions of FDARA also will be addressed separately.

## TITLE I—FEES RELATING TO DRUGS

---

Title I reauthorizes the Prescription Drug User Fee Act (PDUFA) for another five-year period through fiscal year 2022.<sup>2</sup> PDUFA VI generally retains the fee setting process that existed under the prior five authorizations, but makes several key changes intended to increase “predictability, stability, and efficiency” according to FDA.<sup>3</sup>

Historically, the statute required FDA to set PDUFA fees in order to generate PDUFA revenue as follows: one-third of revenue from application fees, one-third of revenue from establishment fees, and one-third of the revenue from product fees.<sup>4</sup> PDUFA VI shifts the revenue allocation to derive a greater proportion from more predictable fee-paying types.<sup>5</sup> Starting October 1, 2017, FDA will set PDUFA fees to generate 20% of revenue from human drug application fees and 80% of revenue from “prescription drug program fees.”<sup>6</sup> The new prescription drug program fee maintains the same structure as the previous “prescription drug product fee,” with a new limitation that a sponsor will not be assessed more than five prescription drug program fees in a given fiscal year for products identified in each distinct approved human drug application held by

---

<sup>1</sup> Pub. L. No. 115-52 (2017).

<sup>2</sup> FDARA § 102 (amending FDCA § 736).

<sup>3</sup> 81 Fed. Reg. 46,929, 46,934 (July 19, 2016).

<sup>4</sup> FDCA § 732(b)(2) (2016).

<sup>5</sup> 81 Fed. Reg. at 46,934.

<sup>6</sup> FDARA § 102(b) (amending FDCA § 736(b)).

that sponsor and otherwise subject to the fee.<sup>7</sup> Of significance, PDUFA VI discontinues the fee for supplements and the “establishment fee.”<sup>8</sup>

FDARA also discontinues the so-called “Fees-Exceed-the-Costs” waiver, which applied when the fees would exceed the anticipated present and future costs incurred to review the human drug applications for the applicant.<sup>9</sup>

The reauthorization includes a target of \$878,590,000 annual base revenue in fiscal year 2018, plus revised inflation and other adjustments. A “capacity planning” adjustment will be developed and implemented to replace the existing “workload adjustment” from prior authorizations.<sup>10</sup> An “operating reserve adjustment” replaces the fifth-year offset and final year adjustment provisions of prior authorizations and may apply if necessary to either increase or decrease fee revenue and fees to provide for no more than 14 weeks of operating reserves of carryover user fees.<sup>11</sup> New under PDUFA VI is a “direct cost adjustment,” starting at \$8,730,000 in fiscal year 2018 and adjusted in subsequent years, to fund PDUFA enhancements.<sup>12</sup> Lastly, PDUFA VI authorizes additional dollar amounts for each fiscal year to phase in funding for 230 FTE staff, beginning with \$20,077,793 in fiscal year 2018.<sup>13</sup>

PDUFA VI modifies the prescription drug program fee billing date to minimize the need for multiple billing cycles. Under PDUFA VI, each applicant must pay the annual program fee established for the fiscal year for each drug that is identified in one of its human drug applications *that is approved as of October 1 of that fiscal year*.<sup>14</sup> Thus, there will be one billing cycle at the beginning of the fiscal year, and a newly approved product will first be charged a program fee in the fiscal year following its approval. The fee is due on October 1 (or the first business day after the enactment of the relevant appropriations act, if later).

Like previous reauthorizations, FDARA requires FDA to continue submitting annual reports describing its progress toward meeting the PDUFA performance goals in the FDA “goals letter.”<sup>15</sup> Starting in fiscal year 2013, FDA was required to submit detailed data on the progress of drug approvals at CDER and CBER, and those reporting requirements continue under PDUFA VI.<sup>16</sup>

---

<sup>7</sup> *Id.* § 102(a)(1)(J) (amending FDCA § 736(a)).

<sup>8</sup> *Id.* § 102(a) (amending FDCA § 736(a)). A conforming edit provides that establishments that manufacture both animal drug products and prescription drug products will be assessed only one fee per fiscal year, under FDCA § 740(a)(3), for animal drug establishment fees. *Id.*

<sup>9</sup> *Id.* § 102(d) (amending FDCA § 736(d)).

<sup>10</sup> *Id.* § 102(c) (amending FDCA § 736(c)). First, FDA must obtain an independent report evaluating capacity planning options and recommendations. The report is due to be published for public comment by the end of 2020. In the meantime, an interim method uses a three-year weighted average based on numbers of applications and formal meetings.

<sup>11</sup> *Id.* If an operating reserve adjustment is made, the rationale for the adjustment must be described in the annual Federal Register notice establishing fee revenues and fees for that year.

<sup>12</sup> *Id.* Consumer price index adjustments apply in subsequent years.

<sup>13</sup> *Id.* The additional amounts for the remaining four years are: \$21,317,472 for fiscal year 2019, \$16,953,329 for fiscal year 2020, \$5,426,896 for fiscal year 2021, and \$2,769,609 for fiscal year 2022.

<sup>14</sup> *Id.* (amending FDCA § 736(a)(3)).

<sup>15</sup> FDARA § 103 (amending FDCA § 736B). The goals letter is available on FDA’s website [here](#) (hereinafter PDUFA VI Performance Goals).

<sup>16</sup> FDARA § 103 (amending FDCA § 736B).

FDA's review performance goals under PDUFA VI remain the same as under PDUFA V.<sup>17</sup> The PDUFA VI Performance Goals letter also maintains the Program for enhanced review transparency and communication for new molecular entity (NME) new drug applications (NDAs) and original biologics license applications (BLAs).<sup>18</sup> Modifications to that Program include the option for the FDA review team and sponsor to agree on a formal communication plan and minor changes in procedures for obtaining advisory committee input.<sup>19</sup> Other changes related to review timing include an extension of FDA's goal date for applications that did not identify all manufacturing facilities in a comprehensive list of facilities and changes to meeting management.<sup>20</sup>

The PDUFA VI Performance Goals letter also includes a number of enhancements related to regulatory science and expediting drug development, as well as modernization of the FDA drug safety system.<sup>21</sup> FDA's goals also include financial and administrative enhancements to manage user fee resources (for example, through resource capacity planning), improve hiring and retention of review staff, and meet new information technology goals.<sup>22</sup>

## **TITLE IV—FEES RELATING TO BIOSIMILAR BIOLOGICAL PRODUCTS**

---

Title IV reauthorizes the Biosimilar User Fee Act (BsUFA) through 2022.<sup>23</sup> It establishes an independent fee structure for biosimilars under which FDA will set the amount of each type of BsUFA fee via publication in the Federal Register; in contrast, under BsUFA I, the biosimilar user fee amounts were based on the PDUFA fee amounts.<sup>24</sup>

BsUFA II contains several changes to the biosimilar user fee structure that parallel changes in PDUFA VI. First, BsUFA II eliminates the establishment fee and supplement fee, while continuing to provide that original biosimilar applications are subject to an application fee.<sup>25</sup> Second, BsUFA II renames the product fee as the "biosimilar biological product program fee."<sup>26</sup> The program fee will be invoiced only once annually, and an applicant will not be assessed more than five program fees per fiscal year for each application.<sup>27</sup> Third, under BsUFA II, FDA will establish a capacity planning adjustment in place of the workload adjustment.<sup>28</sup> Fee amounts may not increase more than 25% from the 2018 amounts until the capacity planning adjustment is available in 2021.<sup>29</sup>

---

<sup>17</sup> Compare PDUFA VI Performance Goals, Table 1, with PDUFA V Performance Goals, Table 1 (available [here](#)).

<sup>18</sup> PDUFA VI Performance Goals, I.B.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at I.A.5.b. and I.H.

<sup>21</sup> *Id.* at I.I and I.K.

<sup>22</sup> *Id.* at II-IV.g.

<sup>23</sup> FDARA § 403 (amending FDCA § 744H).

<sup>24</sup> FDASIA § 402 (adding FDCA § 744H(b)); FDARA § 403(c)(4) (adding FDCA § 744H(c)).

<sup>25</sup> FDARA § 403(a)(12) (amending FDCA § 744H(a)(2)).

<sup>26</sup> *Id.* § 403(a) (amending FDCA § 744H(a)).

<sup>27</sup> *Id.* § 403(a)(13) (amending FDCA § 744H(a)(3)).

<sup>28</sup> *Id.* § 403(c)(4) (adding FDCA § 744H(c)(1)-(3)).

<sup>29</sup> *Id.* § 403(b) (amending FDCA § 744H(b)).

BsUFA II maintains the initial, annual, and reactivation biosimilar biological product development (BPD) fees from BsUFA I.<sup>30</sup> These fees will be set by FDA, rather than constitute a percentage of the application fee. The initial fee is equal to the annual fee for the applicable fiscal year, whereas the reactivation fee is twice the annual fee.<sup>31</sup> BsUFA II eliminates the practice of crediting the BPD fees against the later application fee for a product, however.<sup>32</sup> BsUFA II maintains the reporting and reauthorization requirements from BsUFA I.<sup>33</sup>

Under the BsUFA II performance goals, FDA will establish an application review model similar to the Program under PDUFA for all biosimilar BLAs received during BsUFA II with the aim of increasing the number of first-cycle approvals.<sup>34</sup> The review timeframe is increased by 60 days to accommodate the additional activities.<sup>35</sup>

Other performance goals under BsUFA II parallel those for 2017, *e.g.*, the performance goal for an original supplement with clinical data is 10 months from receipt.<sup>36</sup> For consistency with PDUFA, the review goal date for prior approval manufacturing supplements will be four months instead of six months with the performance goal to be phased in from 70% in fiscal year 2018 to 90% in fiscal year 2022.<sup>37</sup> FDA may extend the goal date if facilities are not adequately identified in an original application or supplement.<sup>38</sup>

The BsUFA II performance goals reflect changes regarding meeting management. . These include the option to request a written response instead of a meeting for Biosimilar Initial Advisory and BPD Type 2 meetings and adjustments to the scheduling timeframes for those meetings (with phased-in performance goals for BPD Type 2 meetings).<sup>39</sup> FDA will revise guidance related to formal meetings and communications best practices.<sup>40</sup>

FDA also committed to several performance goals on biosimilars guidance development. First, FDA aims to publish revised draft or final guidance on considerations in demonstrating interchangeability with a reference product by May 19, 2019 (24 months after close of the comment period on the draft guidance released earlier this year). The agency also aims to issue revised draft or final guidance on biosimilar labeling by May 31, 2019 and a revised draft or final version of the recently-issued guidance on statistical considerations for the analysis of analytic similarity data intended to support a demonstration of “highly similar” for biosimilars by eighteen months after the close of the comment period. Finally, the agency intends to issue draft guidance on processes and considerations for post-approval manufacturing changes for biosimilars by March 31, 2019.<sup>41</sup>

---

<sup>30</sup> *Id.* § 403(a)(1)-(9) (amending FDCA § 744H(a)(1)(A)-(D)).

<sup>31</sup> *Id.* § 403(b) (adding FDCA § 744H(b)(3)(C)).

<sup>32</sup> *Id.* (amending FDCA § 744H(a)(2)(B)).

<sup>33</sup> *Id.* § 404 (amending FDCA § 744I).

<sup>34</sup> FDA, Biosimilar Biological Product Reauthorization Performance Goals and Procedures Fiscal Years 2018 through 2022, available [here](#) (hereinafter BsUFA II Performance Goals).

<sup>35</sup> *Id.* at I.B.4; 81 Fed. Reg. 64,171, 64,173 (Sept. 19, 2016).

<sup>36</sup> BsUFA II Performance Goals, I.A.4, Table 1.

<sup>37</sup> *Id.* at I.A.3.

<sup>38</sup> *Id.* at I.A.5.b.

<sup>39</sup> *Id.* at I.I.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at II.

## TITLE V—PEDIATRIC DRUGS AND DEVICES

---

Title V of FDARA includes several provisions intended to promote the development of drugs for pediatric populations.<sup>42</sup> The most substantial of these provisions is section 504, which amends section 505B of the FDCA, *i.e.*, the Pediatric Research Equity Act (PREA), to require a “molecularly targeted pediatric cancer investigation” for certain original applications.

### **Sec. 501. Best pharmaceuticals for children.**

Section 501 amends section 409I of the PHSA, which deemed pediatric study reports submitted to the National Institutes of Health (NIH) and FDA pursuant to a funding award to be in the public domain subject to redaction of trade secret and confidential commercial information. Under the amended section 409I, these reports must be posted on the NIH website, consistent with laws and regulations protecting personal privacy and proprietary interests, within 90 days of their submission. FDA will continue to assign each study report a docket number and make it available for public comment. Amended section 409I of the PHSA requires FDA to take action in response to a submitted report in a “timely and appropriate manner” beginning upon receipt of the report.

### **Sec. 503. Early meeting on pediatric study plan.**

Section 503 amends section 505B(e)(2)(C) of the FDCA, which addresses meetings with FDA to discuss an initial pediatric study plan (iPSP), to require FDA to meet with applicants in two additional circumstances. First, upon the applicant’s request, a meeting is required to discuss preparation of the iPSP for a drug or biological product that is intended to treat a serious or life-threatening disease or condition. The meeting must occur not later than the end-of-Phase 1 meeting or within 30 days of FDA’s receipt of the request, whichever is later. Second, FDA must meet with an applicant to discuss the bases for a deferral or waiver of an applicant’s pediatric study requirements under section 505B.

### **Sec. 504. Development of drugs and biological products for pediatric cancers.**

Section 504 amends FDCA section 505B to add a new pediatric investigation requirement for sponsors of certain applications for cancer drugs. Specifically, this requirement applies to the sponsor of an original NDA or BLA for a new active ingredient submitted on or after August 18, 2020 if the drug or biological product is intended for the treatment of an adult cancer and directed at a molecular target that FDA determines to be “substantially relevant to the growth or progression of a pediatric cancer.” The required investigation is a “molecularly targeted pediatric cancer investigation . . . designed to yield clinically meaningful pediatric study data” on dosing, safety, and preliminary efficacy to inform potential pediatric labeling. Applications will be subject to either the requirement for pediatric assessments or the new investigation requirement. FDA’s prior authority to extrapolate data for purposes of satisfying pediatric assessment requirements and to defer and waive those requirements apply to the same extent and in the same manner to the new investigation requirement.

Within one year of enactment, FDA must publish on its website: (1) a list of molecular targets considered, on the basis of data the agency determines to be adequate, to be substantially relevant to the growth and progression of a pediatric cancer and that may trigger the new

---

<sup>42</sup> Section 502 of FDARA, which addresses pediatric devices, is discussed in our [client alert](#) on FDARA’s device-specific provisions.

investigation requirement; and (2) a list of molecular targets of unapproved drugs in development for which the study requirements under section 505B will automatically be waived. In establishing the list, FDA must consider input from various stakeholders, including input received at a public meeting that must be held within one year of enactment. A rule of construction stipulates that publication of the lists is not necessary for the new investigation requirement to apply to a drug. At the public meeting, FDA must solicit stakeholder input on numerous issues, including the data necessary to satisfy the standards and requirements of amended section 505B. FDA also must issue final guidance on FDARA's amendments to section 505B within two years of enactment.

FDARA amends the PREA exemption for orphan-designated indications. Under the amended statute, section 505B applies "with respect to a drug or biological product for which an indication has been granted orphan designation" if that drug or biological product is subject to the new investigation requirement.

Section 504 includes a rule of construction stating that it does not limit FDA's authority to issue written requests or to negotiate or implement amendments to written requests that are proposed by sponsors.

FDA must, as part of a report made to Congress every five years, assess the impact of FDARA's amendments to section 505B on pediatric research and labeling, among other things. The Government Accountability Office (GAO) must conduct a study and publish a report on the effectiveness of requiring assessments and investigations under section 505B for the development of drugs for pediatric cancer indications.

### **Sec. 505. Additional provisions on development of drugs and biological products for pediatric use.**

Section 505 amends section 505A to require FDA to review and act upon a proposed pediatric study request (PPSR) or proposed amendment to a written request within 120 calendar days of its submission, codifying the Center for Drug Evaluation and Research's (CDER's) internal deadlines for both.<sup>43</sup> FDA also must provide the Pediatric Review Committee (PeRC) with any response issued to a PPSR and provide the Pediatric Advisory Committee with any letters issued to sponsors for failure to submit a required assessment or new investigation as well as responses to these non-compliance letters.

Within one year of enactment, PeRC must develop and implement a plan to achieve, "where appropriate," earlier submission of pediatric studies in response to written requests. This plan must include recommendations to achieve earlier discussions of PPSRs and written requests with sponsors, earlier issuance of written requests (including for investigational drugs), and shorter timelines (where appropriate) for completion of studies pursuant to a written request.

Within two years of enactment, FDA must submit to Congress and publish a report on "the lack of [pediatric] information in the labeling" of drugs for orphan-designated indications. The report must include a list of orphan-designated drugs for which an application described in section 505B(a)(1) for the orphan indication was submitted after April 1, 1999 and for which the labeling for the orphan indication "lacks important pediatric information, including information related to

---

<sup>43</sup> See CDER MaPP 6030.9, Good Review Practice: Good Review Management Principles and Practices for Effective IND Development and Review (effective April 29, 2013), at 31.

safety, dosing, and effectiveness.” The report also must describe the lack of information for each drug for a listed indication and make recommendations to “improve” the pediatric labeling of drugs for orphan-designated indications.

Section 505 makes permanent the FDCA’s requirement that the Office of Pediatric Therapeutics include at least one individual with expertise in neonatology. This requirement had expired on July 9, 2017. FDA also must issue draft guidance on clinical pharmacology considerations for neonatal drug studies within two years of enactment.

## **TITLE VI—REAUTHORIZATIONS AND IMPROVEMENTS RELATED TO DRUGS**

---

### **Sec. 601. Reauthorization of provision relating to exclusivity of certain drugs containing single enantiomers.**

FDARA extends the authorization of section 505(u) of the FDCA and, as such, extends the ability of sponsors to obtain new chemical entity (NCE) exclusivity for qualifying drugs. FDARA extends the provision to cover applications submitted before October 1, 2022, rather than before October 1, 2017, as under prior law.<sup>44</sup>

As background, section 505(u) of the FDCA permits, if certain conditions are met, a manufacturer of a non-racemic drug containing as an active ingredient a single enantiomer that is contained in a previously approved racemic drug to “elect to have the single enantiomer not be considered the same active ingredient as that contained in the approved racemic drug.” As such, section 505(u) of the FDCA allows qualifying drugs to obtain five-year NCE exclusivity.<sup>45</sup>

### **Sec. 602. Reauthorization of the critical path public-private partnerships.**

FDARA amends section 566(f) of the FDCA to authorize appropriations of \$6 million for each of fiscal years 2018 through 2022 to implement FDA’s Critical Path Public-Private Partnerships.<sup>46</sup>

### **Sec. 603. Reauthorization of orphan grants program.**

FDARA reauthorizes an appropriation for FDA’s Orphan Drug Grant Program in the amount of \$30 million for each of fiscal years 2018 through 2022.<sup>47</sup>

The Orphan Products Grant Program allows FDA to make grants to and enter into contracts with public and private entities to defray the costs of developing drugs (including “qualified testing” expenses), medical devices, and medical foods for rare diseases or conditions.<sup>48</sup>

### **Sec. 604. Protecting and strengthening the drug supply chain.**

Section 604 amends section 801(d)(1) of the FDCA to prohibit the importation of any prescription drug into the U.S. for commercial use unless the manufacturer has authorized the drug to be marketed in the U.S. and caused the drug to be labeled to be marketed in the U.S.

---

<sup>44</sup> FDARA § 601 (amending FDCA § 505(u)(4)).

<sup>45</sup> FDCA § 505(u)(1).

<sup>46</sup> FDARA § 602 (amending FDCA § 566(f)).

<sup>47</sup> FDARA § 603 (amending § 5(c) of the Orphan Drug Act (21 U.S.C. § 360ee(c)).

<sup>48</sup> Orphan Drug Act § 5(a) (21 U.S.C. § 360ee(a)).

The new provision provides for two specific exceptions: (1) if FDA has “authorized” such importation when the drug appears on the drug shortage list under section 506E of the FDCA; or (2) in the case of importation pursuant to section 804 of the FDCA.

Section 605 also amends section 303 of the FDCA to provide that any person who violates section 301(i)(3) of the FDCA by knowingly making, selling or dispensing, or holding for sale or dispensing a counterfeit drug, will be imprisoned for not more than 10 years and/or fined. Of note, Congress previously defined “counterfeit drug” in section 201(g)(2) of the FDCA.

#### **Sec. 605. Patient experience data.**

Section 605 of FDARA expands the definition of “patient experience data” that was added to section 569C of the FDCA in last year’s 21st Century Cures Act. As described more fully in a previous Covington [alert](#) on the Cures Act, section 569C of the FDCA requires FDA to provide, following the approval of an NDA or BLA, a “brief statement regarding the patient experience data and related information” that the sponsor submitted and FDA reviewed.

Under the definition as amended in FDARA, patient experience data includes the new items underlined, as follows: “the impact (including physical and psychosocial impacts) of such disease or condition, or a related therapy or clinical investigation, on patients’ lives.”

#### **Sec. 606. Communication plans.**

Section 606 adds a new possible component to a risk evaluation and mitigation strategy (REMS) communication plan. As amended by FDARA, a REMS communication plan also may include “disseminating information to health care providers about drug formulations or properties, including information about the limitations or patient care implications of such formulations or properties, and how such formulations or properties may be related to serious adverse drug events associated with use of the drug.”<sup>49</sup>

As background, section 505–1(e) of the FDCA authorizes FDA to require that a proposed REMS contain additional elements (beyond a timetable for submission of assessments of the strategy) if certain conditions are met. One additional potential element is a communication plan, which now may include the communication described above.<sup>50</sup>

#### **Sec. 607. Orphan drugs.**

Section 607 amends section 527 of the FDCA, which addresses orphan drug exclusivity (ODE). Under amended section 527, if a sponsor seeks ODE for an orphan-designated drug that is otherwise the same as a previously-approved drug for the same use, in order to receive ODE, the sponsor must demonstrate clinical superiority to “any” approved “same drug.” New subsection 527(c) defines “clinically superior” to mean that “the drug provides a significant therapeutic advantage over and above an already approved or licensed drug in terms of greater efficacy, greater safety, or by providing a major contribution to patient care.”

FDA may issue regulations to implement new section 527(c). Beginning on the date of FDARA’s enactment and until promulgation of these regulations, FDA may apply definitions in its pre-FDARA regulations “to the extent such definitions are not inconsistent with the terms of

---

<sup>49</sup> FDARA § 606 (amending FDCA § 505–1(e)(3)).

<sup>50</sup> FDCA § 505–1(e)(3).



[amended section 527].” A rule of construction provides that nothing in the amendments made by section 607 affects any determination under FDCA section 526 or 527 made prior to enactment of FDARA.

Upon orphan designation of a drug, FDA must notify the sponsor of the basis for the designation, including “any plausible hypothesis” that the drug is clinically superior to a previously-approved same drug relied upon by FDA. FDA must also publish a summary of its clinical superiority findings upon granting ODE based on clinical superiority.

**Sec. 608. Pediatric information added to labeling.**

Section 608 amends FDCA section 505A(o), which previously authorized generic drug applicants to omit from their labeling a pediatric indication or other information protected by patent or certain exclusivity and to include related disclaimers and safety information. FDARA expands section 505A(o) to also apply to section 505(b)(2) applicants. It also authorizes omission of pediatric labeling information protected by ODE, pediatric exclusivity, and exclusivity under the Generating Antibiotic Incentives Now (GAIN) Act. Finally, FDARA amends section 505A(o)(2) to provide that, notwithstanding ODE (in addition to three-year exclusivity, as under pre-FDARA law), FDA may require a generic or section 505(b)(2) applicant’s labeling to state that pediatric information has been omitted due to such exclusivity and to contain appropriate pediatric contraindications, warnings, precautions, or other information that FDA considers necessary to assure safe use.

**Sec. 609. Sense of Congress on lowering the cost of prescription drugs.**

Section 609 provides that it is the sense of Congress that the Secretary of Health and Human Services should work with Congress to take administrative actions and enact legislative changes that will lower the cost of prescription drugs for consumers and reduce the corresponding burden on taxpayers. These actions and changes should balance the need to encourage innovation with the need to improve affordability and “strive to” increase competition in the pharmaceutical market, prevent anticompetitive behavior, and promote “the timely availability of affordable, high-quality generic drugs and biosimilars.”

**Sec. 610. Expanded access.**

Section 610 amends section 561A of the FDCA, which Congress added in the 21st Century Cures Act and which requires a manufacturer or distributor of an investigational drug for a serious condition to make available publicly its policy for responding to requests for individual patient expanded access. Under section 561A of the FDCA, as amended by FDARA, a manufacturer or distributor must make its policy publicly available on the earlier of: (1) the date of initiation of a phase 2 or 3 study with respect to the investigational drug (as was the case under the 21st Century Cures Act); or (2) the date 15 days after the drug receives a designation as a breakthrough therapy, fast track product, or regenerative advanced therapy (as added in FDARA).

Section 610 also requires FDA (in coordination with the NIH and in consultation with certain stakeholders) to convene a public meeting on or before May 15, 2018, to discuss clinical trial inclusion and exclusion criteria. Within 90 days after such meeting, FDA must release a meeting report that discusses the rationale for inclusion and exclusion criteria and potential barriers created by them, how appropriate patient populations can benefit from the results of trials that employ alternative designs, barriers to participation in clinical trials, clinical trial designs and

methods, how changes to inclusion and exclusion criteria might affect the complexity and length of clinical trials and the data necessary to demonstrate safety and effectiveness, and potential approaches to mitigating those impacts. Within one year of the meeting report, FDA must issue draft guidance(s) regarding clinical trial eligibility criteria. The guidance document must address methodological approaches that a manufacturer or sponsor may take to broaden eligibility criteria for trials and to develop such criteria to increase enrollment of patients most likely to receive the drug.

Also within one year of FDA issuing the meeting report, GAO must report to Congress on individual access to investigational drugs through the expanded access program. The GAO report must address actions taken by companies under section 561A of the FDCA; whether FDA guidance and forms have reduced application burden and improved clarity with respect to individual patient expanded access; whether FDA guidance and rules have improved investigational drug access for individuals not qualifying for clinical trials; remaining access barriers; and methods that patients and providers use to engage with the agency and sponsors regarding expanded access, among other issues.

FDA also must issue new or revised guidance or regulations before August 18, 2018 to streamline institutional review board (IRB) review of individual patient expanded access protocols submitted under section 561(b) of the FDCA and update any relevant forms associated with individual patient expanded access requests under such section. The guidance or regulations may describe “the process for any person acting through a physician licensed in accordance with State law to request that an [IRB] chair (or designated member of the institutional review board) review” an individual patient expanded access protocol for a drug.

Of note, since FDARA was enacted, FDA announced a change to the process for physicians submitting a request for individual patient expanded access to an investigational drug product. Under this change, one IRB member – the chair or another designated IRB member – can approve the treatment, so the physician need not wait for an IRB meeting at which a majority of the members are present to obtain approval.<sup>51</sup>

### **Sec. 611. Tropical disease product application.**

Section 611 expands the eligibility requirements for a tropical disease priority review voucher by adding two additional conditions to the definition of a “tropical disease product application” in section 524 of the FDCA. Under the amended definition, a tropical disease product application must “contain[] reports of one or more new clinical investigations (other than bioavailability studies) that are essential to the approval of the application and conducted or sponsored by the sponsor.” It also must contain a sponsor attestation “that such reports were not submitted as part of an application for marketing approval or licensure” in India, Brazil, Thailand, or any country that is a member of the Pharmaceutical Inspection Convention or the Pharmaceutical Inspection Cooperation Scheme prior to September 27, 2007. The amendments made by section 611 apply to human drug applications submitted after September 30, 2017.

---

<sup>51</sup> FDA, Guidance for Industry: Expanded Access to Investigational Drugs for Treatment Use — Questions and Answers (updated Oct. 2017), at 6; Form FDA 3926 at 10.b.

## **TITLE IX—ADDITIONAL PROVISIONS**

---

### **Sec. 901. Technical corrections.**

Section 901 makes several technical corrections. Many of these corrections fix cross-references or typographical errors, but two of the “corrections” may be worth noting:

- Prior to FDARA, section 505F(b) of the FDCA defined the term “real world evidence” to mean “data regarding the usage, or the potential benefits or risks, of a drug derived from sources other than randomized clinical trials.” Section 901 changes “randomized clinical trials” to “traditional clinical trials.”
- Section 510(h)(6) of the FDCA requires FDA to publish an annual report on registrations and inspections of establishments from the previous calendar year. FDARA amends the deadline for the publication of this annual report from February 1 to May 1.

### **Sec. 902. Annual report on inspections.**

Section 902 requires FDA to publish annually certain information from the previous calendar year regarding the timing of establishment inspections necessary for drug approvals or device approvals or clearances. Specifically, FDA must publish the median time from: (1) a request from review staff to the beginning of an inspection; (2) the beginning of the inspection to the issuance of an inspection report; (3) the issuance of an inspection report to the sending of a warning letter, issuance of an import alert, or holding of a regulatory meeting, for inspections where regulatory or enforcement action was indicated; and (4) the sending of a warning letter, issuance of an import alert, or holding of regulatory meeting to the resolution of the regulatory or enforcement action, for inspections where such action was indicated.

FDA also must publish the number of times that a facility was issued an inspection report “and approval of an application was delayed due to the issuance of a withhold recommendation.”<sup>52</sup>

This information must be published annually on FDA’s website by March 1 regarding information from the previous calendar year.

### **Sec. 903. Streamlining and improving consistency in performance reporting.**

Under sections 736B(a), 744C(a), and 744I(a) of the FDCA, FDA must submit to Congress annual performance reports with respect to PDUFA, the Generic Drug User Fee Amendments (GDUFA), and BsUFA. Section 903 expands these annual reporting requirements and also sets forth new quarterly reporting requirements, which are outlined explicitly in FDARA.

### **Sec. 904. Analysis of use of funds.**

Section 904 imposes additional requirements with respect to FDA’s annual performance reports under PDUFA, GDUFA, and BsUFA. FDARA requires FDA to analyze the aggregate human drug, abbreviated new drug, and biosimilar biological product applications filed and approved or issued a complete response letter during the year. This analysis must specify the aggregate number of applications that did not meet the goals identified in FDA’s commitment letters. The agency must further evaluate “[t]he most common causes and trends of external or other

---

<sup>52</sup> FDARA § 902.

circumstances affecting the ability”<sup>53</sup> of FDA to meet its review time and performance enhancement goals.

Based on the above analysis in FDA’s annual performance reports, section 904 requires FDA to issue separate “corrective action reports.” These reports must either confirm that the agency’s commitment letter goals were met and make recommendations for improvements, or identify which commitment letter goals were not met. FDARA requires that, if FDA missed its commitment letter goals, the agency must provide a “detailed justification” and description of why the goals were not met, as well as “a description of efforts [FDA] has put in place . . . to improve the ability of such agency to meet each such goal” for the upcoming year.<sup>54</sup> These “corrective action reports” must be submitted to Congress beginning with fiscal year 2018.

**Sec. 905. Facilities management.**

Section 905 requires GAO to conduct a study about the expenses incurred by FDA in fiscal year 2012 through 2019 for “facility maintenance and renovation.” GAO must issue a report of its findings to Congress by July 30, 2020. In this report, GAO may include recommendations on methods through which FDA may improve planning for the maintenance, renovation, and repair of facilities; the purchase of furniture or other acquisitions; and ways FDA may allocate these expenses. FDARA also changed, starting October 1, 2023, how FDA may calculate “costs” for the purposes of the medical product user fee programs and, as such, limits the items for which FDA may allocate user fee revenue.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Food, Drug, and Device practice:

<u><a href="#">Wade Ackerman</a></u>	+1 424 332 4763	<u><a href="mailto:ackermanw@cov.com">ackermanw@cov.com</a></u>
<u><a href="#">Krista Carver</a></u>	+1 202 662 5197	<u><a href="mailto:kcarver@cov.com">kcarver@cov.com</a></u>
<u><a href="#">Denise Esposito</a></u>	+1 202 662 5562	<u><a href="mailto:desposito@cov.com">desposito@cov.com</a></u>
<u><a href="#">Michael Labson</a></u>	+1 202 662 5220	<u><a href="mailto:mlabson@cov.com">mlabson@cov.com</a></u>
<u><a href="#">Elizabeth Guo</a></u>	+1 202 662 5852	<u><a href="mailto:eguo@cov.com">eguo@cov.com</a></u>
<u><a href="#">Kristen Gurley</a></u>	+1 202 662 5454	<u><a href="mailto:kgurley@cov.com">kgurley@cov.com</a></u>
<u><a href="#">Mingham Ji</a></u>	+1 202 662 5621	<u><a href="mailto:mji@cov.com">mji@cov.com</a></u>
<u><a href="#">Marienna Murch</a></u>	+1 415 591 7016	<u><a href="mailto:mmurch@cov.com">mmurch@cov.com</a></u>

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to [unsubscribe@cov.com](mailto:unsubscribe@cov.com) if you do not wish to receive future emails or electronic alerts.

---

<sup>53</sup> FDARA § 904(a)(1) (adding FDCA § 736B(a)(5)); see also *id.* § 904(c)(1) (adding FDCA § 744C(a)(4)); *id.* § 904(d)(1) (adding FDCA § 744I(a)(5)).

<sup>54</sup> FDARA § 904.