

Client Alert

February 26, 2014

\$4 Billion Price Tag for Pleasing Plaintiffs' Bar? New Study Estimates Costs of FDA's Proposed Rule on Generic Drug Labeling

By James Huston, Erin Bosman, Jessica Roberts, Julie Y. Park and Sara Bradley

An economic consulting group recently published findings that a Food and Drug Administration (FDA) proposed rule will increase annual healthcare costs by \$4 billion. The FDA's proposal, announced in November 2013, would allow generic drug manufacturers to update product labeling with new safety information even if the revised labeling differs from that of the reference listed drug (RLD). The FDA's proposed change was a direct response to the Supreme Court's call for action in *PLIVA, Inc. v. Mensing*. In the rule, the FDA estimated net annual costs would range between \$44,000 and \$385,000, which many critics have suggested is too low. Those critics have also voiced concerns that the proposed rule would only serve to fund the plaintiffs' bar at the expense of public safety. The alarming cost increases announced by this recent study provide further support for those who believe that the FDA simply got it wrong this time.

I. BACKGROUND ON THE PROPOSED RULE

In *PLIVA, Inc. v. Mensing*, 564 U.S. ___, 131 S. Ct. 2567 (2011), the Supreme Court held that federal law preempted state law failure-to-warn claims against generic drug manufacturers because the Hatch-Waxman Amendments ("Hatch-Waxman") require generics to use warnings that are identical to the brand-name's. Recognizing generic preemption could leave some plaintiffs without a failure-to-warn claim, the Supreme Court nevertheless declared it "will not distort the Supremacy Clause in order to create similar pre-emption across a dissimilar statutory scheme. As always, Congress and the FDA retain the authority to change the law and regulations if they so desire." *Id.* at 2852. In response, the FDA issued the rule currently under debate.

The proposed rule allows holders of abbreviated new drug applications (ANDAs) to update product labeling to reflect newly acquired information related to drug safety, regardless of whether the revised label is different from the RLD's label. The proposal permits the ANDA holder to distribute the revised label at the same time that it sends labeling changes in a "changes being effected" supplement (CBE-0) to the FDA. Simultaneously, the ANDA holder sends labeling changes and supporting information to the RLD manufacturer, which is generally the new drug application (NDA) holder.

The NDA holder reviews the information and submits a revised label to the FDA indicating whether it supports the CBE-0 supplement. The FDA evaluates the proposed labels and determines which label should be approved. After that determination, the ANDA holder has 30 days in which to update its labels.

II. RESULTS OF STUDY SHOW \$4 BILLION INCREASE IF RULE ENACTED

On February 4, 2014, Matrix Global Advisors (MGA), an economic policy consulting firm, released its findings following a study of the proposed rule. MGA projected that the changes would add \$4 billion annually in U.S. healthcare costs due to increased product liability exposure. The study called the \$4 billion figure a "conservative estimate" of the total cost of the proposed rule, which flies in the face of the FDA's insistence that the rule would "generate little cost."

Client Alert

First, MGA's study contrasted the FDA's stated purpose for the proposed rule—creating "parity" between brand-name and generic manufacturers' labeling obligations—with what MGA believes is the FDA's actual purpose: fixing the "perceived inequality" in a consumer's ability to sue drug manufacturers after the Supreme Court's decisions in *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187 (2009), and *PLIVA, Inc. v. Mensing*.

Next, MGA criticized several aspects of the FDA's economic impact assessment under the proposed rule. For instance, the FDA did not consider product liability costs, even though the FDA acknowledged the proposed rule may eliminate generic preemption. Instead, the FDA focused only on increased costs associated with extra paperwork and added administrative burdens. The FDA also failed to account for increased insurance premiums or increased CBE-0 filings, and did not even attempt to quantify the benefit from the proposed rule that would come in the form of improving communication to health care providers.

The study highlighted that even small price increases for generic drugs could significantly impact drug spending and savings in the U.S. due to the sheer volume of generic prescriptions. In 2012, generics were responsible for \$217 billion of savings, in a year where retail prescription drug spending totaled \$263.3 billion. Without generics, retail prescription drug spending would have been \$480.3 billion, equivalent to an 82 percent spending increase. Generic price increases under the new rule would reduce savings attributed to generics, add to total retail prescription drug spending, and dramatically change the savings figures.

Finally, the study used brand-name product liability costs to project generic product liability costs. MGA estimated that, in 2012, the cost of a brand's product liability exposure equaled "0.4 percent of consumer spending," or \$758.3 million. Dividing this by the 652.5 million brand prescriptions from 2012, brand-name product liability spending was approximately \$1.16 per prescription. Multiplying brand-name product liability spending per prescription (\$1.16) by the number of generic prescriptions in 2012 (3.4 billion) totals \$4 billion in generic product liability spending. Although the study uses different assumptions to arrive at brand- and generic product liability costs, in any event it is clear that these costs represent a significant potential economic impact that the FDA completely ignored. In light of recent healthcare reform and concerns over rising healthcare costs, these numbers are particularly disconcerting.

Some of MGA's assumptions may be susceptible to criticism. For instance, multiple labels may not create confusion in the marketplace and the study assumes that generics' current product liability litigation costs are minimal. But there is no doubt that the rule will eliminate generic preemption, which dramatically increases a generic's product liability exposure.

This heightened risk will lead to higher insurance premiums, which in turn may force some generic manufacturers to exit the market or decline to enter the market, causing decreased supply and increased prices.

III. CRITICISMS FROM LAWMAKERS AND INDUSTRY

The MGA's study was the latest in a series of highly critical reactions to the proposed rule. Both lawmakers and industry have criticized the proposal. Congressional Republicans urged the FDA to "reconsider [its] departure from decades of settled practice" surrounding generic labeling, and the pharmaceutical industry suggests the rule could result in fewer generic options for the public.

The GOP, through Senator Lamar Alexander (the senior Republican on the Senate health committee), expressed its displeasure in a letter to FDA Commissioner Margaret Hamburg. The letter noted "grave concerns regarding a regulation . . . that would directly conflict with [Hatch-Waxman's] longstanding policy." In particular, Republicans identified three main problems with the proposed rule: (1) it directly conflicts with the statute, (2) it "thwarts" the law's purpose, creating confusion, and (3) it imposes "significant costs on the drug industry and healthcare consumers."

Client Alert

Senator Alexander suggested that allowing generic drug manufacturers to unilaterally revise their labeling contradicts Hatch-Waxman's "sameness" requirement. As the FDA itself recognized, the "sameness" requirement is important because "[c]onsistent labeling will assure physicians, health professionals, and consumers that a generic drug is as safe and effective as its brand-name counterpart." FDA, *Abbreviated New Drug Application Regulations – Final Rule*, 57 Fed. Reg. 17950, 17961 (Apr. 28, 1992). Eliminating the "sameness" requirement will cause confusion in the healthcare industry. Generic manufacturers will also be forced to engage in costly "duplicative testing," thereby facing increased exposure to tort lawsuits.

The lawmaker's concerns were echoed by the pharmaceutical industry, as demonstrated in an 11-page white paper issued on January 29, 2014. In the white paper, the Generic Pharmaceutical Association (GPhA) reproached the FDA for ignoring Hatch-Waxman's "delicate balance" between the brand-name drug industry and the generic drug industry. It predicted the increased cost burden will force some generic manufacturers out of the market.

The GPhA also accused the FDA of disregarding the possibility of generic drug shortages and higher costs. These costs would result from additional regulatory requirements and an exponential increase in "litigation risk," which lends support to the conclusions reached in the MGA's study.

IV. CONCLUSION

Generic drug manufacturers will feel an immediate impact if FDA's proposed rule is adopted. But the rule's effects on government programs (such as Medicare), private insurers, doctors, patients, and the general public will be much farther reaching, leaving no one untouched by increased costs. As GPhA CEO Ralph Neas said, we should call on the FDA to "work with all stakeholders and identify a course of action that does not put patient safety or patient savings at risk." As with any proposed rule, FDA welcomes comments and has extended the comment period until March 13, 2014. All affected parties are urged to submit comments at <http://www.regulations.gov>, the Docket No. FDA-201

Contact:

James Huston
(858) 720-5154
jhuston@mofo.com

Erin Bosman
(858) 720-5178
ebosman@mofo.com

Morrison & Foerster's Product Liability Group defends and provides counsel to product manufacturers and suppliers of all types of products. We serve as trial and national coordinating counsel in product liability and toxic tort cases, including class actions, multiparty serial tort litigation, mass tort litigation, and multidistrict litigation proceedings. We bring to every case a wealth of experience, a keen understanding of the multifaceted issues confronted by manufacturers, and the skills and knowledge to communicate scientific and medical defenses to juries. Learn more about our [product liability practice](#).

Client Alert

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 10 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.