Morgan Lewis

# LIFE SCIENCES
# INTERNATIONAL REVIEW

Welcome to the Q2 2019 issue of our *Life Sciences International Review*. This issue covers new developments within Europe, Asia, and the United States in intellectual property, regulatory, pricing, and international trade, among others. Content for the newsletter was generated by Morgan Lewis lawyers. Many of these subjects will be updated in future issues as we will stay current with the continuous happenings and trends within the life sciences industry.

**Read the latest issue of *Life Sciences International Review* >**

## EU – REGULATORY

**Brexit, Notified Bodies, and Medical Devices**

The House of Commons Library published a briefing paper on June 12 on the UK's product standards and safety marking compliance in light of Brexit. In the absence of a deal, the European Union (EU) will no longer recognize UK-based notified bodies for CE-marking purposes.

Post-Brexit UK notified bodies will become UK "approved bodies" and be able to grant "UKCA" marks to compliant products, including medical devices. Currently some 40% of all CE-marked medical device products use UK notified bodies. For a limited time manufacturers can use the CE mark on EU-compliant products on the UK market although, post-Brexit, relevant UK products for export to the EU will continue to require CE marking awarded by EU-based notified bodies.

The situation has been exacerbated by the coming into force of the EU regulation on medical devices (2017/745/EU) (MDR) whereby few of the remaining such notified bodies are ready for CE-marking under the MDR (see Notified Body Crisis below).

See the Briefing Paper **here**.

**Q2 | 2019**

## TABLE OF CONTENTS

**Notified Body Crisis**

With less than one year before the MDR takes effect (May 2020), the European Coordination Committee of the Radiological, Electromedical, and Healthcare IT Industry (COCIR) has expressed concern as to the readiness of notified bodies for the new requirements of EU regulation on medical devices (2017/745/EU) (MDR) and the regulation on in-vitro diagnostic devices (2017/746/EU) (IVDR).

The new regime includes changes in classification for a number of classes of device, meaning significantly more devices will fall under the MDR and/or will require approval by a Notified Body for the first time (including software medical devices, meaning increased demands on notified bodies.) It is understood that a number of competent authorities are already calling for a "grace period" being introduced for products requiring Notified Body certification for the first time.

So far, only two notified bodies—BSI and TUV SUD—have been designated under the MDR. Moreover, at least eight existing notified bodies across Europe have said they will not pursue designation under the MDR, including the UK's Lloyd's Register Quality Assurance and Swiss notified body (NB) QS Zürich AG. A possible no-deal Brexit could further result in BSI UK being incapable of certifying products for the EU market in any event, further reducing notified body supply.

The European Commission (EC), intervening during the Council debate, insisted that May 2020 was still a reasonable deadline for the implementation of the MDR and that some 20 notified bodies will be designated by the end of 2019. Moreover, the EC has published a **Question & Answer document** addressing requirements for notified bodies under the new Medical Devices Regulation (MDR) and In Vitro Diagnostic Medical Devices Regulation (IVDR).

**The Device Borderline Manual**

The EC updated the **Manual on Borderline and Classification in the Community Regulatory Framework for Medical Devices (Borderline Manual)** on May 22[MK3] . The Borderline Manual is intended to assist manufacturers in determining whether their product falls within the definition of a medical device laid down in the Council Directive 93/42/EEC concerning medical devices (MDD).

In general, a product will be considered to fall within the definition of a medical device if it has a medical purpose and if the product functions primarily in a way that is not metabolic, immunological, or pharmacological. Determination of whether a product is considered to have a medical purpose will be based on its intended purpose. The MDD provides for several rules for the exact classification of a medical device. The Borderline Manual provides guidance concerning a broad range of "borderline" products.

Of particular interest to the EC is the update on medication decisions support software. The Borderline Manual provides that medication decision support software falls within the definition of a medical device. This is because the medication decision support software is used for the purpose of prevention, monitoring, treatment or alleviation of a disease.

**NHS Plans Fast Track for 'Tumour Agnostic' Cancer Drugs**

The Natonal Health Service (NHS) is to fast-track the introduction of "tumour agnostic" drugs, which target tumours according to their genetic makeup rather than where they originate in the body. The announcement was made in a press release by Accelerated Access Collaborative[MK4] , established by the UK government as part of the Life Sciences Industrial Strategy to speed up the adoption and uptake of innovative new treatments.

Specific proposals include the following:

- Bringing together different cancer specialists to ensure all patients who could benefit from tumour agnostic drugs are identified
- Embedding the tests for these genomic mutations within existing cancer pathways
- Through NICE ensure that the unique characteristics of these treatments will be valued appropriately and efficiently.

**EMA and Centralized Approval Readiness**

At the June 2019 management board meeting, the European Medicines Agency (EMA) reviewed the pharmaceutical industry's preparedness in relation to centrally authorized products (CAPs) post-Brexit. Of the 400 marketing authorizations that need to be transferred from the United Kingdom to an EU 27 member states, just three (for human medicines) are still pending. The EMA also reports good progress on transferring from qualified persons for pharmacovigilance (QPPVs) and pharmacovigilance system master files (PSMFs) based in the UK. See the minutes **here**.

**CBD Novel Food Status**

The EU Novel Foods Committee recently concluded that it could not be demonstrated that CBD or other hemp product had been widely used for human consumption within the EU prior to 15 May 1997, when the original "Novel Food" regulation, (EC) 258/97, came into force. Accordingly, CBD was in effect reclassified and placed in the **Novel Food Catalogue**.

Under the current Novel Food Regulation (2283/2015), any food product that is "new" must be authorized by the EC before it can be marketed within the EU based on a dossier of scientific evidence.

The EU Novel Food Catalogue lists foods and ingredients viewed as novel foods, for which an authorization should be obtained. The catalogue itself has no legal status

but is frequently used by EU member states to assist in enforcement of the Novel Food Regulation. Much will depend on the enforcement approach of the individual member states.

# EU – COMPETITION AND PRICING

### EU Regulation on Health Technology Assessment

The EU Presidency provided an update on the proposed regulation on health technology assessment was given at the 14 June European Council Employment, Social Policy, Health and Consumer Affairs meeting. The Commission submitted the proposal for a regulation on health technology assessment amending Directive 2011/24/EU. The proposal includes identifying emerging health technologies, joint clinical assessments, joint scientific consultations, and voluntary cooperation on health technology assessment. It also intends to set common rules for national clinical assessments.

Four member states (Germany, France, the Czech Republic, and Poland) have raised subsidiarity concerns. The Presidency reported that the revised texts it has presented at Working Party level on joint scientific consultations, identifying emerging health technologies and the support framework, are robust and accurately reflect the discussion and comments made by delegations although changes to other parts of the proposal might make it necessary to adapt these revised texts.

The discussion apparently focused on the choice between a mandatory approach and a more voluntary approach with greater flexibility for member states. The Presidency concluded that the debate indicated a prevailing preference for a voluntary approach. **Read more**.

### Orphans and Excessive Pricing

The EC has indicated that it will support national competition authorities in their probes against excessive pricing practices in pharmaceutical markets and that the commission itself will continue to scrutinize the sector.

The European Commissioner for Health and Food Safety reiterated the EC's position on the matter in light of the producer of an orphan product (chenodeoxycholic acid) substantially increasing its prices. In confirming that the main objective of the EU regulation on orphan medicinal products (Regulation 141/2000) is to provide incentives for the research, development, and placing on the market of orphan medicines in such incentives. It acknowledges that such incentives, particularly market exclusivity, can influence prices. The commission is therefore currently evaluating the functioning of the regulation.

The commission is also promoting the exchange of information among ember states on a voluntary basis, e.g., through tools such as a European medicine price database as the database on their pricing policies (EURIPID) and an exchange of best practices and knowledge among member states between the national competent pricing and reimbursement to maximize price competition. Existing initiatives include the Beneluxa collaboration between Belgium, the Netherlands, Luxembourg, Austria, and now Ireland including joint horizon scanning, health technology assessment, pricing and reimbursement and information sharing, particularly relating to orphan and other high-priced medicines.

Furthermore, the commission indicated that it was proactively monitoring pharmaceutical markets and is ready to take action, where appropriate, against breaches of the EU competition rules, including excessive pricing that may be in breach of Article 102 of the Treaty on the Functioning of the EU (prohibiting abuse of a dominant position).

**Read the commission statement**.

### UK Competition and Markets Authority (CMA) Action on Nortriptyline

The CMA has reached a preliminary finding that King and Auden Mckenzie shared out between them the supply of nortriptyline to a large pharmaceutical wholesaler. The companies are accused of colluding in 2014, whereby Auden Mckenzie would supply only 10 mg tablets and King would supply only 25 mg tablets in addition to fixing the quantities and the prices of supply.

The CMA has also accused the companies King, Alissa, and Lexon of exchanging commercially sensitive information, including information about prices, volumes, and entry plans to keep nortriptyline prices high.

This is the CMA's provisional finding and the companies now have the chance to make representations to the CMA before the CMA reaches a final decision.

The CMA has provisionally found that four pharmaceutical companies broke competition law in the way they supplied an antidepressant drug, nortriptyline, to a large pharmaceutical wholesaler. Prices paid by the NHS peaked at £38 million in 2015, according to the **CMA press release**, leading to allegations that the companies entered into anti-competitive agreements.

# EU – INTELLECTUAL PROPERTY AND EXCLUSIVITY

### SPCs for New Formulations

The European Court (the CJEU) was asked by the English High Court in case C-443/17 to decide on whether a marketing authorization (MA) for a new formulation of a previously marketed active was a "first authorisation" within the scope of Article 3(d).

The issue arose in the context of Supplementary Protection Certificates (SPCs), which, under Regulation (EEC) 1768/92 (the Regulation), are granted by member states for medicinal products protected by a basic patent and with an EU/EEA member state marketing authorization (MA). SPCs are a form of protection in the EU that aim to compensate for the time lost between filing a patent application and gaining market authorization by extending market exclusivity provided by a patent for up to five years for medicinal products. Currently, an SPC provides similar protection to that granted by the patent on which it is based.

Under Article 3(d) of the Regulation, the MA must be the first such authorization to place the product on the EU or EEA market.

Abraxane (which received an MA in 2008) contains a combination of ingredient (paclitaxel) in nanoparticle form and carrier (albumin), nab-paclitaxel, which was claimed to demonstrate greater efficacy in certain cancerous tumors than the original paclitaxel.

The UK Intellectual Property Office decided that the 2008 MA was not the "first authorisation" to place the product on the market, and hence refused the SPC and Abraxis appealed. The CJEU considered two questions:

- Is a new formulation a new "product" within the meaning of the SPC Regulation?
- Is the MA for the new formulation the first authorization to place the product on the market?

The CJEU noted that Article 1(b) of the Regulation states that "product" means the active ingredient or combination of active ingredients and concluded from case law that an "active ingredient" does not include substances that do not have a therapeutic effect.

The court therefore decided that, since the carrier has no therapeutic effect of its own, it cannot be regarded as being an active ingredient within the meaning of Article 1(b) and the combination could not be regarded as a combination of active ingredients within the meaning of Article 1(b). The new formulation could not therefore be regarded as being a product in this sense.

The negative answer to the first question, inevitably also entailed a negative answer to the second in that nab-paclitaxel could not considered to be a distinct product from the previous product, paclitaxel.

The CJEU therefore decided that Article 3(d) in conjunction with Article 1(b) must be interpreted to mean that an SPC cannot be granted for a new formulation of an active ingredient if that active ingredient has already been the subject of an earlier MA.

**Read the case report**.

**SPCs – Manufacturing Waiver**

As of 1 July 2019, generics companies can lawfully manufacture SPC-protected drugs throughout the EU for export outside the EU under Regulation (EU) 2019/933 (the New Regulation). It will also be lawful for generics manufacture generics during the last six months of the lifetime of the SPC, to stockpile supplies for immediate EU market entry after the SPC expires

The New Regulation seeks to limit the effect of an SPC by ending protection against the manufacturing of any active ingredients protected by the SPC and of any corresponding medicinal products, if manufactured (i) for export to countries outside the EU, or (ii) for the purpose of stockpiling for "day one" entry to the EU market immediately after the SPC expires.

Stockpiling is only permissible in the final six months before expiry of the SPC, whereas manufacture for export outside the EU will be allowed throughout SPC's lifetime. The SPC holder must be directly notified three months prior to manufacture and national patent offices must also be notified.

The manufacturing waiver applies to SPCs filed on or after 1 July 2019. An SPC already in effect by 1 July 2019 will not be affected by this waiver; however, for SPCs filed before 1 July 2019 but that are not yet in effect by this date, the manufacturing waiver will initially not apply but will become

Finally, the New Regulation requires the EC to evaluate the manufacturing waiver by July 1, 2024, and then every five years thereafter in order to assess the impact of the provisions. **Read more**.

# EU – DATA PRIVACY

**Consent and Clinical Trials**

The European Data Protection Board (EDPB) adopted an opinion on the much-debated issue of the interplay between the forthcoming Clinical Trials Regulation (CTR) and the European General Data Protection Regulation (GDPR) on the appropriate legal justifications under the GDPR for processing personal data in the clinical trial patient data.

The starting point for any such analysis is the requirement for subject consent before commencing the trial, and this consent is distinct from any consent provided under the GDPR as a legal basis for processing personal data. In relation to the processing of health data under the GDPR, companies must have both, a basis for processing those data under Article 6 GDPR (which addresses lawfulness of processing) such as consent, as well as an exception to the general prohibition on processing such health data under Article 9 GDPR (which addresses the processing of special categories of personal data).

Consent is considered unlikely to be the most appropriate basis in the clinical trials context. The opinion stresses that consent must be "freely given," which may not be possible where there is an imbalance of power between the participant and the sponsor/investigator in a clinical trial. Moreover, if consent is withdrawn, the processing operations must be stopped and the personal data deleted unless there is another lawful basis for retaining it. Given these limitations, the EDPB considers that other bases under the GDPR would be more appropriate.

Where the data is used in clinical trials, the EDPB proposes "compliance with a legal obligation" with the most appropriate exception being that the processing is "in of public interest in the area of public health."

For research activities, the EDPB considers that a valid basis for processing by industry may be that the processing is necessary for the purposes of the legitimate interests pursued by the controller (e.g., a sponsor) and that exception for special category data is that the processing is necessary (a) "for reasons of public interest in the area of public health…" or "for scientific… research purposes."

For secondary uses of clinical trial data for scientific purposes (i.e., uses that are outside of the original clinical trial protocol), the opinion suggests that further processing may be considered compatible with the initial purposes of the clinical trial and hence a new legal basis and exception may not be required.

It remains to be seen whether regulatory bodies and ethics committees the approach of the EDPB, particularly with regard to consent.

**Read the opinion**.

# CHINA

### Costs, Profits, and Compliance: China Audits Companies with Goal of Decreasing Drug Prices

The Ministry of Finance of the Peoples Republic of China (PRC) has announced it will audit 77 randomly selected drug makers in China, examining the companies' costs and profits to determine the reasonableness of their drug pricing mechanisms, in a bid to drive down medical costs. The audit will include some of the largest domestic drug makers as well as Chinese subsidiaries of three international pharmaceutical conglomerates.

Read the Morgan Lewis **LawFlash** for more insight on the audit's key areas of focus. This initiative marks the first time the Ministry of Finance has launched a nationwide audit specifically targeting pharmaceutical companies, and it could be expanded if evidence is found to suggest issues are prevalent across the industry.

### China Continues to Focus on Physician Speaking Fees in Commercial Bribery Regulation

The Administration for Market Regulation of Jing'an District in Shanghai (AMR) on May 7 announced an administrative penalty decision against the Shanghai branch of a multinational pharmaceutical company for speaking fees it paid to physicians. According to the decision, the AMR found that the speeches in question never actually occurred and that the "speaking fees" were actually bribes. The AMR held that the physicians had utilized their official positions to unduly influence patients to purchase medical products promoted by the company branch, and that the payment of the fees constituted commercial bribery in violation of Article 7, Section 1(i) of the Anti-Unfair Competition Law of the People's Republic of China.

The payment of speaking fees in the pharmaceutical industry has attracted heightened scrutiny from the Chinese government in recent years, and this case is not the first time the Shanghai AMR has targeted the practice. Read the Morgan Lewis **LawFlash** for more details.

# INTERNATIONAL TRADE

### National Security Reviews and Export Controls Likely to Have More Effect on US Biotech Deals

Back in May 2018, we correctly predicted that with the publication in March 2018 of the Section 301 report by the United States Trade Representative, there would be greater scrutiny by the Trump administration of foreign investment, particularly from China, in the US biotech industry. *See Law 360 Trade Rep Hints At More CFIUS Scrutiny of Biotech Deals, May 23, 2018*. Since then, the Committee on Foreign Investment in the United States (CFIUS) has blocked or required mitigation in several transactions in the life sciences industry. In early 2018, CFIUS required the divestiture of Biotest's US blood plasma products and biomedical testing operations because of the potential access by the Chinese acquirer, Creat Group, of confidential health information relating to US citizens possessed by Biotest. More recently, in 2019, CFIUS required the divestiture, based on similar personal data concerns, of Chinese investments in Grindr and PatientsLikeMe, which were not notified to CFIUS before the investments were made.

While all of these transactions involved the authority of CFIUS to review transactions resulting in the acquisition of control (as broadly defined by CFIUS) of a US business by foreign persons, the enactment in 2018 of the Foreign Investment Risk Review and Modernization Act (FIRRMA) gave CFIUS the authority to review non-controlling (≤50%) investments in certain industries, including biotechnology, where certain rights were proposed to be obtained by the investor, and to require mandatory filings (termed Declarations) where the foreign investor would be given

access to "critical technology." Before FIRRMA, submissions to CFIUS were entirely voluntary, but the foreign investor proceeded at its own risk if it chose not to clear the transaction with CFIUS before closing. The CFIUS actions in the Grindr and PatientsLikeMe cases show how real those risks can be for foreign investors.

The publication by CFIUS in October of 2018 of the interim pilot program regulations caught the biotech community off-guard because biotechnology was one of the 27 industries covered and the regulations became effective with respect to transactions that closed after November 10, 2018. The publication by CFIUS of the pilot program regulations caused many biotech companies who were negotiating deals with foreign investors (the rules did not single out Chinese investors) to scramble to determine if they had "critical technology" as currently defined and, if so, to restructure their transactions to avoid CFIUS review to the extent possible. Given the currently narrow definition of critical technology, it is unclear how many biotech transactions have been notified to CFIUS under the mandatory pilot program; CFIUS has not published any data to date. We are aware that certain transactions involving Chinese investors that could not be restructured were abandoned, but again, there is no reliable data on the extent of the impact since CFIUS does not report on or disclose its decisions.

At present, the definition of "critical technology" for biotechnology covers biodefense and bio-warfare technologies controlled by the State Department in the US Munitions List of the International Traffic in Arms Regulations (ITAR), the list of "select agents and toxins" in certain biologics and agriculture regulations, certain nuclear materials, and items appearing on the US Department of Commerce on the Commodity Control List (CCL) under the Export Administration Regulations. Many early stage biotech companies have never gone through the exercise of classifying their technology for export purposes, although many were technically subject to the "deemed export" rules because of their employment of non-US scientists even if they weren't exporting their technology abroad. In many cases, these early stage biotech companies don't have "critical technology" as currently defined.

Two important rulemakings are underway that could materially affect the biotechnology industry further, and the proposed regulations are likely to be published in the next couple of months. First, CFIUS will be publishing draft regulations to implement FIRRMA, which must be finalized by March 2020. It is expected that the pilot program regulations are likely to be expanded and many provisions of FIRRMA, such as the rules on "critical infrastructure," real estate, protected personal information, and filing fees are likely to be implemented. Second, the Department of Commerce's Bureau of Industry and Security (BIS) will publish draft rules defining those "emerging" and "foundational" technologies referenced in Section 1758 of the Export Control Reform Act of 2018 (ECRA), enacted along with FIRRMA, which may have an even more profound effect on the biotechnology industry because they have the potential to expand both export controls, including "deemed export" controls, on biotechnology and the scope of transactions subject to mandatory CFIUS review, because designated "emerging and foundational" technologies will automatically become "critical technologies" for CFIUS purposes.

In November of 2018, BIS published an Advance Notice of Proposed Rulemaking indicating that it was considering including as "emerging and foundational technology" such biotechology industry-related products and processes as nanobiology, synthetic biology, genomic and genetic engineering, genetic algorithms and programming, neurotech, and biomaterials. In response, a variety of stakeholders ranging from leading industry advocacy groups to multinational corporations submitted comments to try to convince BIS to strike the right balance between regulating technology important to national security and not inhibiting foreign investment in biotechnology and collaboration among biotech companies across borders. The new regulations are expected to be released in draft form so there will be another opportunity for the biotechnology community to weigh in on these important issues.

A separate but equally important development focusing particularly on Chinese participation in the US biotechnology market is the joint outreach by the National Institutes of Health (NIH) and Federal Bureau of Investigation (FBI) to recipients of NIH grants with respect to the controls in place to prevent against the unauthorized export and/or theft of federally funded research. This has created concern in the biotech scientific community, both commercial and academic, regarding the employment or recruitment of Chinese origin scientists, regardless of whether they have US citizenship. Read our August 27, 2018, LawFlash, "**The National Institutes of Health and National Security: The Long Tentacles of Foreign Influence**." . This effort is part of the broader US government initiative to combat what it considers unfair Chinese trade practices generally and, in particular, in the biotechnology industry and the potential for loss of what it considers to be a critical technology. Notwithstanding these US government initiatives, Chinese participation in the US life sciences industry remains strong, funded in part by investments encouraged by the Chinese government's Made in China 2025 program.

Morgan Lewis is following these developments closely and is actively engaged in representing US and foreign clients in the biotech industry. We will provide further updates once the draft implementing regulations for FIRRMA and "emerging and foundational" technologies become available.

### Drugs and Other FDA-Regulated Products Among Latest Proposed Tariffs

The Trump administration has issued a fourth set of proposed tariffs on an additional $300 billion of goods related to China, this time adding a range of commercial goods across industries. This round affects medical devices

and their components, certain chemicals and precursors that are in pharmaceuticals and dietary supplements, and other products regulated by the US Food and Drug Administration (FDA). The administration continues to try to use tariffs as a means of balancing the trade deficit with China and to bring the Chinese government to the negotiating table on a longstanding set of issues related to intellectual property (IP), cyber, and technology transfer.

There are two steps to the tariff process:

1. At the proposed stage, parties can submit comments on why the proposed tariffs are damaging to US interests while not addressing the root cause of either the trade imbalance or China's policies in the IP, cyber, and technology transfer areas. The Office of the United States Trade Representative (USTR), and other government agencies, will consider the rationale for the comments and factor into the finalization of the tariffs whether the changes proposed in the comments would meet the US government's objectives. Generally, this administration finds tariffs to be a useful tool.
2. Once the tariffs are implemented, parties can request "exclusions" for their particular products. Exclusions require a party to indicate why application of the tariffs to its product would be damaging to US interests, disrupt the supply chain, significantly adversely affect the industry, or prevent a US company from providing products, services, or technical assistance based on the cost of the products under the tariff. Other fact-specific arguments can also be presented.

**Read more**.

# US – REGULATORY

### FDA Continues to Facilitate Expanded Access

Over the last few months, FDA has continued its efforts to encourage and facilitate the use of the agency's Expanded Access Program (EAP). This follows other FDA EAP actions, including its announcement of program improvements. Overall, these steps appear to signal that FDA is trying to position the EAP as a desirable option for patients, healthcare providers, and industry following the passage of the Federal Right to Try statute, in which, as noted in FDA's recent Right to Try Frequently Asked Questions (FAQs), the agency plays a very limited role.

Most recently, FDA held a workshop on Project Facilitate, a pilot program developed under the Oncology Center of Excellence that is intended to provide a "concierge-like" EAP service for providers and patients. Acting FDA Commissioner Ned Sharpless stated that Project Facilitate will assist oncology providers to locate Institutional Review Board (IRB) resources, find EAP contacts at companies, complete the necessary FDA forms, and receive advice on the information needed to complete EAP requests. Project Facilitate will also assist FDA in gathering information on whether drug manufacturers are providing access to investigational drugs through EAPs and, if not, understanding the reasons for denials.

Prior to the workshop, FDA had also issued a statement encouraging the use by sponsors of EAPs following clinical trial completion for both patients who do not qualify for trials and for participating patient follow-on treatment. The agency, however, also acknowledged that there may be impediments to EAP implementation, such as investigational product supply and the cost of manufacturing complex products (e.g., cell and gene therapies).

**Read more**.

### Supreme Court Clarifies Judges Must Decide Impossibility Pre-Emption

The US Supreme Court held on May 20 that a judge, not a jury, must decide the question of whether federal law prohibited drug manufacturers from adding warnings to the drug label that would satisfy state law. To succeed on a pre-emption defense on failure-to-warn claims, the drug manufacturer must present "clear evidence" that it fully informed the FDA of the justifications for the warning, and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve the addition of the warning to the drug's label. The Court remanded to the US Court of Appeals for the Third Circuit to decide the pre-emption question. Two concurring opinions provide the Third Circuit with roadmaps to opposite conclusions.

**Read more**.

### Knowing Your Customer Just Got a Little Easier: DEA Enables Access to ARCOS Data

The Drug Enforcement Administration (DEA) recently announced an enhancement to the Automation of Reports and Consolidated Orders System (ARCOS) to allow DEA-registered drug manufacturers and distributors to access anonymized information concerning their customers' orders of certain controlled substances. Manufacturers and distributors of Schedule I and II and certain other Schedule III controlled substances are required to submit quarterly reports to ARCOS of controlled substance purchases and sales. With this enhancement, registrants will be able to view ARCOS data submitted by other manufacturers and distributors. Specifically, registrants will be able to see and download data on a customer's (e.g., pharmacy's) controlled substance purchases, in terms of both the amount of purchased controlled substances and the number of distributors from which controlled substances were procured. While this enhancement will help controlled substance manufacturers and distributors fulfill their suspicious order monitoring obligations, it also raises questions regarding the steps that distributors and manufacturers will be required to take if suspicious order patterns are detected.

Under the DEA's regulations, controlled substance manufacturers and distributors are required to "design and operate a system" to detect suspicious orders of controlled substances, including orders of unusual size, orders that deviate from a normal pattern, and orders of unusually high frequency. In the event a suspicious order is found, the registrant must notify the DEA. This requirement is commonly known as the "know your customer" requirement. In recent years, this requirement has received increased attention as a result of some high-profile DEA wins related to alleged suspicious order monitoring deficiencies.

**Read more**.

### FDA Issues Proposal on Oversight of Artificial Intelligence and Machine Learning Software

The FDA's recent discussion paper suggests a new regulatory approach for evaluating postmarket changes to artificial intelligence and machine learning software devices, but further clarity is needed on when such devices are subject to FDA regulation. Recognizing that AI/ML is intended to constantly evolve, FDA proposes a plan to help streamline the requirements for postmarket changes, and also outlines the agency's expectations for AI/ML developers to conform to certain practices and principles.

The FDA has published a discussion paper, Proposed Regulatory Framework for Modifications to Artificial Intelligence/Machine Learning (AI/ML)-Based Software as a Medical Device (SaMD), in which the agency proposes a new regulatory approach for evaluating postmarket changes to AI/ML-based software devices. Although the April 2 proposal has the potential to reduce postmarket burdens for FDA cleared or approved AI/ML technologies, the agency has yet to offer clear guidance on when such technologies would be subject to FDA regulation.

**Read more**.

### FDA Supports Changing Date Label Phrasing on Foods—but Consumer Confusion Is Likely to Continue

FDA released a consumer update stating that it supports industry's effort to toss expiration dating terms on foods, such as "use before," "sell by," and "expires on," for the more neutral date phrase "best if used by."

The reason for removing these types of date label phrases is simple: consumer confusion. Supposedly, consumers do not know whether these phrases mean food is no longer safe to eat. Additionally, there is no legal requirement to provide a date label phrase on packaged foods (other than infant formula) in the United States, so these phrases are not defined in law or regulation.

However, it turns out most date label phrasing on food in the United States is not based on whether the food is "expired" or unsafe to eat. Instead, date label phrasing is based on how long the food will retain its optimum "quality." While food may not be at its optimum quality after a "best if used by" date, it does not necessarily mean the food is unsafe to eat. This change in date phrasing may help with some of the food waste issues caused by this consumer confusion. For example, FDA believes that current variations of date label phrasing "contribute to about 20% of food waste in the home" because consumers interpret these labels to mean that the food should not be consumed after the date listed (regardless of phrasing).

But in the battle of quality vs. safety in the unregulated world of date label phrasing for everyday foods, which is the consumer likely to assume "best if used by" means?

Industry's plan to use a "best if used by" label pulls away from informing consumers about the safety aspects of the foods they produce and instead focuses mostly—if not fully—on quality. It is not surprising that there is widespread support for this shift in phrasing, given that food manufacturers have difficulty developing tests that offer consistent scientific precision as to when particular food items are no longer safe to eat.

**Read more**.

## US – REIMBURSEMENT

### Current Rebate Implications of CMS's Proposed Drug Pricing Anti-Kickback Rule

The Centers for Medicare and Medicaid Services (CMS) issued proposed regulations in February targeting manufacturer arrangements with pharmacy benefit managers (PBMs). These proposed regulations are a direct outgrowth of the administration's drug pricing blueprint, and if finalized, would revise the Anti-Kickback Statute discount safe harbors that have protected drug manufacturer rebates from potential criminal liability, and affect their agreements with PBMs. However, what many may not realize is that even if the proposed regulations are not finalized, they warrant special attention, as the preamble elucidates CMS's view on applicability of the current safe harbors to current contracting practices.

The vast majority of prescription drug claims are covered by private insurers, including Medicare Part D and Medicaid Managed Care (MMC) plans. These insurers contract with PBMs to negotiate rebates from manufacturers, which are intended to offset the amount insurers pay to pharmacies. Insurers also contract with PBMs to develop and administer formularies used to manage pharmacy benefits. These are lists of drugs that are covered by a health plan and are usually in tiers differentiated by beneficiary copay. When developing and managing formularies, PBMs evaluate the cost of drugs in a therapeutic class, based on the price the pharmacy charges the plan reduced by rebates and other discounts. Thus, the payment of rebates can make a manufacturer's drug more cost effective than other

therapeutically equivalent drugs, resulting in a preferred drug formulary position. If passed through to the insurer, the rebate also may reduce insurers' costs, permitting the insurer to provide drug benefits at reduced prices to beneficiaries. However, concerns have been raised as to whether the full value of these rebates is passed to insurers.

**Read more**.

# US – LABOR AND EMPLOYMENT

**Employment in the Life Sciences Sector: Q&A, Practical Law**

Morgan Lewis partner Louise Skinner authored an article for *Practical Law* about employment issues in the life sciences sector. The article covers a variety of topics, including intellectual property rights, compensation and benefits, and regulatory and compliance issues. In reference to global codes of conduct and work polices, Louise said, "Companies with a global presence, such as those operating in the life sciences industry, will also be required to implement local policies, handbooks and checklist procedures which adhere to local law requirements."

**Read more**.

# US – INTELLECTUAL PROPERTY

**Legislation in US Congress Seeks to Provide Clarity on Patents Protecting Biologic and Pharmaceutical Products**

The US House of Representatives unanimously passed two bills, HR 1520 (Purple Book Continuity Act) and HR 1503 (Orange Book Transparency Act), which impact the scope of available patent information associated with a pharmaceutical or biologic product. The US Senate has yet to act on either legislation and has instead introduced its own bill.

The Purple Book is a nickname applied to a list of biologic products licensed by FDA under the Public Health Service (PHS) Act, including any biosimilar and interchangeable biologic products. The Purple Book derives its name from the Orange Book, the nickname for the FDA publication (Approved Drug Products with Therapeutic Equivalence Evaluations) that contains therapeutic equivalence evaluations for approved drug products. The Orange Book references patents that cover an approved drug product so that a generic manufacturer can properly assert a challenge to any Orange Book listed patents when filing an Abbreviated New Drug Application (ANDA). Unlike the Orange Book, the Purple Book currently does not provide any reference to patents covering an approved biologic product. The absence of patent information in the Purple Book makes it difficult for a biosimilar applicant to determine which patents may protect the biologic product including, methods of its manufacture. Rather, the current biosimilar approval process requires exchange of patent information between the biosimilar applicant and the owner of the biologic product. This process is sometimes referred to as the patent dance.

The Purple Book Continuity Act would require that each approved biologic product reference any patent(s) that protect the biologic, but would not require publication of such patents until the exchange of patent information required by the Biologics Price Competition and Innovation Act (BPCIA) has been initiated stating "[n]ot later than 30 days after a list of patents under subsection (l)(3)(A), or a supplement to such list under subsection (l)(7), has been provided by the reference product sponsor to the subsection (k) applicant … the reference product sponsor shall provide such list of patents (or supplement thereto) and their corresponding expiry dates" (see https://www.govtrack.us/congress/bills/116/hr1520/text). Such information, made readily available to biosimilar applicants will make it easier to assess patents that protect a biologic product. Currently, a biosimilar applicant has no way to know which patents the owner of a biologics may assert in a patent infringement action brought under the BPCIA until it has entered the patent dance.

A related bill, called the Orange Book Transparency Act, passed by the US House of Representatives, clarifies information related to patent listing and the types of patents that should be listed in the Orange Book. The bill requires that invalidated patents be removed, but not before the expiration of any 180-day exclusivity period that relies on a Paragraph IV certification that the patent is invalid. The US Senate also introduced a bill that clarifies the information that FDA must include in the Orange Book about patents and exclusivities for drugs approved under Section 505 of the Federal Food, Drug, and Cosmetic Act. Specifically it would require FDA to remove patents and patent claim information from the Orange Book when the US Patent and Trademark Office determines a patent or patent claim is invalid to encourage drug development

The US Senate has also introduced a bill to modify the Purple Book, which is purported to increase transparency of patent information for biologics. The bill would codify the Purple Book as a single, searchable list of information about each licensed biologic, including marketing and licensure status, patent information, and relevant exclusivity periods. Interestingly, the owner of a biologic product is prohibited from bringing a patent infringement suit under the BPCIA for any patent protecting its biologic that is not listed in the Purple Book. No action has yet to be taken on this bill by the US Senate. With bipartisan support in both the US House of Representatives and US Senate to lower drug prices and increase patient access to lifesaving medications, it is expected that a hybrid form of legislation addressing both the Purple Book and Orange Book is likely to pass in the coming months.

# EVENTS

The Morgan Lewis Life Sciences Growth Series is an online series of tailored webinars led by a cross-practice team of Morgan Lewis life sciences lawyers. The program is designed to provide startup and early-stage companies with a comprehensive overview of a variety of topics affecting the life sciences industry.

Our programs will begin again shortly so stay tuned for future announcements. You can also **access our previous presentations**.

---

# PUBLICATIONS

*Blockbuster Biologics Review*, produced by our intellectual property lawyers, covers developments in inter partes review (IPR) and patent litigation challenges to blockbuster biologic drugs.

These quarterly reports provide updates on the following topics:

- The current status of IPR challenges to blockbuster biologics
- The institution and invalidation rates for IPRs challenging blockbuster biologics
- The current status of patent litigations implicating blockbuster biologics

We will continue to monitor developments and provide updates regularly.

**Read the latest issue here**.

Morgan Lewis

## CONTACTS AND AUTHORS

### UNITED STATES


**Michael Abernathy**
Chicago | +1.312.324.1447
mike.abernathy@morganlewis.com

**Jacqueline Berman**
Washington, DC | +1.202.739.5057
jacqueline.berman@morganlewis.com

**Christopher Betti, Ph.D.**
Chicago | +1.312.324.1449
christopher.netti@morganlewis.com

**Michele Buenafe**
Washington, DC | +1.202.739.6326
michele.buenafe@morganlewis.com

**Giovanna Cinelli**
Washington, DC | +1.202.739.5619
govanna.cinelli@morganlewis.com

**Beverly Dale**
San Francisco | +1.415.442.1124
beverly.dale@morganlewis.com

**Ryan Fournier**
Washington, DC | +1.202.739.5966
ryan.fournier@morganlewis.com

**Alan Leeds**
Princeton | +1.609.919.6677
alan.leeds@morganlewis.com

**Wan-Shon Lo**
Chicago | +1.312.324.1742
shon.lo@morganlewis.com

**Stephen Paul Mahinka**
Washington, DC | +1.202.739.5205
stephen.mahinka@morganlewis.com

**Jeff Mann, Ph.D.**
San Francisco | +1.415.442.1119
jeffry.mann@morganlewis.com

**Kenneth Nunnenkamp**
Washington, DC | +1.202.739.5618
kenneth.nunnenkamp@morganlewis.com

**Stephen Ruscus**
Washington, DC | +1.202.739.5870
stephen.ruscus@morganlewis.com

**Andrew Ruskin**
Washington, DC | +1.202.739.5960
andrew.ruskin@morganlewis.com

**Kathy Sanzo**
Washington, DC | +1.202.739.5209
kathleen.sanzo@morganlewis.com

**Robert Smyth, Ph.D.**
Washington, DC | +1.202.739.5139
robert.smyth@morganlewis.com

**Carl Valenstein**
Boston | +1.617.341.7501
carl.valenstein@morganlewis.com

**Donna Lee Yesner**
Washington, DC | +1.202.739.5887
donna.yesner@morganlewis.com


### EUROPE


**Tom Cartwright**
London | +44.20.3201.5671
tom.cartwright@morganlewis.com

**Paul Ranson**
London | +44.20.3201.5660
paul.ranson@morganlewis.com


### ASIA


**Todd Liao**
Shanghai | +86.21.8022.8799
todd.liao@morganlewis.com


Connect with us

**www.morganlewis.com**




072319_192076