FDA Regulatory & Compliance 2020 Year in Review

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Frankly put, 2020 was a year like none we have ever seen.

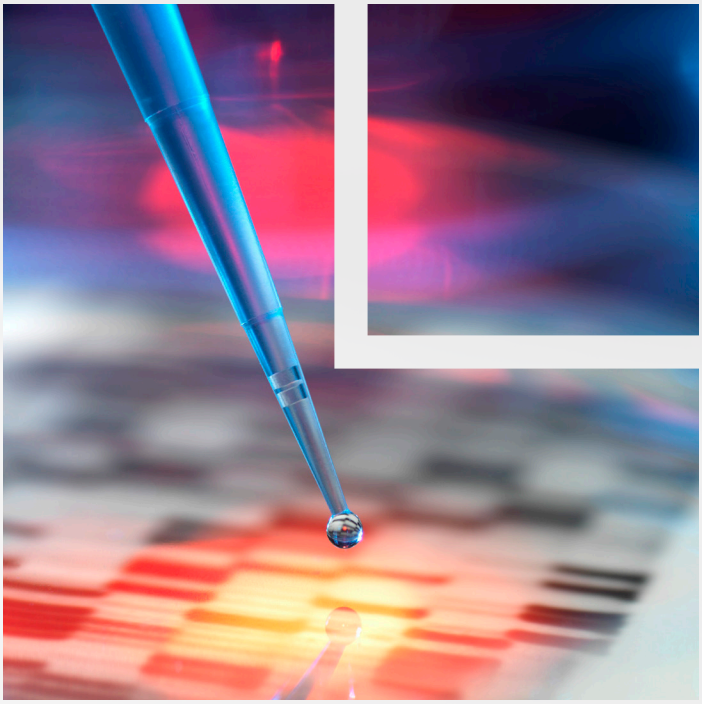
The COVID-19 pandemic in the United States and around the globe impacted local, state, and federal public health policies, activities and resources in ways never previously experienced. The pandemic fueled a public health crisis that challenged the ability of the federal government to provide oversight and deliver resources to the states, while at the same time those states were trying to allocate, ration, and triage medical supplies and hospital resources among the very sickest of COVID-19 patients. At this moment, health experts are predicting that the pandemic will continue for many more months, with spikes in infections and hospitalization likely throughout most of the country. It's unclear what the continuing impact of the pandemic will be on public health resources. While the pharmaceutical industry has been able to deliver what appear to be promising vaccines and therapies, the effects of the pandemic will continue through 2021 and have lasting impacts thereafter.

At the same time, both state and federal governments have continued their investigations into and settlements with corporations and individuals deemed responsible and accountable for the long-term effects of a catastrophic opioid crisis impacting thousands of Americans. While Purdue Pharma's eventual settlement with the Department of Justice (DOJ) relating to its marketing and distribution of OxyContin might have been predictable, few of us could have foreseen that the company would not only declare bankruptcy, but then emerge as a public benefit company designed for the benefit of the American public, with the proceeds of the company to be directed toward state and local opioid abatement programs.

Against the backdrop of these two ongoing and unprecedented events, the normal course of government activities continued, as the Food and Drug Administration (FDA), the DOJ and the Office of Inspector General (OIG) pursued their public missions, which included meeting the challenges of the pandemic as well as continuing to issue guidance, conduct investigations, and enforce the laws and regulations generally impacting the life sciences industry.

Here are the highlights of the more notable developments of 2020, as well as some of our predictions for 2021.

Pandemic-Related Activities



Guidance

FDA stepped up to meet the multiple issues and challenges created by the pandemic, issuing dozens of pandemic-related guidance documents. On March 25, 2020, FDA announced procedures for making available FDA guidance documents related to the COVID-19 public health emergency. These procedures allowed FDA to rapidly communicate recommendations and policies related to COVID-19 to industry, FDA staff and other stakeholders. Pursuant to these procedures, FDA issued guidance on the conduct of clinical trials, the reporting of adverse events for medical products and dietary supplements, Emergency Use Authorization (EUA) for personal protective equipment, and (in a surprise move) a temporary policy permitting distribution of drug samples directly to patients during the pandemic, subject to certain restrictions. (Read our alerts on the COVID-19-related guidance here, here and here.) FDA also issued a final guidance resulting from its initiatives to promote diversity in clinical study populations to more accurately reflect those real-world patient populations that will ultimately use the products, and to obtain important safety and efficacy data about those populations. FDA recently indicated that it will review these guidance documents to determine the feasibility of keeping them in place them after the pandemic has subsided.

Emergency Use Authorization

FDA also expanded its use of the EUA process to authorize several COVID-19 vaccines prior to approval. Under the EUA process, FDA may issue an EUA only if it concludes that the following statutory criteria for issuance have been met:

- The disease causing the public health emergency can cause a serious or life-threatening disease or condition.
- It is reasonable to believe that the product may be effective in diagnosing, treating, or preventing the serious or life-threatening disease or condition.
- The known and potential benefits outweigh the known and potential risks of the product when used to diagnose, prevent, or treat the serious or life-threatening disease or condition that is the subject of the declaration.
- There is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such serious or life-threatening disease or condition.

EUAs do not require the same level of review as standard FDA approvals. While EUAs must be based on data and science, and must include a rigorous evaluation of currently available scientific evidence, their sponsors must continue to collect and review additional data about the product's safety and effectiveness. An EUA does not remain in effect indefinitely and terminates at the end of the public health emergency, which makes it imperative that sponsors also pursue simultaneous FDA approvals of the product.

Sampling to Patients

In response to a request, FDA announced in April that it would permit manufacturers to provide prescription drug samples directly to a patient's home during the COVID-19 public health emergency. (Read our At-a-Glance on the guidance here.) This directive directly contravenes the Prescription Drug Marketing Act, which authorizes a manufacturer's distribution of drug samples only to a health care provider (HCP), who in turn may distribute that drug sample directly to a patient. In supporting this approach, FDA acknowledged that it was challenging for

HCPs to provide samples to patients during the pandemic when they were not meeting face-to-face with patients.

FDA's response authorizes the delivery of drug samples directly to a patient's home, subject to the following conditions:

- The sample request is in writing from a health care practitioner licensed to prescribe the drug.
- The sample request is for an identified patient of that health care practitioner who has been designated to accept the delivery of the drug samples for the health care practitioner.
- The samples are delivered by mail or common carrier directly to the identified patient's home.
- The receipt of the samples is documented.
- The record-keeping requirements under the Prescription Drug Marketing Act and regulations are met by the manufacturer.

Despite this announcement, many manufacturers have been reluctant to begin mass sample distribution directly to patients, recognizing that they must first assess, evaluate, and overcome the hurdles and possible impediments posed by individual state laws governing i) sample distribution, ii) pharmacy dispensing and distribution, iii) wholesaler distribution and wholesalers, and ii) privacy. These laws differ from state to state and make it potentially difficult to launch a "one size fits all" direct-to-patient sample program.

Life Sciences Interactions

The pandemic also impacted and challenged the traditional ways that pharmaceutical and medical device companies, HCPs, and patients interact with and among each other. Pharmaceutical manufacturers have collaborated among themselves to integrate their research and development activities to develop possible vaccines and therapeutics to treat the coronavirus. The federal government provided billions of dollars of funding to support these research efforts and to purchase vaccine supply, and we expect that by midyear 2021 we will have ongoing large-scale public inoculation efforts not seen since the polio vaccination programs in the 1950s.

With respect to interactions with HCPs, the industry was challenged to significantly change the ways in which those interactions took place, quickly transitioning their sales representatives from face-to-face meetings to web-driven and remote engagements. In a May survey conducted by Accenture called "Reinventing Relevance New Models for Pharma Engagement with Healthcare Providers in a COVID-19 World" HCPs acknowledged the value of services provided by pharmaceutical sales representatives during the pandemic and further requested that manufacturers do the following:

- Utilize the representatives' unique customer insights to develop new educational communications platforms for both HCPs and patients to further broaden both HCP and patient support activities.
- Provide additional support services such as education on remote support and digitized patient information.
- Have a greater understanding of their needs and expectations.

The pandemic has created an opportunity for the industry to redefine its relevance and create new ways to connect its representatives and HCPs. We expect that the role of the pharmaceutical sales representative will evolve to keep pace with continuing changes to promotional practices and targeting activities.

Telemedicine

The advent of telemedicine is another tool that HCPs and patients will be able to rely upon and benefit from, as more and more patients transition from seeing their HCPs in their offices to engaging with them via web-based programs, especially if patients can receive both prescribed medicines and samples through the mail and can avoid going to an HCP's office. As telemedicine becomes more integrated into the health care system, it could reduce the strain on the existing health care resources by minimizing the surge of patient demand on facilities and reducing the use of protective personal equipment by HCPs during and after the COVID-19 pandemic.

The Centers for Disease Control and Prevention (CDC) issued a guidance in June 2020 titled "Using Telehealth to Expand Access to Essential Health Services during the COVID-19 Pandemic" in which it noted that many professional medical societies endorse telehealth services. The CDC guidance provides recommendations for safe medical practices to follow during the pandemic and recognizes the use of telehealth as a way to deliver acute, chronic, primary and specialty care, and to improve patient health outcomes. Manufacturers should build on this transition to telemedicine by providing educational programs and support to HCPs and patients that enhance their overall telemedicine experience.

Regulatory Activities

Congress, FDA and the U.S. Department of Health & Human Services (HHS) continued to focus their regulatory and investigative powers on the important business of enforcing those laws and regulations impacting, in particular, the life sciences industry and the complex web of third parties with which it interacts.

Drug Pricing

The Trump administration continued its focus on drug pricing reform and implementation of drug price controls. In an attempt to address the continuing concern of the government and the public about drug prices, FDA issued a final rule to allow importation of certain prescription drugs from Canada without the manufacturer's authorization. Congressional oversight of drug pricing continued as well, as senior executives from Celgene, BMS, Teva, Amgen, Mallinckrodt and Novartis testified to the House Committee on Oversight and Reform about pricing practices.

On Nov. 20, the Centers for Medicare & Medicaid Services (CMS) issued an interim final rule that implements President Trump's Most Favored Nation executive order, which pegs Medicare Part B payments for certain drugs to the lowest price paid in other economically advanced countries. On the same day, HHS announced that it had finalized a rule to eliminate the current system of rebates for prescription drugs under Medicare Part D.

In the press announcements, HHS Secretary Alex Azar indicated that the most favored nation pricing would create significant savings for consumers and that the final rule eliminating Medicare Part D rebates to pharmacy benefit managers would resolve a "perverse incentive" and create a "safe harbor" that protects discounts at the point of sale and creates savings to patients that could total nearly 30% based on the nearly $40 billion in Part D rebates from last year.

While these rules tend to reinforce the current administration's position on price controls, it remains to be seen whether they will ever be implemented. Implementation of the interim final rule for the Most Favored Nation executive order has already been enjoined by several district courts until the notice and comment procedures required by the Administrative Procedures Act are completed.

Orange Book Reform Legislation

On March 5, 2019, Rep. Robin Kelly, D-Ill., introduced H.R. 1503 – 116th Congress: Orange Book Transparency Act of 2020. The bill amends the Federal Food, Drug, and Cosmetic Act (FD&C Act) to require:

- Prompt removal of certain patents from the Orange Book that have been invalidated by a ruling of the Patent Trial and Appeal Board at the U.S. Patent and Trademark Office USPTO)
- FDA to solicit public comments regarding the types of patent information that should be listed in the Orange Book and to transmit to Congress an evaluation of those comments, including recommendations about the types of patent information that should be included on or removed from the list
- The General Accountability Office (GAO) to conduct a study that analyzes certain patents with claims relating to devices listed in the Orange Book and evaluate the extent to which listing those patents has affected the timing for the entry of generic drugs into the market, and to submit the report to the Congress within one year of enactment

The bill passed both the House and the Senate on Dec. 10, 2020, and was signed into law Jan. 5, 2021.

Over-the-Counter (OTC) Reform

On March 27, 2020, the president signed into law H.R. 748, the Coronavirus Aid, Relief, and Economic Security Act, or the CARES Act. The law includes OTC Monograph Reform provisions to reform and modernize the OTC monograph drug development and review process. The law replaces the rule-making process with an administrative order process to add, remove or change an OTC monograph. The administrative order process is expected to improve efficiency, timeliness and predictability in the OTC Drug Review process. The law also provides FDA with user fees to support OTC monograph drug activities.

Intended Use

In September, FDA published a proposed rule to amend current medical product "intended use" regulations to clarify the types of evidence it would consider when determining a product's intended use as a drug or device. In their current form, the regulations created confusion as to whether knowledge of an unapproved or off-label use of an approved product automatically triggers a new intended use, for which FDA clearance or approval is required. The proposed rule confirms FDA's long-standing position that relevant sources of evidence (including knowledge) may be used to determine intended use, but clarifies that knowledge alone of off-label use would not create a new intended use. (Read our At-a-Glance on the proposed rule here.)

HIPAA Privacy Rule

On Dec. 10, 2020, HHS issued a Notice of Proposed Rulemaking (NPRM) that contains significant changes to the Health Insurance Portability and Accountability Act (HIPAA). These changes provide increased rights allowing individuals to access their protected health information (PHI) as well as increasing permissible disclosures of PHI. The NPRM contains a 60-day period in which interested parties may provide comments.

Patient Assistance Programs

The OIG issued several advisory opinions that addressed the provision of financial assistance to patients by pharmaceutical manufacturers.

OIG Advisory Opinion No. 20-02: Provision of Financial Assistance for Travel, Lodging and Other Patient Expenses. OIG approved certain lodging and travel assistance offered by a pharmaceutical manufacturer to patients being administered the manufacturer's drug during the post-administration period when the patient would be most at risk for reactions and require monitoring. While the arrangement implicated the Anti-Kickback Statute (AKS) and the civil monetary provision related to beneficiary inducements, OIG indicated that it would not impose sanctions related to the arrangement. Read our At-a-Glance on Advisory Opinion 20-02 here.)

OIG Advisory Opinion No. 20-05. OIG declined to approve a manufacturer's request to subsidize the copay obligations of Medicare patients through the offer of a subsidy card to beneficiaries in return for the beneficiaries' purchase of the manufacturer's medication. In its Sept. 18, 2020, opinion, OIG characterized the offer of the subsidy card as a "quid pro quo," involving remuneration to an individual to induce them to purchase a drug for which payment may be made under a federal health care program. Even though it recognized that the proposed arrangement could help individual beneficiaries access needed medications, OIG concluded that the subsidy would present many of the traditional risks of fraud and abuse that the federal AKS was designed to prevent, including increased costs to federal health care programs, beneficiary steering and anti-competitive effects, and interference with or skewing of clinical decision-making.

Misbranding of Boxed Warning Drug Product

The Office of Prescription Drug Promotion (OPDP) issued six enforcement letters this year, including three warning letters to pharmaceutical companies for making false and misleading claims that caused a drug product to be misbranded. The warning letters were issued for drug products with boxed warnings, where the violations raised public health concerns.

Outlook Pharmaceuticals Inc. OPDP issued a Warning Letter dated Feb. 21, 2020, to Outlook Pharmaceuticals relating to claims for its PROCENTRA (dextroamphetamine sulfate) oral solution, CII product (ProCentra), that were made on a sponsored link on Google. OPDP determined that the sponsored link was false or misleading because it presented information about the benefits of ProCentra but failed to include any risk information, causing the drug to be misbranded within

the meaning of the FD&C Act. OPDP also noted that the violations were especially concerning from a public health perspective because they create a misleading impression about the safety of ProCentra, a Schedule II controlled substance used in the vulnerable pediatric patient population, with a boxed warning that describes the high potential for abuse and states that administration of amphetamines for prolonged periods of time may lead to drug dependence and that misuse may cause sudden death or serious cardiovascular adverse events.

Sprout Pharmaceuticals Inc. OPDP issued a Warning Letter dated Aug. 31, 2020, to Sprout Pharmaceuticals relating to a direct-to-consumer radio advertisement for ADDYI (flibanserin) tablets, for oral use (Addyi). OPDP determined that the radio advertisement made false or misleading claims about the risks associated with Addyi and omitted other material facts, causing the drug to be misbranded within the meaning of the FD&C Act. OPDP also noted that the violations were concerning from a public health perspective because they create a misleading impression about the safety and effectiveness of Addyi, which has a boxed warning due to the risk of severe hypotension and syncope in certain settings. OPDP noted that the radio advertisement completely omitted all the contraindications associated with the use of Addyi and failed to disclose material risk information from the boxed warning.

Currax Pharmaceuticals LLC. OPDP issued a Warning Letter dated Sept. 22, 2020, related to a claims made on a sponsored link on Google for CONTRAVE (naltrexone hydrochloride and bupropion hydrochloride) extended-release tablets, for oral use (Contrave). OPDP determined that the sponsored link was false or misleading because it presented efficacy claims for Contrave but failed to communicate any risk information, causing the drug to be misbranded within the meaning of the FD&C Act. OPDP also noted that the violations were especially concerning from a public health perspective because Contrave is a weight management drug product with multiple serious, potentially life-threatening risks, including a boxed warning that describes the risk of suicidal thoughts and behaviors. Consumers and patients who seek assistance with their weight loss goals should not be misled regarding the serious risks, expected benefits, and necessary nutritional and lifestyle modifications associated with the use of a weight management prescription drug product such as Contrave.

FDA also issued a multitude of warning letters to manufacturers for unapproved and misbranded products related to COVID-19 products and the unlawful sale of unapproved and misbranded opioids to U.S. consumers over the internet.

Safe Harbors

In November, OIG issued a final rule titled "Revisions to the Safe Harbors Under the Anti-Kickback Statute and Civil Monetary Penalty Rules Regarding Beneficiary Inducements." The rule results from the government's ongoing effort to examine federal regulations that potentially impede HCPs' efforts that otherwise would advance a transition to value-based care and improve the coordination of patient care across care settings in federal health care programs and the commercial sector. The final rule:

- Implements new safe harbors for value-based arrangements, patient engagement and support, and CMS-sponsored models
- Modifies existing safe harbors for cybersecurity technology and services, electronic health records, outcomes-based payments and part-time arrangements, warranties, and local transportation
- Codifies a new exception to the definition of "remuneration" under the Beneficiary Inducements Civil Money Penalty rule

Certain categories of entities, such as pharmaceutical manufacturers and compounding pharmacies, that are not typically on the front lines of care coordination and that pose a higher risk of fraud or abuse are ineligible to use the new safe harbors for value-based arrangements, outcomes-based payments, and patient engagement and support.

Transparency Reporting

Significant changes to data collection and reporting requirements of the Physician Payment Sunshine Act went into effect on Jan. 1, 2021, including:

- Expansion of covered entities to include five new provider types
  - Physician assistants
  - Nurse practitioners
  - Clinical nurse specialists
  - Certified registered nurse anesthetists (including anesthesiologist assistants)
  - Certified nurse midwives

- Expansion of nature of payment categories to include three new categories
  - Debt forgiveness
  - Long-term medical supply or device loan
  - Acquisitions
- Consolidation of nature of payment categories related to education programs
- Addition of reporting requirements for the "device identifier" component of the unique device identifier for medical supplies and devices

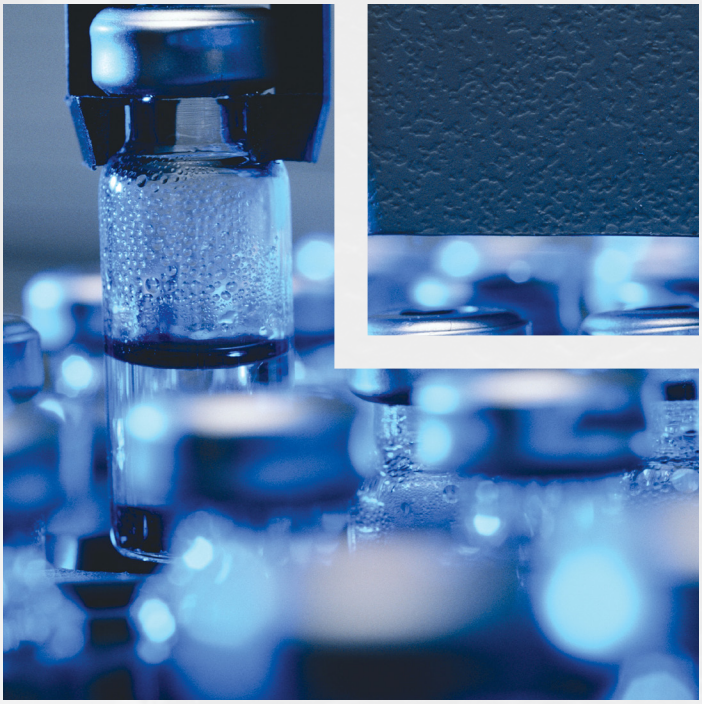
Manufacturers should already be addressing the complexities posed by these changes and expanding their system capabilities to address the changes. For instance, the addition of five new covered recipient categories will significantly increase the number of covered recipients reported through the Open Payments system. Likewise, it may be difficult for manufacturers to determine which advanced practice registered nurses to include for reporting purposes, as many nursing roles do not currently have a national provider identifier and the licensing framework for these nursing roles varies from state to state. The new device identifier reporting requirement likely will pose a significant challenge for device manufacturers because a single device with multiple components may have a lengthy list of related device identifiers.

Regulation of Cannabinoids

In August, the Drug Enforcement Agency (DEA) published an "Interim Final Rule for the Implementation of the Agriculture Improvement Act of 2018" conforming DEA's regulations to statutory amendments previously made to the Controlled Substances Act (CSA) via the Agriculture Improvement Act of 2018, otherwise known as the 2018 Farm Bill. Pursuant to the 2018 Farm Bill, hemp (with a delta-9-tetrahydrocannabinol concentration of not more than 0.3% on a dry weight basis) was legalized and removed as a Schedule I controlled substance from the CSA. The rule has important ramifications for both the hemp and cannabidiol industry, as it essentially legalizes the cultivation and sale of hemp at the federal level and removes hemp from DEA regulation.

The 2018 Farm Bill does explicitly preserve FDA's authority to regulate products containing cannabis or cannabis-derived compounds under the FD&C Act and Section 351 of the Public Health Service (PHS) Act. FDA will continue to treat products containing cannabis or cannabis-derived compounds as it does any other FDA-regulated product, and will subject these products to the same requirements as FDA-regulated products containing any other substance, regardless of whether the cannabis or cannabis-derived compounds are classified as hemp under the 2018 Farm Bill. FDA continues to publish guidance for industry and consumers on issues related to federal regulation of cannabis and cannabis-derived products.

Enforcement—Investigations, Suits And Settlements



DOJ continued to maintain its historically aggressive enforcement focus on violations of the AKS and the False Claims Act (FCA) in a variety of activities.

Copay Assistance Settlements and Litigation

In 2017, DOJ sent subpoenas to a large number of companies in connection with an ongoing inquiry related to the practice of pharmaceutical companies donating to and collaborating with independent charities—patient assistance programs, or PAPs—to provide financial assistance to Medicare patients to subsidize copay costs. The government's theory of liability is that these donations may violate the AKS as well as the FCA, because they are directed only to certain patients and induce the purchase of a company's drug product, resulting in federal health care program subsidization of the drug costs.

Since then, DOJ has continued to settle these matters with a number of pharmaceutical companies as well as the PAPs. DOJ also expanded the targets of its enforcement actions to include a specialty pharmacy, which until this year had not been a target of enforcement actions. In 2020, DOJ announced settlements with a number of organizations, including:

Biogen Inc. Biogen paid $22 million to end allegations that the pharmaceutical company violated the AKS by paying through two foundations, the Chronic Disease Fund (CDF) and The Assistance Fund (TAF), the copays of Medicare patients taking Avonex and Tysabri, Biogen's drugs to treat multiple sclerosis. (Read our At-a-Glance on the Biogen settlement here.)

Patient Services Inc. (PSI). PSI paid $3 million to settle allegations that it conspired with three pharmaceutical manufacturers—Insys, Aegerion and Alexion—to enable them to pay kickbacks to Medicare patients taking their drugs by providing access to patient data and allowing charitable funds to be supported by one manufacturer only. (Read our At-a-Glance on the PSI settlement here.)

Sanofi-Aventis U.S. Sanofi paid $11.58 million to settle allegations that it violated the AKS by making payments to TAF when the fund was closed. Thereafter, it instructed its hub to quickly refer as many eligible patients to TAF when it reopened so Sanofi would get the benefit of the funding to pay Medicare co-obligations of patients taking Lemtrada. (Read our At-a-Glance on the Sanofi settlement here.)

Novartis. Novartis paid $51.25 million to settle allegations that it utilized three independent PAPs to inappropriately funnel financial assistance to patients taking Novartis drugs. (Read our At-a-Glance on the Novartis settlement here.)

Advanced Care Scripts (ACS). ACS, a specialty pharmacy, paid $3.5 million to settle allegations that it maintained and shared data and updates with Teva Pharmaceuticals and its PAPs relating to the number of patients it helped obtain Medicare Part D and/or foundation copay coverage and the number of patients who were awaiting foundation copay coverage. Teva used this information to fund the PAP, and once ACS learned that the PAPs were funded, ACS sent patients' applications for copay coverage to the PAPs; most or all applications were approved.

Given the ACS settlement, it appears that DOJ's aggressive enforcement stance with respect to the relationships of pharmaceutical manufacturers with PAPs will continue and expand to include a focus on the activities of specialty pharmacies as well. Pharmaceutical manufacturers, PAPs and specialty pharmacies should

now ensure that their activities comply not only with prior OIG advisory bulletins but also with learnings from these latest settlements.

Not all PAP investigations are being settled, however, and some defendants are aggressively pushing back on federal lawsuits.

In 2017, Regeneron disclosed that it had received a subpoena in connection with charitable donations Regeneron made in 2013 and early 2014 to an independent charitable patient assistance foundation, to assist financially disadvantaged elderly patients with wet age-related macular degeneration in gaining access to treatments designed to prevent blindness. One of those treatments is Regeneron's EYLEA® (aflibercept) Injection (Eylea).

In 2020, the government filed an FCA lawsuit against Regeneron in which it alleged that the millions of dollars Regeneron provided to the PAPs were kickbacks intended to induce doctors to prescribe its macular degeneration drug Eylea. Regeneron released a press statement indicating that it had not engaged in illegal or wrongful conduct and that it would vigorously defend its donations to charitable foundations, as the intent of the donations was to help ensure that elderly patients have access to their prescribed medicines and not to influence the prescribing of Eylea.

Regeneron filed a motion to dismiss the lawsuit, which the Massachusetts federal court denied in December 2020. The court found that the government's claim—that Regeneron's contributions to the PAP were based on how much the fund subsidized copays for Eylea—sufficiently alleged violations of the AKS —and thus the FCA—and denied Regeneron's motion to dismiss, allowing the Government to proceed with its case.

Similarly, after the federal government sued Teva Pharmaceuticals USA Inc., claiming that the company used two copay foundations to funnel more than $300 million in illegal kickbacks to Medicare patients using Copaxone, its multiple sclerosis drug, Teva filed a motion to dismiss the case, arguing that the government could not demonstrate it had any control over how the copay groups used funds donated by Teva. The government responded that it had adequately alleged violations of federal laws and will be able to demonstrate that the company indirectly paid patients through two charitable foundations, CDF and TAF (which foundations have previously entered into settlements with the government for their related activities on behalf of Teva). The government also responded that it is not required to demonstrate that the two foundations actually agreed to promote Copaxone.

Nurse Educator Programs

In a surprise move in December 2018, DOJ exercised its discretion and sought to dismiss *qui tam* actions that were filed between July 2016 and July 2018 by the same corporate relators in seven different judicial districts, in which they claimed that nurse educator programs offered by several manufacturers violated the AKS. The federal government determined substantial time and expense would be necessary for the cases to proceed, with little upside, and acknowledged that patient support programs are in the public interest, especially regarding rare and devastating diseases with limited treatment options that are highly complex from a safety, efficacy and administration perspective.

In contrast, the California Department of Insurance last year reached a settlement with AbbVie Inc. in which the company agreed to pay $24 million and to make a number of changes to its Nurse Ambassador program, including:

- Implementation of training programs clarifying that Nurse Ambassadors offer only education and support to patients prescribed an AbbVie product
- Prohibition on describing services as an "extension" of the physician office
- Removal of performance evaluation or compensation tied to patient adherence to an AbbVie drug
- Prohibition on patient-specific discussions with providers and patient–insurance company discussions

(Read our At-a-Glance on the AbbVie settlement here.)

At this time, how regulatory bodies will view nurse educator programs, and what (if any) enforcement activities might ensue, remains unclear. The seemingly inconsistent policy and enforcement views between California and DOJ are stark. Further settlements or regulatory guidance may provide more insight into the enforcement environment surrounding these programs.

Speaker Programs

Several DOJ investigations and settlements focused on pharmaceutical sales and marketing activities involving sham speaker program activities.

Teva Sales and Marketing Inc. This subsidiary of Teva Pharmaceuticals paid $54 million to resolve claims brought by two whistleblowers that Teva was providing kickbacks in the form of fees and expensive meals to HCPs, (Read our At-a-Glance on the Teva settlement here.)

Novartis. In a blockbuster settlement, Novartis paid over $678 million relating to thousands of speaker programs and meetings it conducted over a nine-year period under the guise of educational content, when the events served as nothing more than a means to provide illegal inducements to HCPs, in violation of the AKS. Novartis made extensive factual admissions in the settlement relating to the conduct of these programs and agreed to strict limitations on any future speaker programs, including reductions to the amount it can spend on these programs. (Read our At-a-Glance on the Novartis settlement here.)

In a surprise announcement, the OIG issued "Special Fraud Alert: Speaker Programs" in November 2020, in which it identified a list of activities that, taken together or separately, could implicate violations of the AKS and subject manufacturers and HCPs to enhanced scrutiny. (Read our At-a-Glance on the OIG announcement here.)

OIG described those activities, taken substantially from the Novartis settlement, as follows:

- Programs with limited substantive information
- Speaker programs on the same or substantially the same topic or product, especially in situations involving no recent substantive change in relevant information
- Speaker programs covering the same information or indication over long periods of time
- Speaker programs held at a location that is not conducive to the exchange of educational information (e.g., restaurants or entertainment or sports venues)
- Speaker programs serving expensive meals or free alcohol
- Speaker programs attended by repeat attendees, prior speakers or attendees who don't have a legitimate business reason to attend
- Sales or marketing department "influence" on the selection of speakers
- Selection of HCP speakers or attendees based on their past or expected ability to generate company revenue, including the use of return-on-investment analyses to identify speaker program participants

With the issuance of the Special Fraud Alert, OIG is reminding manufacturers of its long-standing concern about speaker programs and their potential to influence HCPs to make or influence referrals of a manufacturers' products. Going forward, manufacturers should ensure that speaker programs are reviewed against the Special Fraud Alert and should include strong business justification for and strict controls around their implementation.

Opioid Settlements and Litigation

In furtherance of a continuing effort to aggressively pursue responsible parties involved in the exploding opioid epidemic, DOJ entered into several significant settlements.

Indivior. Indivior Solutions agreed to pay a $600 million settlement to resolve both civil and criminal liability relating to off-label promotion of and false statements related to Suboxone. (Read our At-a-Glance on the Indivior settlement here.) Together with previous settlements from related Indivior companies and Reckitt Benckiser Group PLC, Indivior's former parent company, total penalties paid collectively by these companies exceeded $2 billion.

In an example of the government's continued priority under the Yates Memorandum to pursue responsible executives as part of larger corporate investigations, DOJ also successfully pursued individuals at Indivior. Shaun Thaxter, former CEO of Indivior PLC, pleaded guilty to one count of misbranding in July 2020 and was ultimately sentenced to six months in prison and fined $600,000. Tim Baxter, the former medical director, pleaded guilty to one count of misdemeanor information related to false and misleading statements he made and was sentenced to six months' home detention.

Purdue Pharma LP. This year, Purdue agreed to a global resolution of criminal and civil investigations into its conduct and a civil resolution of the investigation into the conduct of individual shareholders from the Sackler family for fueling and furthering the opioid crisis through the sale and marketing of OxyContin. Purdue agreed to plead guilty to a three-count felony information charging it with

one count of dual-object conspiracy to defraud the United States and to violate the FD&C Act, and two counts of conspiracy to violate the AKS. The criminal settlement includes the largest penalties ever levied against a pharmaceutical manufacturer, including a criminal fine of $3.544 billion, an additional $2 billion in criminal forfeiture and a $2.8 billion civil settlement to resolve civil liability under the FCA.

Separately, individual members of the Sackler family agreed to pay $225 million to resolve their civil FCA liability arising from the alleged conduct of Dr. Richard Sackler, David Sackler, Mortimer D. A. Sackler, Dr. Kathe Sackler and Jonathan Sackler. This settlement resolves allegations that the Sacklers knew that the legitimate market for Purdue's opioids had contracted, but nonetheless requested that Purdue executives recapture lost sales and increase Purdue's share of the opioid market. The Sacklers approved a marketing program called "Evolve to Excellence," through which Purdue sales representatives intensified their marketing of OxyContin to extreme, high-volume prescribers to induce them to prescribe opioids for uses that were unsafe, ineffective and medically unnecessary, and that often led to abuse and diversion. The civil settlement also resolves the government's allegations that from approximately 2008 to 2018, Purdue transferred, at the Sacklers' request, assets into Sackler family holding companies and trusts that were made to hinder future creditors or were otherwise voidable as fraudulent transfers.

The Indivior and Purdue settlements build on the global settlement that DOJ struck with Insys Therapeutics in 2019, in which Insys agreed to pay $225 million to end criminal and civil investigations tied to allegations that it used speaker programs to bribe doctors to prescribe the opioid spray Subsys. Rather than educating HCPs on the benefits of the drug, the speaker programs were nothing more than an opportunity to funnel cash and other perks to HCPs in exchange for writing more prescriptions and prescribing higher dosages of Subsys.

In addition to the corporate settlement with Insys, a Boston jury convicted five former Insys executives, including its onetime-billionaire founder John Kapoor, of a racketeering conspiracy. To date, a total of eight company executives were convicted or pleaded guilty in Massachusetts federal court and have been sentenced.

DOJ will continue to aggressively pursue manufacturers, pharmacies, distributors and individuals it deems responsible for their role in creating the opioid crisis, and we expect to see more investigations, enforcement and settlements as the crisis continues. We also expect that organizations will resist the government investigations in ways similar to those indicated by Walmart, however. In October, Walmart Inc. sued the federal government in an attempt to strike a preemptive blow against what it described as an impending opioid-related civil lawsuit. Walmart claims that the federal government is looking to scapegoat it for the government's own regulatory and enforcement failures in combating the opioid crisis. Walmart seeks a declaratory judgment that the government has no lawful basis for seeking civil damages from the company based on claims that Walmart pharmacists filled valid prescriptions that they should have known raised red flags.

Off-Label

DOJ continues to pursue investigations into off-label marketing activities that give rise to FCA violations.

DUSA Pharmaceuticals agreed to pay $20.75 million to resolve allegations that it caused physicians to submit false claims to federal health care programs by knowingly promoting an off-label administration process for its Levulan Kerastick drug, in contravention of its approved label. (Read our At-a-Glance on the settlement here.)

Medical Device Business Services Inc., a Johnson & Johnson (J&J) unit, and the Gores Group, a private equity firm, agreed to pay a combined $11.5 million to resolve FCA allegations that Therakos Inc., a former J&J subsidiary, improperly marketed a cancer treatment for off-label uses in children when J&J owned the company and after the Gores Group bought it. The purported misconduct occurred between 2006 and 2015.

Kickbacks and Transparency Violations

In an enforcement first, Medtronic agreed to pay $8.1 million to resolve FCA allegations and an additional $1.1 million to resolve allegations that it violated Open Payments transparency reporting requirements by failing to accurately report to CMS payments it made to a neurosurgeon for social events, expensive meals and alcohol. This is the first enforcement action taken by DOJ to include violations of the Open Payments transparency reporting requirements. (Read our At-a-Glance here.)

Foreign Corrupt Practices

Outside of the United States, DOJ and the Securities Exchange Commission (SEC) continued to pursue violations by pharmaceutical companies of the anti-bribery and books and records provisions of the Foreign Corrupt Practices Act (FCPA).

Novartis Hellas S.A.C.I. (Novartis Greece) and Alcon Pte Ltd. These related companies paid a combined total of more than $233 million to settle FCPA violations in Greece and Vietnam, with Novartis AG, the parent company, agreeing to disgorge more than $112 million in profits for activities associated with improper payments made to foreign officials in Greece, Vietnam and South Korea. (Read our At-a-Glance on the settlement here.)

Alexion Pharmaceuticals. Alexion paid $21.4 million to the SEC to settle allegations that it paid bribes to officials in Turkey, Russian, Brazil and Colombia to influence prescription of Soliris and that it lacked sufficient internal accounting controls to detect and prevent these payments. (Read our At-a-Glance on the settlement here.)

2021—What To Expect

If 2020 is any indication, we certainly can't predict with any certainty what will happen in 2021, but a number of areas do deserve close monitoring by the life sciences industry.

HHS

President-elect Biden's choice to head the HHS, California Attorney General Xavier Becerra, is known to be a supporter and defender of the Affordable Care Act (ACA). Becerra led the state coalition defending the ACA from the Trump administration's latest effort to overturn it, a legal case currently with the U.S. Supreme Court. He will oversee the coronavirus response as the United States begins a mass vaccination effort. He is also committed to lowering drug prices by challenging patent protections and negotiating patent infringement settlements.

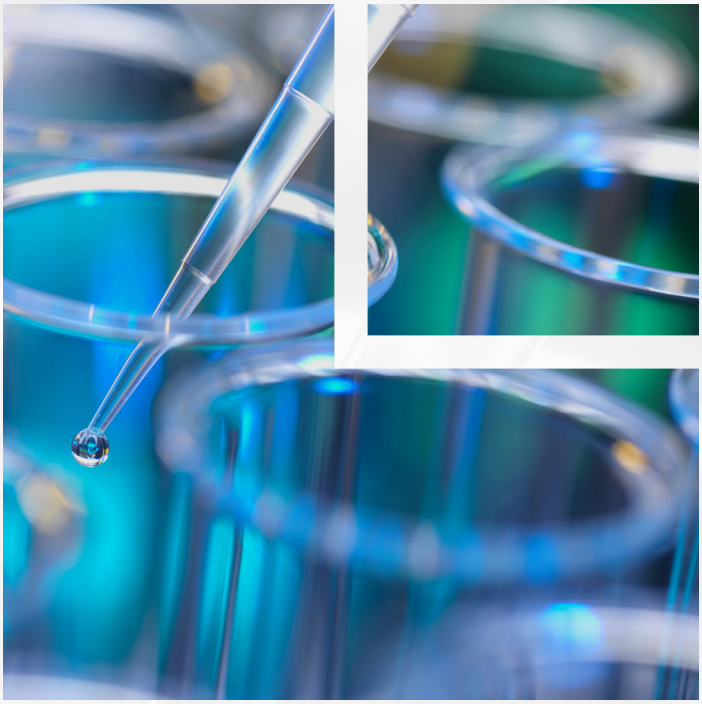
We would also expect that a 2021 focus for HHS will be to revive public health policies and practices related to pandemic planning, strengthen federal and state partnerships related to pandemic preparedness, and provide the leadership necessary for the success of these activities. These activities align with recently published HHS priorities that reflect overarching challenges affecting multiple HHS programs and responsibilities:

- Safeguarding public health
- Ensuring the financial integrity of HHS programs
- Delivering value, quality and improved outcomes in Medicare and Medicaid
- Protecting the health and safety of HHS beneficiaries
- Harnessing data to improve health and well-being of individuals
- Improving collaboration to better serve the nation

FDA

In conjunction with Tom Abrams' retirement and the appointment of Catherine Gray as OPDP acting director, FDA announced that OPDP's priorities for 2021 include continuing a risk-based monitoring and compliance approach focused on:

- National public health issues such as the opioid and COVID-19 crises



- Approved products under a risk evaluation and mitigation strategy program
- Products with boxed warnings

Industry analysts suggest that the other priorities will include first-impression launch materials for newly approved drugs, newly approved uses of approved products, products that have been the subject of previous compliance letters, products cited in complaints and products promoted with far-reaching campaigns. With respect to core launch materials, OPDP has added a five-day screening period during which the agency will confirm that a submission is complete and consists of core launch materials that represent the core introductory messaging for a new product.

Enforcement

We expect that DOJ will continue to focus significant resources on investigations of AKS and FCA violations by life sciences companies, with a continued focus on PAPs, speaker programs, off-label promotion and other activities designed to induce the prescribing of a company's products in contravention of federal law. It will also be interesting to see whether HHS' announcement of a False Claims Act Working Group to enhance the working partnership with DOJ and OIG to combat fraud and abuse will actually contribute to an increase in investigations and enforcement activities in the life sciences industry.

The Team

Scott Liebman
Chair, FDA Regulatory
& Compliance;
Co-Chair, Life Sciences
T: +1.212.407.4838
sliebman@loeb.com

James Czaban
Partner
T: +1.202.618.5007
jczaban@loeb.com

Eve Costopoulos
Of Counsel
T: +1.212.407.4187
ecostopoulos@loeb.com

Dominick DiSabatino
Associate
T: +1.202.925.5429
ddisabatino@loeb.com

Rachel Gartner
Associate
T: +1.212.407.4234
rgartner@loeb.com

Alexandra Kitson
Associate
T: +1.212.407.4951
akitson@loeb.com

PHOTO
UNAVAILABLE

Alison Mulry
Associate
T: +1.212.407.4121
amulry@loeb.com

Jeremiah Miah
Regulatory Specialist
T: +1.212.407.4239
jmiah@loeb.com

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