MAY 10, 2022

And So It Begins: House Energy and Commerce Leaders Unveil FDA User Fees Legislative Package

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On May 4, 2022, House Energy and Commerce ("E&C") Committee leaders unveiled the legislative package to reauthorize the U.S. Food and Drug Administration ("FDA" or the "Agency") user fee agreements (the "House Draft"). As described by E&C, the bipartisan agreement reauthorizes user fees and "includes many provisions . . . to support patients by lowering costs and providing a clear path for innovators, such as improvements and program integrity for Accelerated Approval, requirements regarding clinical trial diversity, policies to improve generic drug competition, and authorities to strengthen supply chains through accountability in FDA's inspections programs."[1] The E&C package is just the opening act, with changes inevitable as the bill makes its way out of Committee and the Senate version still to come.

BACKGROUND ON USER FEE PROGRAMS

The Prescription Drug User Fee Act ("PDUFA"), the Medical Device User Fee Act ("MDUFA"), the Generic Drug User Fee Act ("GDUFA"), and the Biosimilar User Fee Act ("BsUFA") (collectively the "user fee programs") authorize FDA to collect user fee payments for the review of certain applications, which can facilitate timely access to safe and effective drugs and devices. The user fee programs must be reauthorized every five years, with the current authorizations ceasing to be effective on October 1, 2022. Prior to reauthorization, FDA and regulated industry negotiate proposed user fees and FDA performance goals, which are then presented as recommendations to the E&C Committee and the Senate Health, Education, Labor, and Pensions ("HELP") Committee and to the public.[2] It has become typical for Congress to bundle additional measures to the reauthorizing legislation too, which generally reflect congressional, FDA, and other stakeholder priorities. This round is no exception, based on the language of the House Draft, which reflects E&C's priorities. Stay tuned for more updates as we expect the Senate HELP Committee to release its version soon.

HIGHLIGHTS FROM THE E&C LEGISLATIVE PACKAGE

The House Draft includes numerous and varied provisions that run the gamut from allowing biological products to be designated as a qualified infectious disease product (although not to be eligible for accompanying exclusivity)[3] to authorizing FDA to disclose specific information to help

facilitate generic drug development.[4] The draft is also notable for its omissions. It leaves out several items previously raised as possibilities for inclusion, including cosmetics reform,[5] new pathways for biologics,[6] and in vitro clinical tests.[7] The following discussion highlights some of the most noteworthy provisions from the House Draft.

Accelerated Approval. Under the current accelerated approval provisions,[8] FDA can approve a drug that is intended to treat a serious or life-threatening disease or condition and that provides a meaningful advantage over available therapies based on a surrogate endpoint or intermediate clinical endpoint that is "reasonably likely"[9] to predict a drug's intended clinical benefit.[10] FDA requires the sponsor of an accelerated approval drug to conduct a post-approval confirmatory study (*i.e.*, a study that will verify and describe the relationship between the endpoint and the anticipated expected clinical benefit).[11] When a completed post-approval study validates the surrogate or intermediate clinical endpoint and verifies the expected clinical benefit, the accelerated approval will be converted to a "traditional approval."[12] On the other hand, if the sponsor fails to timely complete a post-approval study, or if such study fails to confirm the anticipated clinical benefit, FDA has the authority to withdraw the accelerated approval.[13]

There has been a lot of scrutiny of this pathway recently, including that related to costs associated with accelerated approval drugs. One line of criticism in particular has focused on the issue of "dangling" accelerated approvals—approvals that are not converted to traditional approval (*i.e.*, the requisite study was not completed or did not confirm the anticipated clinical benefit) but for which FDA has not initiated withdrawal procedures.[14] FDA currently has the authority to withdraw accelerated approval drugs using expedited withdrawal procedures prescribed in regulations,[15] but FDA has not promulgated such specific regulations. In the extremely rare instances in which FDA has initiated withdrawal proceedings, they have been lengthy and resource intensive. Section 804 of the House Draft would provide a statutory expedited withdrawal process that would require: (i) due notice; (ii) an explanation for the proposed withdrawal; (iii) an opportunity for the sponsor to meet with the FDA Commissioner (or their designee); and (iv) an opportunity to submit a written appeal to the FDA Commissioner (or an independent designee).[16]

The House Draft would also codify certain programmatic requirements for accelerated approval, including:

- Authorizing FDA to require the sponsor to have commenced a post-approval study or studies at the time of accelerated approval;[17]
- Making explicit that sponsors can use real world evidence to meet post-approval study requirements;
- Establishing specific labeling requirements for accelerated approval drugs (high level labeling requirements were previously articulated in FDA guidance);[18]
- Directing FDA to define the conditions for each sponsor's post-approval studies (which can include enrollment targets, study protocols, milestones, and the study completion target date) at the time of accelerated approval, and requiring sponsors to report their progress to FDA every 180 days until study completion or termination—a more stringent requirement than that currently required by FDA's regulations;[19] and
- Ordering FDA to explain on its website any decision not to require a sponsor to conduct a post-approval study.[20]

Section 804 of the House Draft is also notable for what it does not include: an automatic expiration provision for accelerated approval drugs, for example, which had been discussed in an earlier draft bill proposed by E&C Chairman Rep. Frank Pallone Jr.[21] That draft would have caused an accelerated approval to automatically expire one year after the target completion date of the post-approval study, unless the study confirmed the anticipated clinical benefit or FDA determined that the sponsor had made adequate progress toward completion. Instead, the House Draft went in another direction, focusing on FDA's oversight of the post-approval studies and paving FDA's path to expedited withdrawal.

Clinical Trial Diversity. In recent years, FDA has engaged in various efforts to increase enrollment of underrepresented populations in clinical trials, including through its recently issued draft guidance, "Diversity Plans to Improve Enrollment of Participants from Underrepresented Racial and Ethnic Subgroups in Clinical Trials."[22] Title V, Improving Diversity in Clinical Trials, would provide FDA with additional tools to achieve this important goal. Under section 501 of the House Draft, in order for new drugs, biological products, and devices to be eligible for the exemption for investigational use under investigational new drug applications ("INDs") and investigational device exemptions ("IDEs"), as applicable, sponsors

would be required to submit a diversity action plan; FDA may waive the requirement if it determines that a waiver is necessary based on what is known about the prevalence of the disease in terms of the patient population. The diversity action plan would include the sponsor's goals for enrollment in the clinical investigation, the rationale for such goals, and an explanation of how the sponsor intends to meet such goals. Under the House Draft, FDA would be required to issue a new or update an existing draft guidance 12 months after the date of enactment (with final guidance to publish not later than six months after the comment period closes) that provides recommendations on the content and format of the diversity action plans and how sponsors should report their progress to the Agency. Although the House Draft would not provide any additional authority to require post-approval studies or postmarket surveillance, FDA would be directed to evaluate whether any such additional authority is needed to ensure that sponsors conduct post-approval studies or postmarket surveillance when enrollment goals in their diversity action plans are not met.[23] Additionally, section 504 would require annual reports from FDA on the progress to increase diversity in clinical trials and studies.

Inspections. The COVID-19 public health emergency revealed limitations and challenges related to FDA's inspections authorities, resulting in, among other things, delayed FDA actions on applications and worries about a backlog of inspections.[24] It is thus unsurprising that many provisions in the House Draft are directed at addressing these limitations. For example, section 721 would expand the use of so-called Section 704(a)(4) Records Requests for records and documents provided in advance or in lieu of an inspection to device establishments, closing a gap in FDA's inspection authority exposed by the COVID-19 pandemic.[25] Further, section 723 would to provide FDA explicit authority to rely on records and other information collected under Section 704(a)(4) of the FD&C Act[26] to satisfy requirements pertaining to preapproval or risk-based surveillance inspections, or to resolve deficiencies found in such inspections. This change, if enacted, would help avoid repeats of the pandemic-caused delays in approval of marketing applications because FDA was unable to safely conduct in-person inspections. Section 721 also appears directed to providing more certainty to regulated industry, requiring FDA to include a rationale for Section 704(a)(4) Records Requests and to issue guidance describing the circumstances in which the Agency would make such requests, the processes for responding electronically or in physical form, and the factors the Agency intends to consider in evaluating whether such records and other information are provided in a reasonable timeframe, within reasonable limits, and in a reasonable manner. Relatedly, section 729 would provide more granular reporting categories to the annual report on inspections previously required under FDA Reauthorization Act of 2017.[27]

Additionally, the House Draft would also expand section 809(a)(1) of the FD&C Act,[28] which provides the underpinning for FDA's U.S. and European Union Mutual Recognition Agreement ("MRA"). Under the existing MRA, FDA can enter into arrangements and agreements with foreign governments (or government agencies) to recognize certain inspections of foreign establishments to facilitate risk-based inspections. FDA has long planned to expand the MRA to include preapproval inspections,[29] and the House Draft would make explicit FDA's authority to do so.

Orphan Drug Exclusivity ("ODE"). In order to stimulate development of drugs to treat rare diseases and conditions, the Orphan Drug ("ODA") provides several incentives for orphan-designated drugs.[30] The primary incentive is a seven-year period of exclusivity during which FDA cannot approve a subsequent application for the "same drug for the same rare disease or condition" for seven years, except in narrowly prescribed circumstances.[31] In the wake of a recent Eleventh Circuit decision rejecting FDA's interpretation, section 811 of the House Draft would revise the ODA to codify FDA's long-standing interpretation, tying the scope of orphan drug exclusivity explicitly to the "indication or use for which the Agency has approved or licensed the drug." This is not the first time Congress has employed the user fee reauthorization process to codify FDA's interpretation of the ODA. Indeed, during the previous user fee cycle, section 607 of the FDA Reauthorization Act ("FDARA") amended section 527 of the FD&C Act, in the wake of an adverse court opinion,[32] to clarify FDA's authority to require a demonstration of clinical superiority for a second or subsequent "same drug for the same rare disease or condition" to be awarded orphan drug exclusivity.[33]

Device Classification. The FD&C Act defines both "drug" and "device."[34] Whether a product is definitionally considered a drug or a device will inform which of the different regulatory frameworks applies, but this critical decision can be muddied by the fact that the statutory definitions overlap. In 2021, the D.C. Circuit was presented with the question as to whether FDA has discretion to regulate a product that meets both definitions—in particular, a specific contrast imaging agent—under the regime of its choosing.[35] The court concluded that the Agency did not: "[e]xcepting combination products … devices must be regulated as devices and drugs—if they do not also satisfy the device definition—must be regulated as drugs."[36] Subsequent to the decision, FDA issued a Federal Register notice,[37] indicating, among other things, that it is reexamining whether individual imaging agents meet the device definition and that it intends to regulate products that

meet both the device and drug definition as devices, "except where the statute indicates that Congress intended a different classification." FDA received upwards of three dozen comments to that Federal Register notice,[38] but that feedback could now be complicated by section 803 of the House Draft, which would alter the statutory language to define any contrast agent, radioactive drug, or OTC monograph drug as a drug, and not a device.

While this provision resolves the status of contrast imaging agents, questions about the impact of *Genus* on other classification decisions remain. For example, FDA recently published guidance in which the Agency asserted that, as a result of the *Genus* case, "the language in § 200.50(c) indicating that ophthalmic dispensers are regulated as drugs when packaged with ophthalmic drugs is now obsolete, because these articles meet the device definition," and so FDA now intends to regulate such products—including OTC monograph ophthalmic drugs—"as drug-led combination products."[39] In a strange twist, it seems the House Draft (which, as noted, extends to OTC monograph drugs) could raise questions about the guidance's position on the obsolescence of § 200.50.

Biosimilar Reporting Requirements. Section 801 of the House Draft would extend to biologics (including biosimilars) current section 506I of the FD&C Act,[40] which requires holders of New Drug Applications ("NDAs") and Abbreviated New Drug Applications ("ANDAs") to provide certain marketing status notifications to FDA and the Agency to update the Orange Book to reflect such notifications. The Biological Product Patent Transparency section of the Consolidated Appropriations Act, 2021[41] required FDA to publish certain information about listed biological products, including "the licensure status, and, as available, the marketing status."[42] The holders of Biologics License Applications ("BLAs") are already subject to certain reporting requirements that can bear on marketing status, including notification of permanent discontinuation or interruption in the manufacture of certain life-saving biological products,[43] submission of distribution reports,[44] and notification of the withdrawal from sale of an approved biological product.[45] However, the proposed language would also require BLA holders to notify the Agency 180 days prior to withdrawing a biological product from sale or if a biological product will not be available for sale within 180 days of approval. BLA holders would also be subject to a one-time reporting requirement, confirming to the Agency whether all of its biological products listed in the Purple Book as not discontinued are available for sale or whether one or more of such products has been withdrawn from sale or has never been available for sale. The Agency would be required to update the Purple Book to reflect this information, helping to ensure the Purple Book contains comprehensive information about the status of biological products. Such up-to-date status information can be critical to biosimilar manufacturers, as the lack of availability of a reference product can add significant risk to a biosimilar development program. This is particularly true because FDA has not addressed whether, or how, an applicant could demonstrate biosimilarity (or interchangeability) to a reference product that is no longer marketed.

Real World Evidence ("RWE"). In December 2016, the 21st Century Cures Act[46] pushed FDA to think harder on the use of RWE[47] in regulatory decision making for drugs, including by directing FDA to create a "framework for a program to evaluate the potential use of RWE" to support the approval of a new indication of an already-approved drug or to help satisfy post-approval study requirements. FDA has subsequently released its Framework for FDA's Real-World Evidence program for drugs in 2018, and, more recently, released a series of guidance documents on the use of real world data ("RWD") on drug products to generate RWE, including two draft guidances published in the fall of 2021, which addressed the use of electronic health records and medical claims data intended to derive RWE in support of a demonstration of safety or effectiveness as well as considerations related to mapping RWD to study data submission standards.[48] Additionally, FDA's Center for Devices and Radiological Health ("CDRH") has been focused on the use of RWD and RWE in regulatory decision-making for several years. Prior to the drug-related RWE guidances, CDRH released a final guidance on Use of Real-World Evidence to Support Regulatory Decision-Making for Medical Devices in August 2017,[49] followed by a March 2021 report describing 90 situations in which CDRH used RWE in regulatory decision-making.[50] These developments, along with the COVID-19 public health emergency (and its impacts on clinical trials), have increased the spotlight on RWE.

The House Draft seems to be contemplating some potential new uses of RWE, including for confirming clinical benefit for accelerated approval drugs, as mentioned above, and by including RWE in topics for consideration and solicitation of input during public workshops, including those regarding enhancing clinical trial diversity (section 503 of the House Draft) and supporting validation of efficacy endpoints (section 804 of the House Draft). Section 805 of the House Draft seeks to continue this trend, directing the Agency to issue or revise existing guidance within one year from enactment on considerations for use of RWD and RWE to support regulatory decision making for both drugs and devices. Importantly, the guidance would address the use of such data and evidence to support device clearances, approvals, and De Novo classifications and new drug applications, where previously the utility of RWE for drugs generally has been limited to post-

approval supplements and similar considerations. Section 805 also expressly contemplates a role for RWE in the approval of drugs and devices previously authorized for emergency use under section 564 of the FD&C Act,[51] and the provision would further direct the Agency to include in a report to Congress whether, for authorized products being converted to approved or cleared products, RWE was submitted and either supported a regulatory decision or was determined to be insufficient to support a regulatory decision.

Misbranding. Under section 502(a)(1) of the FD&C Act,[52] a drug or device shall be deemed to be misbranded if its labeling is false or misleading in any particular. However, to facilitate communications with payors, formulary committees, and other similar entities that can inform coverage and reimbursement decisions, the statute also includes a safe harbor, under which health care economic information (as defined in section 502(a)(2)(B) of the FD&C Act[53]) provided to such entities will not be considered false or misleading, assuming certain conditions are met. Under the current law, such health care economic information must be related to an indication *approved* for a *drug*. Section 809 of the House Draft would expand section 502(a)(1) of the FD&C Act to include devices, codifying a position FDA has already taken in guidance.[54] In addition, it would add a new subsection (subsection (gg)), which creates a similar safe harbor, but with respect to investigational drugs and devices (and investigational uses). Specifically, a drug or device would not be considered misbranded through the provision of "product information" (as described in subsection (gg)(2)) to payors, formulary committees, and other similar entities. As a result, payors, formulary committees, and other similar entities can engage in advance planning of coverage and reimbursement decisions. Section 809 would also require a GAO study on the provision and use of the information covered by the new subsection, including an analysis of the types of information communicated, whether a marketing application is submitted for the drug or device, and the timeframe between the initial communication and initial marketing of any such drug or device.

Cybersecurity. Cybersecurity of software in a medical device ("SiMD") and software as a medical device ("SaMD") is a topic that is increasingly the subject of attention by regulatory authorities worldwide. In fact, last month, CDRH issued a long-awaited draft guidance document on cybersecurity concerns in premarket submissions.[55] Section 807 of the House Draft would create a new section 524C in the FD&C Act that provides explicit statutory authority for that recent guidance, requiring device manufacturers to include specified information regarding the cybersecurity of their medical devices in premarket submissions.[56] This requirement would apply to a newly defined set of "cyber devices," which the House Draft defines as SaMD and SiMD and other devices that connect to the internet or are otherwise vulnerable to cyberattack. Section 807 would further amend the FD&C Act to specify that failure of a cyber device to comply with the premarket cybersecurity requirements would both be a prohibited act and constitute adulteration.

THE ROAD TO PASSAGE OF THE UFAS

The House will now continue to finalize its draft, a process that began on Friday, May 6, with the introduction of the "Food and Drug Amendments of 2022" (H.R. 7667), followed by mark up by the Health Subcommittee. The Senate will release, introduce, and mark up its own bill, on a parallel track. Both chambers of Congress must then resolve any differences between their proposals before the final bill is sent to the President for signature. The clock is ticking, as the current user fee authorizations cease to be effective on October 1, 2022.

King & Spalding LLP regularly counsels drug and device manufacturers and other life sciences companies on product development and the submission of drug, biological product, and device applications to FDA. Please let us know if you have any questions regarding the user fee reauthorization process or specific provisions.

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[1] *See* U.S. House Committee on Energy & Commerce, Press Release, E&C Leaders Unveil FDA User Fees Legislative Package (May 4, 2022), *available at* https://energycommerce.house.gov/newsroom/press-releases/ec-leaders-unveil-fda-user-fees-legislative-package.
[2] *See generally* section 736B(f)(4) of the FD&C Act (21 U.S.C. § 379h-2(f)(4)) (PDUFA); section 738A(b)(4) of the FD&C Act (21 U.S.C. § 379j-1(b)(4)) (MDUFA); section 744C(f)(4) of the FD&C Act (21 U.S.C. § 379j-43(f)(4)) (GDUFA); and section 744*I*(f)(2) of the FD&C Act (21 U.S.C. § 379j-53(f)(2)) (BsUFA).
[3] *See* House Draft § 705 (proposing to amend section 505E(a) of the FD&C Act (21 U.S.C. § 355f) and section 524A(a) of the FD&C Act (21 U.S.C. § 360n-1)).
[4] *See id.* § 601 (proposing to amend section 505(j)(3) of the FD&C Act (21 U.S.C. § 355(j)(3)).
[5] *See* Personal Care Products Safety Act, S. 2100, 117th Cong. (2021).
[6] *See* Pink Sheet, *Could US FDA User Feel Bill Include the Long-Sought 505(b)(2) Pathway for Biosimilars* (May 25, 2021), *available at* https://pink.pharmaintelligence.informa.com/PS144356/Could-US-FDA-User-Fee-Bill-Include-The-LongSought-505b2-Pathway-For-Biosimilars; *see also* Pink Sheet, *Woodcok Bemoans Lack of a "Biobetter" Provision in BPCIA* (Oct. 3, 2019), *available at* https://pink.pharmaintelligence.informa.com/PS140942/Woodcock-Bemoans-Lack-Of-Biobetter-Provision-In-BPCIA.
[7] Verifying Accurate Leading-edge IVCT Development Act, H.R. 4128, 117th Cong. (2021).
[8] *See* section 506 of the FD&C Act (21 U.S.C. § 356), as amended by section 901 of the Food and Drug Administration Safety and Innovation Act (Pub. L. 112-144); *see also* 21 C.F.R. part 314, subpart H and 21 C.F.R. part 601, subpart E.
[9] *See* U.S. Food & Drug Admin., GUIDANCE FOR INDUSTRY: EXPEDITED PROGRAMS FOR SERIOUS CONDITIONS – DRUGS AND BIOLOGICS 15 (May 2014) ("Expedited Programs Guidance").
[10] 21 U.S.C. § 356(c); Expedited Programs Guidance at 19–22.
[11] *See* 21 U.S.C. § 356(c)(2); 21 C.F.R. §§ 314.510 & 601.41. In addition, accelerated approval sponsors must obtain preapproval of promotional materials prior to use in marketing.
[12] *See* U.S. Food & Drug Admin., GUIDANCE FOR INDUSTRY: LABELING FOR HUMAN PRESCRIPTION DRUG AND BIOLOGICAL PRODUCTS APPROVED UNDER THE ACCELERATED APPROVAL REGULATORY PATHWAY 5 (Jan. 2019).
[13] Section 506(c)(3) of the FD&C Act (21 U.S.C. § 356(c)(3)).
[14] Eva Temkin & Jonathan Trinh, FDA'S ACCELERATED APPROVAL PATHWAY: A RARE DISEASE PERSPECTIVE 20 (2021), *available at* https://rarediseases.org/wp-content/uploads/2021/06/NRD-2182-Policy-Report_Accelerated-Approval_FNL.pdf.
[15] Section 506(c)(3) of the FD&C Act (21 U.S.C. § 356(c)(3)).
[16] House Draft § 804.
[17] *Id.*
[18] *Id.*; *see* U.S. Food & Drug Admin., GUIDANCE FOR INDUSTRY: LABELING FOR HUMAN PRESCRIPTION DRUG AND BIOLOGICAL PRODUCTS APPROVED UNDER THE ACCELERATED APPROVAL REGULATORY PATHWAY 3 (2019).
[19] House Draft § 804; *see* 21 C.F.R. § 314.81(b)(2)(vii) ("The status of these postmarketing studies shall be reported annually until FDA notifies the applicant, in writing, that the agency concurs with the applicant's determination that the study commitment has been fulfilled or that the study is either no longer feasible or would no longer provide useful information.").
[20] House Draft § 804.
[21] Accelerated Approval Integrity Act, H.R. 6963, § 2 (2022) (introduced March 2022 by E&C Chairman Rep. Frank Pallone Jr.).
[22] U.S. Food & Drug Admin., DRAFT GUIDANCE FOR INDUSTRY: DIVERSITY PLANS TO IMPROVE ENROLLMENT OF PARTICIPANTS FROM UNDERREPRESENTED RACIAL AND ETHNIC POPULATIONS IN CLINICAL TRIALS (2022); *see also* Eva Temkin et al., Client Alert, *A Pandemic Silver Lining: FDA's New Guidance*

on Using Digital Health Technologies for Clinical Investigations (Feb. 7, 2022), *available at* https://www.kslaw.com/attachments/000/009/402/original/A_Pandemic_Silver_Lining_-_FDA's_New_Guidance_on_Using_DHTs_for_Clinical_Investigations.pdf?1644263853.

[23] House Draft § 502.

[24] *See* U.S. Food & Drug Admin., RESILIENCY ROADMAP FOR FDA INSPECTIONAL OVERSIGHT (May 2021), *available at* https://www.fda.gov/media/148197/download; *see also* U.S. Food & Drug Admin., AN UPDATE TO THE RESILIENCY ROADMAP FOR FDA INSPECTIONAL OVERSIGHT (Nov. 2021), *available at* https://www.fda.gov/media/154293/download.

[25] House Draft § 721.

[26] 21 U.S.C. § 374.

[27] FDA Reauthorization Act ("FDARA"), Pub. L. 115-42, § 902, 131 Stat. 1077 (2007).

[28] 21 U.S.C. § 384e(a)(1).

[29] *See* U.S. Food & Drug Admin., *Mutual Recognition Agreement / Frequently Asked Questions and Answers*" (Jan. 2021), *available at* https://www.fda.gov/media/103391/download.

[30] Section 526(a)(1) of the FD&C Act (21 U.S.C. § 360bb(a)(1)).

[31] Section 527(a) of the FD&C Act (21 U.S.C. § 360cc(a)).

[32] *See Depomed, Inc. v. U.S. Dep't of Health & Human Servs.*, 66 F. Supp. 3d 217 (D.D.C. 2014).

[33] In *Eagle Pharms., Inc. v. Azar*, 952 F.3d 323 (D.C. Cir. 2020), the court held that the language in section 527 (prior to the passage of FDARA) foreclosed FDA's conditioning eligibility for orphan drug exclusivity on a demonstration of clinical superiority. *See also Depomed*, 66 F. Supp. 3d 217.

[34] *See* section 201(g) and (h) of the FD&C Act (21 U.S.C. § 321(g) and (h)).

[35] *Genus Med. Techs. LLC v. U.S. Food & Drug Admin.*, 994 F.3d 631 (D.C. Cir. 2021). For additional information, *see* Eva Temkin et al., Client Alert, *Genus Medical Technologies LLC v. FDA: D.C. Circuit Holds FDA Cannot Regulate Devices as Drugs* (May 5, 2021), *available at* https://www.kslaw.com/news-and-insights/genus-medical-technologies-llc-v-fda-dc-circuit-holds-fda-cannot-regulate-devices-as-drugs.

[36] *Genus*, 994 F.3d at 644.

[37] 86 Fed. Reg. 43553, 43554 (Aug. 9, 2021).

[38] *See* Regulations.gov, Docket No. FDA-2021-N-0843, *Genus Medical Technologies LLC Versus United States Food and Drug Administration; Request for Information and Comments*, https://www.regulations.gov/docket/FDA-2021-N-0843.

[39] *See* U.S. Food & Drug Admin., GUIDANCE FOR INDUSTRY: CERTAIN OPHTHALMIC PRODUCTS: POLICY REGARDING COMPLIANCE WITH 21 CFR PART 4 (Mar. 2022).

[40] 21 U.S.C. § 356l.

[41] Consolidated Appropriations Act, 2021, Pub. L. 116-260, § 325, 134 Stat. 1182, 2936–38 (2020).

[42] *See* section 351(k)(9)(A)(i)(III) of the PHS Act (42 U.S.C. § 262(k)(9)(A)(i)(III), as amended by Subtitle C, Section 325, the Biological Product Patent Transparency Act, of the Consolidated Appropriations Act, 2021. For additional information on the Biological Product Patent Transparency Act, *see* Eva Temkin et al., *Client Alert, "Purple Book" Patent Listing Under Biological Product Patent Transparency Act: What is Required, and What to Expect?* (Apr. 7, 2021), *available at* https://www.kslaw.com/news-and-insights/purple-book-patent-listing-under-biological-product-patent-transparency-act-what-is-required-and-what-to-expect.

[43] Section 506C of the FD&C Act (21 U.S.C. § 356c) and 21 C.F.R. § 600.82.

[44] 21 C.F.R. § 600.81.

[45] *Id*. § 601.2(f).

[46] 21st Century Cures Act, Pub. L. 114-255, 130 Stat. 1033 (2016).

[47] RWE was defined in section 505F(b) of the FD&C Act (21 U.S.C. § 355G(b)) as data regarding the usage, or potential benefits or risks, of a drug derived from sources other than traditional clinical trials.

[48] *See* Eva Temkin et al., Client Alert, *A Magic Mixing Cauldron for the 21st Century: FDA's new guidances on using real-world data in regulatory decision-making* (Nov. 9, 2021), *available at* https://www.kslaw.com/attachments/000/009/198/original/A_Magic_Mixing_Cauldron_for_the_21st_Century_FDA%E2%80%99s_new_guidances_on_using_real-world_data_in_regulatory_decision-making.pdf?1636471472.

[49] *See generally* U.S. Food & Drug Admin., GUIDANCE FOR INDUSTRY: USE OF REAL-WORLD EVIDENCE TO SUPPORT REGULATORY DECISION-MAKING FOR MEDICAL DEVICES (Aug. 31, 2017).

[50] *See generally* U.S. Food & Drug Admin., EXAMPLES OF REAL-WORLD EVIDENCE (RWE) USED IN MEDICAL DEVICE REGULATORY DECISIONS (2021), *available at* https://www.fda.gov/media/146258/download.

[51] 21 U.S.C. § 360bbb–3.

[52] *Id*. § 352(a)(1).

[53] Section 502(a)(2)(A) of the FD&C Act (21 U.S.C. § 352(a)(2)(A)) defines "health care economic information" as any analysis (including the clinical data, inputs, clinical or other assumptions, methods, results, and other components underlying or comprising the analysis) that identifies, measures, or describes the economic consequences, which may be based on the separate or aggregated clinical consequences of the represented health outcomes, of the use of a drug. Such analysis may be comparative to the use of another drug, to another health care intervention, or to no intervention.

[54] *See* U.S. Food & Drug Admin., GUIDANCE FOR INDUSTRY: DRUG AND DEVICE MANUFACTURER COMMUNICATIONS WITH PAYORS, FORMULARY COMMITTEES, AND SIMILAR ENTITIES QUESTIONS AND ANSWERS 17 (June 2018).

[55] *See* Eric Henry et al., Client Alert, *FDA Issues Draft Guidance on Cybersecurity in Medical Devices: Quality System Considerations and Content of Premarket Submissions* (May 6, 2022), *available at* https://www.kslaw.com/attachments/000/009/653/original/FDA_Issues_Draft_Guidance_on_Cybersecurity_in_Medical_Devices_-_Quality_System_Considerations_and_Content_of_Premarket_Submissions.pdf?1651849394; *see generally* U.S. Food & Drug Admin., DRAFT GUIDANCE FOR INDUSTRY: CYBERSECURITY IN MEDICAL DEVICES: QUALITY SYSTEM CONSIDERATIONS AND CONTENT OF PREMARKET SUBMISSIONS (April 2022).

[56] House Draft § 807.