

Delays in Generic Drug Approvals Seen as Rates of Generic Drug Applications Increase

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Earlier this year, Dr. Margaret Hamburg, Commissioner of the U.S. Food and Drug Administration (FDA), spoke at the Generic Pharmaceutical Association's annual meeting and stated that generic drug applications are facing longer waiting times for approval than ever before.¹ Approximately 2,000 generic drug applications are currently pending approval.² Dr. Hamburg stated that the delays are due, in part, to a doubling of generic drug applications over the past ten years as well as a lack of needed FDA reviewers. Her solutions include increasing the number of FDA generic drug reviewers as well as instituting a user fee for generic drug applicants. Not only does the delay in approving generic drugs for use contribute to the rising cost of medical care in the country, it likely will continue to do so for years to come if the problem is not addressed.

Background/History

Prior to 1962, drug companies could obtain approval of generic drugs only by filing a New Drug Application (NDA).³ Filing an NDA requires extensive testing and clinical trials that prove that the drug is safe and effective. Since that time it was learned through research and congressional testimony that the cost and time to go through the NDA process had resulted in a very small number of generic drugs on the market. However, no legislative or administrative remedy was pursued to make it easier for generic drugs to get on the market.

Finally, in 1984, Rep. Henry Waxman of California and Sen. Orrin Hatch of Utah sponsored the Drug Price Competition and Patent Term Restoration Act (also known as the Hatch-Waxman Act).⁴ This Act amended the Food, Drug and Cosmetic Act (FDCA) outlining a method for generic drug manufactures to obtain approval of their drugs through an Abbreviated New Drug Application (ANDA).⁵ Filing an ANDA is much simpler than filing an NDA; an ANDA requires only bioavailability and bioequivalence data as opposed to the lengthy clinical trials required in NDA approval process, i.e., no safety and efficacy data is required.⁶ The Hatch-Waxman Act also contains a provision

¹ Natsha Singer, *Generics Face Longer Wait for Approval*, N.Y. TIMES, (Feb. 19, 2010), available at <http://www.nytimes.com/2010/02/20/business/20generics.html>; Commissioner Margaret Hamburg, *Remarks at Generic Pharmaceutical Association*, The U.S. Food & Drug Adm'n, Feb. 18, 2010, available at <http://www.fda.gov/NewsEvents/Speeches/ucm201833.htm>.

² Hamburg, *supra* note 1.

³ Gerald J. Mossinghoff, *Overview of the Hatch-Waxman Act and Its Impact on the Drug Development Process*, 54 FOOD AND DRUG L. J., 188 (1999), available at http://www.fdi.org/pubs/Journal%20Online/54_2/art2.pdf.

⁴ *Id.*

⁵ 21 U.S.C. § 355(j) (West 2009).

⁶ 21 U.S.C. § 355 (West 2009), 21 U.S.C § 320.1 (West 2009). *Bioequivalence* means the absence of a significant difference in the rate and extent to which the active ingredient or active moiety in pharmaceutical equivalents or pharmaceutical alternatives becomes available at the site of drug action when

that grants the first generic drug company to file an ANDA 180 days of market exclusivity.⁷ If the generic drug company desires to be the first to file, it must include in the ANDA a statement that either its drug will not infringe on the patent that protects the brand-name drug (paragraph III certification) or that the brand-name drug company's patent is invalid or unenforceable (paragraph IV certification).

The Hatch-Waxman Act additionally provides for a research exemption stating that performing research in preparation for FDA approval is not patent infringement as long as the drug is not brought to market until the brand-name patent expires (or until the patent is found to be invalid).⁸ This allows generic drug companies to work on making generic drugs without being liable for infringement of the patent so that the generic drug can hit the market as soon as the patent expires or as soon as/if the patent is found to be invalid.

Traditionally, patent protection is granted for 20 years.⁹ In exchange for the allowances provided to a generic drug company in the Hatch-Waxman Act, it also provides an extension of patent protection to the brand name drug companies if there is a delay in obtaining FDA approval. The extension is equal to one-half of the Investigation New Drug Period plus the New Drug Application Period for a maximum of five years.¹⁰

Brand-name drug companies have started to engage in the practice of marketing "authorized generics."¹¹ Authorized generics are generic drugs that are actually made by the brand name company. Less commonly, authorized generics are seen when brand-name companies give a license to a generic drug company to make the generic drug.

Enactment of the Hatch-Waxman Act changed the landscape of pharmaceuticals. The Act has made it more cost effective for pharmaceutical companies to bring generic drugs to the marketplace because they do not have to submit safety and efficacy data. Also, with the availability of generic drugs, there is now more competition in the pharmaceutical marketplace which aids in lowering costs of generic drugs as well. Today, generic drugs constitute approximately 75 percent of the drug marketplace in the United States. However only 15 percent of the money spent on drugs is spent on generic drugs.¹² Generic drugs have saved consumers over \$734 billion over the past ten years.¹³

administered at the same molar dose under similar conditions in an appropriately designed study. *See also*, U.S. Food & Drug Adm'n, *Orange Book Preface* from APPROVED DRUG PRODUCTS WITH THERAPEUTIC EQUIVALENCE EVALUATIONS (30th ed.), *available at* <http://www.fda.gov/Drugs/DevelopmentApprovalProcess/ucm079068.htm> (absorption must be within 80-125% of the brand name drug).

⁷ For 180 days after the brand name drug patent expires, the first to file generic company is the only generic drug company allowed to sell that particular drug.

⁸ 35 U.S.C. § 271(e)(1) (West 2009).

⁹ 35 U.S.C. § 154 (West 2009).

¹⁰ 35 U.S.C. § 156 (West 2009).

¹¹ John Thomas, CRS Report for Congress, *Authorized Generic Pharmaceuticals: Effects on Innovation*, Jan. 10, 2009, *available at* http://ipmall.info/hosted_resources/crs/RL33605_080110.pdf.

¹² *See* Singer and Hamburg, *supra* note 1.

¹³ Generic Pharmaceutical Ass'n, *Economic Analysis, Generic Pharmaceuticals 1999-2008: \$734 billion in Savings*, (May 2009), *available at* [http://www.gphaonline.org/sites/default/files/\\$734%20Billion%20in%20Generic%20Savings%20GPhA.pdf](http://www.gphaonline.org/sites/default/files/$734%20Billion%20in%20Generic%20Savings%20GPhA.pdf). *See also* Hamburg, *supra* note 1.

The Problem

Approval time of generic drug applications has nearly doubled and a large backlog has developed – despite the cost benefit of generic drugs across the country. Five years ago, generic drug applications were approved within 16.3 months with a backlog of approximately 1,000 applications.¹⁴ Currently, approvals take 26.7 months on average and the backlog is approximately 2,000 applications.¹⁵

Dr. Hamburg states that the dramatic rise in generic drug applications over recent years is unprecedented and the agency simply does not have the personnel to keep up. As a result, the FDA's capacity to adequately and timely review applications has not been possible.¹⁶

Solutions

One of the solutions to this problem offered by Dr. Hamburg is to increase FDA generic drug review resources.¹⁷ She states that the FDA has already used \$10 million dollars granted to it by Congress to hire 50 additional scientists in order to help with the backlog of applications (the annual budget for the Office of Generic Drugs has increased from \$41 million to \$51 million).¹⁸ However, she also states that she believes that user fees need to be implemented in order to address the problem.¹⁹ The user fees would be similar to the current user fees that brand-name drug companies must pay for approval of their pharmaceuticals (Prescription Drug User Fee Act-PDUFA).²⁰ Currently, user fees for brand-name drugs are \$1,405,500 for an application requiring clinical data and \$702,750 for applications that do not require clinical data.²¹ She argues that user fees will provide for more resources to speed up review process times and will provide for improved surveillance.²²

In response to Dr. Hamburg's remarks, the President and CEO of the Generic Pharmaceutical Association (GPhA), Kathleen Jaeger, stated that GPhA was amenable to a user fee and that it is willing to re-engage in negotiations regarding such fees so long as they are meaningful and provide measureable results.²³

¹⁴ Singer and Hamburg, *supra* note 1.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Hamburg, *supra* note 1.

²⁰ U.S. Food & Drug Adm'n, *Prescription Drug User Fee Act*, <http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/default.htm> (last updated Feb. 13, 2010).

²¹ 74 Fed. Reg. 55244 (Oct. 27, 2009). U.S. Food & Drug Adm'n, *Prescription Drug User Fee Rates for Fiscal Year 2010*, available at <http://www.fda.gov/downloads/ForIndustry/UserFees/PrescriptionDrugUserFee/UCM190505.pdf>.

²² *Id.*

²³ Generic Pharmaceutical Ass'n, Kathleen Jaeger, *Statement from GPhA President and CEO Kathleen Jaeger in Response to Remarks by FDA Commissioner Margaret Hamburg at the GPhA Annual Meeting*, ,

GPhA was created in 2001 when the Generic Pharmaceutical Industry Association, the National Association of Pharmaceutical Manufacturers, and the National Pharmaceutical Alliance merged into one unified group.²⁴ This organization represents the manufacturers and distributors of finished generic pharmaceuticals, manufacturers and distributors of bulk active pharmaceutical chemicals, and suppliers of other goods and services to the generic drug industry.²⁵

Conclusion

The intent of the Hatch-Waxman Act is being undercut with delays as it is taking longer for generics to be approved. Generic drugs are an integral part of the medical system and an increase in availability of such drugs is likely to aid in lowering health care costs in the United States. Studies have shown that a 3 percent increase in generic utilization annually could yield \$10 billion in savings with \$1.4 billion from Medicaid alone.²⁶ Over the next few years, many commonly-used brand-name drug patents will expire, including Lipitor, Flomax, and Effexor.²⁷ With delays in the generic drug approval process, generic drugs that may have been readily available as soon as these patents expire are likely to be delayed by years due to the current delay in the generic drug approval process. That could result in millions or even billions of dollars of savings in health care costs that the United States is likely going to miss out on at a time when health care costs are at an all-time high.

It is not surprising that there is a backlog of generic drug applications. It makes sense that if the number of FDA employees in the generic drug review area has remained the same over the past five years, yet the number of applications has doubled, that the time to approve the drugs would take twice as long. FDA has been understaffed for a long time, so it is not surprising that this is affecting generic drug applications (especially with the rate of generic drug applications increasing so rapidly). The FDA is heading in the right direction by hiring fifty additional reviewers, but more will need to be done. Funding to the Office of Generic Drugs must be increased. Interestingly, the *New York Times* notes that the United States spends less each year on generic drug application review than the New York Yankees spends on two of its players.²⁸

available at <http://www.gphaonline.org/media/press-releases/2010/statement-gpha-president-and-ceo-kathleen-jaeger-response-remarks-fda-comm> (last accessed Mar. 15, 2010).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Generic Pharmaceutical Ass'n, *Generics Providing Extraordinary Savings for Americans*, <http://www.gphaonline.org/about-gpha/about-generics/case/generics-providing-savings-americans> (last accessed Mar. 15, 2010); see also *Economic Analysis, Generic Pharmaceuticals 1999-2008*, *supra* note 13.

²⁷ Philip Moeller, *Generic Drug Savings Stuck in Passing Lane*, U.S. NEWS & WORLD RPT., (Mar. 11, 2010), available at <http://www.usnews.com/mobile/blogs/the-best-life/2010/3/11/generic-drug-savings-stuck-in-passing-lane.html>.

²⁸ See Singer, *supra* note 1. (Alex Rodriguez and Derek Jeter earned a combined \$54.6 million last year, according to ESPN).

Initiating user fees may be an appropriate way to aid in speeding up the generic drug approval process. But the user fees must remain solely for the use of generic drug application approval and must actually effectuate change. The fees must actually be used in a way that substantially speeds up the generic drug application approval process. Not only are generic drug companies losing income by the delay in not getting the drug on the market, more importantly, consumers are not getting access to the lower cost drugs that could legally be available had the FDA approved them quicker. In turn, getting generic drugs on the market quicker could aid in lowering the longstanding problem of high and increasing health care costs.

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