

# [Congress Enacts Amendments Affecting The Regulation Of Generic Drugs And Biosimilars](#)



On December 27, 2020, the President signed into law the “Consolidated Appropriations Act, 2021” (the “Act”). Included within this omnibus legislation are several provisions (in Division BB, Title III, Subtitle C) that affect the regulation of generic drugs and biosimilar medicines by the U.S. Food and Drug Administration (FDA).

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## [President Trump Signs Four Executive Orders Designed To Reduce Drug Prices](#)



President Trump recently announced four Executive Orders that direct the Secretary of the Department of Health and Human Services (HHS) to implement policy changes to reduce out-of-pocket costs and the price of prescription drugs. All but one of the Executive Orders has been issued with the remaining order on hold until August 24, 2020 pending discussions between the White House and leaders of the pharmaceutical industry. The Executive Orders include some prior policy proposals aimed at lower the cost of drugs and generating savings across the health care system. If implemented, many of these proposals will likely be challenged in court.

### **Most Favored Nations Policy**

If issued, this Executive Order could tie the price that Medicare pays for certain drugs administered by doctors to prices negotiated by other economically comparable countries. This proposed Order is similar to a [2018 prior proposal](#) by the Center for Medicare and Medicaid Services (“CMS”) to use its demonstration authority to test reimbursement changes for certain separately payable Part B drugs and biologicals using an international pricing index (“IPI”). The IPI model would result in

lowering Medicare reimbursement for select drugs in certain geographies covered by the model to better match prices paid by similar economically situated countries. Health officials estimate this change would save Medicare \$17 billion in the first five years. This order will be held until August 24, 2020 pending discussions with pharmaceutical industry leaders about alternative measures for lowering costs.

### **Increase Drug Importation**

This [Executive Order](#) is designed to minimize international disparities in drug prices by increasing the trade of prescription drugs between nations with lower prices and those with persistently higher ones. The Administration argues that “reducing trade barriers and increasing the exchange of drugs will likely result in lower prices for the country that is paying more for drugs.” The Administration aims to expand safe access to lower-cost importation of prescription drugs via three primary strategies.

First, the Order requests the Secretary of HHS to consider “facilitating grants to individuals of waivers of the prohibition of importation of prescription drugs” provided that it “poses no additional risk to public safety and results in lower costs to the American People” under the Federal Food, Drug, and Cosmetic Act (FDCA).

Second, it addresses “authorizing the reimportation of insulin products” where the Secretary of HHS finds that it is “required for emergency medical care” under section 801(d) of the FDCA. Section 801(d) generally places limitations on the reimportation of U.S. manufactured insulin products unless an exception is met.

Third, it requires the Secretary of HHS to complete the rulemaking process regarding a [December 23, 2019](#) proposed rule to import prescription drugs from Canada. The proposed rule contemplates allowing states and certain other non-federal government entities to import certain prescription drugs from Canada if the certain requirements under the FDCA are met.

### **Access to Affordable Life-saving Medications**

This [Executive Order](#) is designed to help low income American’s without access to affordable insulin and injectable epinephrine through commercial insurance or Federal health care programs, such as Medicare and Medicaid, to purchase these products from a Federally Qualified Health Centers (“FQHC”) at a price that aligns with the cost at which the FQHC acquired the medication. FQHCs are community-based health care providers that provide primary care services in underserved areas. FQHCs receive discounted prices through the 340B Prescription Drug Program on prescription drugs.

The Order directs the Secretary of HHS to condition future grants available to FQHCs on establishing practices to make insulin and injectable epinephrine available at the 340B discounted price paid by the FQHCs, plus a minimal administration fee, to individuals with low incomes. The Order specifies that low income individuals include those who (a) have a high cost-sharing requirement for either insulin or injectable epinephrine, (b) have a high unmet deductible, or (c) have no healthcare insurance.

### **Lowering Prices for Patients by Eliminating Kickbacks to Middlemen**

This [Executive Order](#) directs the Secretary of HHS to finalize a February 2019 [proposed rule](#) that would revise the discount safe harbor to the federal Anti-Kickback Statute (“AKS”) with respect to pharmaceutical manufacturer rebates to health plans and pharmacy benefit managers (“PBMs”). Prior to finalizing the rule, the Order requires the Secretary of HHS to publicly confirm that the rule

“is not projected to increase Federal spending, Medicare beneficiary premiums, or patients’ total out-of-pocket costs.” Specifically, the Order directs the Secretary of HHS to “complete the rulemaking process he commenced seeking to:

(a) exclude from safe harbor protections under the anti-kickback statute, section 1128B(b) of the Social Security Act, 42 U.S.C. 1320a-7b, certain retrospective reductions in price that are not applied at the point-of-sale or other remuneration that drug manufacturers provide to health plan sponsors, pharmacies, or PBMs operating the Medicare Part D program; and

(b) establish new safe harbors that would permit health plan sponsors, pharmacies, and PBMs to apply discounts at the patient’s point-of-sale in order to lower the patient’s out-of-pocket costs, and that would permit the use of certain bona fide PBM service fees.”

The Order makes it clear the Administration view rebates as the “functional equivalent of kickbacks” that “erode savings that could otherwise go to the Medicare patients taking those drugs. Yet currently, Federal regulations create a safe harbor for such discounts and preclude treating them as kickbacks under the law.” The policy objective of the order is to ensure that discounts offered on prescription drugs are passed on to patients. The Order states that, narrowing the safe harbor for discounts under the AKS will allow for billions in dollars of rebates in the Medicare Part D program to go patients at the point of sale.

The Administration’s policy positions and proposals in the Order and the prior proposed rule have elicited strong reactions from various stakeholders who suggested they may challenge any changes implemented as a result of this Order.

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## **Goodwin Webinar - Healthcare Issues + Trends: The False Claims Act and Other Government Enforcement**



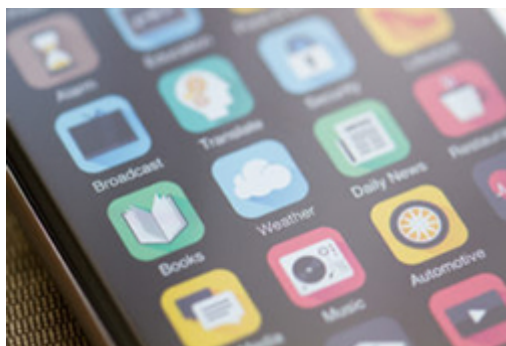
Healthcare companies are facing unprecedented challenges as a result of the COVID-19 crisis. This includes heightened enforcement risks. A key area of risk is the federal False Claims Act (FCA), a powerful tool for the DOJ to seek substantial penalties including three times the amount of money a company received in federal funds.

Join members of Goodwin’s Healthcare team as they discuss recent enforcement developments and ways to mitigate risk from a panel of Goodwin lawyers with experience helping healthcare companies, their executives and medical professionals navigate enforcement investigations.

To register for this event, please visit the registration page [here](#).

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## **FDA's COVID-19 Enforcement Policy for Digital Health Devices for Treating Psychiatric Disorders**



Developers of certain digital health devices for treating psychiatric disorders may be able to take advantage of an FDA [enforcement policy](#), which remains in effect for the duration of the COVID-19 public health emergency. The policy applies to certain prescription computerized behavioral therapy (CBT) devices for psychiatric disorders, digital health therapeutic devices for psychiatric disorders that operate using a different fundamental technology than CBT, other variations of CBT devices, such as non-prescription devices, and low-risk general wellness and digital health products for mental health or psychiatric conditions.

Relevant psychiatric conditions include Obsessive Compulsive Disorder, Generalized Anxiety Disorder, Insomnia Disorder, Major Depressive Disorder, Substance Use Disorder, Post-traumatic Stress Disorder, Autism Spectrum Disorder, and Attention Deficit Hyperactivity Disorder. The enforcement policy's goal is "to help expand the availability" of these devices to aid those with these conditions "while reducing user and healthcare provider contact and potential exposure to COVID-19."

Under this policy, these devices may be distributed and used without complying with the following regulatory requirements, where such devices do not create an undue risk in light of the public health emergency: 510(k) submission, correction and removal reports, registration and listing requirements, and Unique Device Identification requirements. For those software products with low-risk general wellness indications or functionality, FDA does not intend to enforce regulatory requirements consistent with the agency's existing policies, which were in effect prior to the pandemic. Finally, FDA's enforcement policy sets forth certain recommendations regarding the performance and labeling elements for these devices, such as user instructions that direct the patient to contact a physician before using the device. This enforcement policy highlights FDA's regulatory flexibility for software and app developers in this therapeutic area during the COVID-19 pandemic.

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# **Qualifying for Immunity Under the U.S. PREP Act During COVID-19**



As part of the U.S. government's response to the COVID-19 pandemic, on March 10, 2020, the Secretary of Health and Human Services ("Secretary") issued a Declaration pursuant to the Public Readiness and Emergency Preparedness Act ("PREP Act"), 42 U.S.C. § 247d-6d. This Declaration activated immunity from personal injury, property damage, and other types of claims for companies and certain professionals who manufacture, distribute, or use "covered countermeasures"— certain drugs and devices, or components thereof, that may be used to treat COVID-19 patients or combat the COVID-19 pandemic.[1] The PREP Act provides broad immunity from liability, but applies only to products and persons that qualify for the immunity under the PREP Act and the limits established in the Secretary's Declaration.

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## **Update: U.S. Health and Human Services Clarifies Broad Eligibility of Providers for Payments Under \$30 Billion CARES Act Healthcare Provider Relief Fund**



As discussed in Goodwin's prior Client Alert, on April 10, 2020, the U.S. Department of Health and Human Services (HHS) began disbursing \$30 billion to Medicare providers and suppliers under the Public Health and Social Services Emergency Fund (PHSS Emergency Fund). HHS is requiring providers to agree to certain terms and conditions or return the payments. A number of the terms and conditions created some confusion as to whether providers who have not provided services directly related to COVID-19 may keep the payments. HHS has now clarified that providers may keep payments distributed under the PHSS Emergency Fund regardless

of whether they have or will provide services directly related to COVID-19.

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## **U.S. CARES Act Enables Long-Awaited OTC Drug Regulatory Modernization: Key Highlights**



Subtitle F of the recently enacted U.S. CARES Act substantially reforms the regulatory framework for non-prescription drugs, representing the most significant update of the review process for over-the-counter (OTC) drugs since that process was first established in 1972. The Act draws from recent legislative proposals to reform OTC regulation, incorporating a modified version of the “Over-the-Counter Monograph Safety, Innovation, and Reform Act of 2019” (S. 2740, H.R. 3443) that was passed 91-2 by the U.S. Senate in December 2019. At that time, Senate Health Committee Chairman Lamar Alexander (R-Tenn.) described the legislation as “the most important new law affecting the safety, innovation, and affordability of over-the-counter drugs since the 1970s.”

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## **U.S. CARES Act Supply Shortage Provisions: What Drug and Device Manufacturers Need to Know**





On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act in response to the U.S. COVID-19 pandemic. Throughout the COVID-19 outbreak, there has been public discussion and concern over the availability and accessibility of critical medical devices, such as ventilators, and the pandemic has highlighted gaps in the U.S. Food and Drug Administration's (FDA's) authorities regarding medical product shortages. FDA has been able to collect information on drug shortages and take steps to help prevent or mitigate such shortages under authorities set forth in the Food and Drug Administration Safety and Innovation Act of 2012 (FDASIA). However, FDA had not, until now, had equivalent authority with regard to shortages of critical devices. Among the many provisions of the CARES Act ("the Act") are amendments and additions to the Federal Food, Drug, and Cosmetic Act (FDCA) that give FDA the ability to effectively address such shortages. Additionally, the Act enhances FDA's existing authority with respect to drug shortage measures. Below, we have highlighted the key provisions in these areas under the new law.

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## **CMS Expands Availability of Advances on Medicare Reimbursement; U.S. CARES Act Increases Medicare Reimbursement Rates**



In response to the COVID-19 public health emergency, the Centers for Medicare & Medicaid Services (CMS) announced on Saturday March 28, 2020, that it is expanding its Medicare Accelerated and Advance Payment Program (AAPP) to allow nearly all Medicare providers and suppliers to receive advances on future Medicare reimbursement. To provide further relief to healthcare providers and suppliers, the Coronavirus Aid, Relief, and Economic Security U.S. Cares Act (CARES Act), which was signed into law on March 27, 2020, eliminates from May 1, 2020, through December 31, 2020 the 2% sequestration-mandated reductions to Medicare reimbursement. We review these developments in greater detail below.

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# **Collaboration, License and other Commercial Agreements: Key Considerations for Life Sciences Companies in the Age of COVID-19**



The COVID-19 pandemic is continuing to cause major global disruption to the activities of development stage and other life sciences companies due to, among other factors, limited or no access to clinical trial sites, reduced supply levels for active pharmaceutical ingredients or other key materials needed to make drug candidates or medical devices, and the inability of personnel to access laboratory and other specialized work spaces.

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