OTC Crunch Time in California
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California's Safer Consumer Products regulations, currently in draft form and set for implementation in early 2013, pose a serious challenge to US over-the-counter (OTC) drug manufacturers by imposing a new layer of bureaucratic oversight on top of what already exists through federal statutes. There is a high potential for contradictory labeling and information requirements as well as greater liability exposures—even an outright ban on sale of OTCs in the state. Nevertheless, there is little awareness of the extent of the threat. To date the pharmaceutical industry has been largely missing from the dialogue.

On first blush, the regulations, like the federal Toxic Substance Control Act, appear to exempt drugs, devices, and food, which are regulated by the Food and Drug Administration (FDA). However, the regulations only exempt "dangerous drugs," which are defined in the text as prescription (Rx) drugs, not OTC products. Therefore, the entire range of OTC medicines and their packaging—from aspirin to sunscreen—is susceptible to the state's expanded powers of oversight.

Although the pharmaceutical industry is pressing the argument that state-level OTC controls are preempted by the FDA regulations, not everyone in California agrees. And it is unclear whether the industry strategy of obtaining a legislative amendment to make OTC drugs exempt will succeed before the regulations are enacted.

Details, details

California's Safer Consumer Products regulations address all consumer products sold in California that contain a "Chemical of Concern." There are currently over a thousand Chemicals of Concern on the California list, and an initial review of the list includes more than 25 chemicals used in OTC drugs. Additional chemicals may be added at any time by the Department of Toxic Substance Control (DTSC), and this can be facilitated by a citizen petition process. The Chemicals of Concern list becomes a problem for OTC drug manufacturers if these chemicals are present in an OTC drug, in a concentration greater than the "alternative analysis threshold" specified by DTSC. DTSC intends to set this threshold on a case-by-case basis for each product, but it is likely to be below 0.01 percent and perhaps as low as the minimum concentration detectable by available laboratory equipment. For comparison, the widely accepted global standard today for triggering chemical regulatory requirements is 0.10 percent.

This threshold is of great concern for the pharmaceutical industry, as a concentration over 0.01 percent of a chemical is often necessary for the efficacy of an OTC drug. For example, aspirin, a chemical included on the initial Chemicals of Concern list, is available in a 325mg tablet, at a concentration of 85.98 percent.

The regulations require DTSC to evaluate and prioritize products containing a Chemical of Concern based on vague criteria concerning "safety" and "exposure." It must develop a list of priority products for which the responsible party (usually the manufacturer) must conduct a life-cycle-based Alternative Assessment (AA) to determine how to design the product without using the Chemical of Concern. The cost of conducting an AA is estimated to range from $500,000 to $6 million, including obtaining information from the global supply chain as well as the cost of conducting the chemical analysis (along with fees paid to DTSC to conduct review).
Based upon DTSC and public review of the AA, a manufacturer could also be subject to a state-mandated redesign of the product to replace the Chemical of Concern with what DTSC considers to be a safer chemical. Designing an OTC drug without a Chemical of Concern will be impossible for products where—as in the case of aspirin—the Chemical of Concern is the active pharmaceutical ingredient.

In addition to the AA and redesign requirements, manufacturers of products sold in California may be required, at the sole discretion of DTSC, to provide to that agency, for public review, data on the "toxicity" characteristics of the product. This data will be based on newly created California "hazard traits," many of which are not considered to be hazards anywhere else, have no known test methods to measure hazards, and are inconsistent with recognized global hazard trait standards. DTSC may use this data to expand both the list of Chemicals of Concern and the list of Priority Products. The cost of this toxicity review could cost from $5,000 to $100,000 (depending upon availability and cost of the test method) to test for 40-plus hazard traits for chemical ingredients, retool lab equipment to meet a 0.01 percent threshold, and to hire third-party labs.

As a result of this analysis, DTSC may implement labeling requirements, such as requiring that a product be labeled as hazardous. Although FDA strictly regulates the labeling of OTC drugs, DTSC will have the authority, under the Safer Consumer Product regulations, to impose an additional labeling requirement on OTC drug products. A label of hazardous on an OTC drug will drive consumers away from the drug and damage the reputation of the drug manufacturer.

Existing FDA requirements

FDA regulation of OTC drugs entails consideration of human health effects and environmental impacts. There are two regulatory pathways that ensure the safety of the chemicals used in an OTC drug. OTC drugs are either approved through a new drug application (NDA) or must conform to a drug monograph issued by FDA. Through the NDA process, FDA approves a drug if, and only if, it is shown to be safe and effective. FDA permits an Rx-to-OTC switch if there is a long history of safe use, a prescription is no longer necessary to ensure safe use, and it is in the public interest to increase access at a lower cost. Similarly, drug monographs outline detailed conditions to which the OTC drug product must conform in order to be legally marketed. The use of active ingredients is specified in the monograph by dosage strength and dosage form. The active ingredient in a drug monograph has been extensively assessed by FDA for human health effects, for purposes of both safety and efficacy.

Through this detailed assessment, FDA determines what level of chemical is not hazardous and acceptable for use—i.e., conditions under which an OTC ingredient is generally recognized as safe and effective. The monographs contain specific requirements regarding permissible active ingredients, dosage strength, directions for use, claims, warnings, and precautions. The entire OTC monograph development and assessment process is conducted by FDA through public, notice-and-comment rule making, based upon recommendations by expert advisory panels.

The California Safer Consumer Products regulations are largely duplicative of FDA's regulation of OTC drugs. Although the Safer Consumer Products regulations do permit DTSC to grant a regulatory exemption from a requirement if it is in conflict with a federal regulatory program, such that the responsible entity could not reasonably be expected to comply with both, there is no guarantee that DTSC would do so for OTC drug products. Moreover, the burden should not be on industry to resolve conflicts and overlap between regulatory regimes. To obviate the need for a DTSC regulatory exemption, the pharmaceutical industry needs to take an active role and
demonstrate to the California legislature that its proposed regulation of OTC drugs is preempted by the federal Food, Drug and Cosmetic Act (FDCA) and FDA regulation of OTC drugs.

In our view, the FDCA, the FDA's NDA process and drug monograph requirements likely preempt the Safer Consumer Product regulations as they relate to OTC drug products. Section 751 of the FDCA expressly preempts states from imposing additional regulation on OTC drugs: "no state may establish...any requirement (1) that relates to the regulation of a [nonprescription] drug...and (2) that is different from or in addition to, or that is otherwise not identical with, a requirement under this chapter."

In this regard, the statute dictates that "a requirement that relates to the regulation of a drug shall be deemed to include any requirement relating to public information or any other form of public communication relating to a warning of any kind for a drug." Courts have held that federal laws preempt conflicting state laws when it is the "clear and manifest purpose of Congress to do so." An express preemption provision, such as Section 751, is direct evidence of congressional intent to preempt state law. The Safer Consumer Product regulations, as they relate to OTC drugs, are different from, and in addition to, the FDA regulations of OTC drugs. Therefore, they should be interpreted as being preempted by the FDCA.

The bottom line

In sum, California's Safer Consumer Products regulations could impose significant financial costs and other related regulatory burdens on OTC drug manufacturers, and may even bar the sale of OTC drug products in the California market. There is a strong argument that the DTSC requirements conflict with and are preempted by FDA laws and regulations. However, manufacturers cannot expect a quick and favorable judicial review of the preemption issue after implementation of these new regulations. By then, industry may also have to contend with product liability claims. It must take action on the legislative front—beginning now.

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