



# What's In a Name? The Value of Pharmaceutical & Biologic Branding

**By Scott Liebman and Elizabeth Kim**

September 2014 marks 30 years since the *Hatch-Waxman Amendments* (*Hatch-Waxman*) to the *Food, Drug, and Cosmetic Act* (*FD&C Act*) introduced generics as we know them. *Hatch-Waxman* strove to offer consumers the benefits of “rapid availability of lower-priced generic versions of innovator drugs”<sup>1</sup> while preserving a meaningful period of market exclusivity for innovators to recoup their costs. In the process, however, *Hatch-Waxman* established conditions that fundamentally influenced proprietary naming decisions, in particular, incentivizing the introduction of new products that reuse marketed proprietary names to capitalize on brand popularity.<sup>2</sup> These closely named products are commonly known as brand-name extensions (BNEs). *Hatch-Waxman*’s milestone anniversary, coupled with the recent release of FDA’s *Draft Guidance on Best Practices in Developing Proprietary Names for Drugs*, drives us to ask: When it comes to innovative drug products, what’s in a name?

## **Safety First: FDA Regulation of Proprietary Names**

Under the authority of the *FD&C Act*, the US Food and Drug Administration (FDA) oversees the naming of regulated products—including brand-name, generic, prescription and nonprescription drugs and biologics.<sup>3</sup> The focus of this regulation has not changed tremendously over time, but the 2007 reauthorization of the *Prescription Drug User Fee Act* (*PDUFA IV*) has reinvigorated efforts to guide industry. A portion of *PDUFA IV* fees were to “implement various measures to reduce medication errors related to look-alike and sound-alike proprietary names, unclear label abbreviations, acronyms, dose designations, and error-prone label and packaging designs.”<sup>4</sup> One need look no further than the first sentence of the draft guidance to understand how this advances *PDUFA IV*’s goal: “FDA is issuing this guidance to help sponsors of human drugs, including those that are biological products, develop proprietary names that do not cause or contribute to medication errors or otherwise contribute to the misbranding of the drug.”<sup>5</sup>

As a companion to FDA's 2010 *Guidance for Industry on the Contents of a Complete Submission for the Evaluation of Proprietary Names*, the recent draft guidance provides extensive criteria regarding reduction of medical errors drug sponsors should consider when advancing proprietary names for new products. With an average of 7,000 deaths annually attributed to medication errors,<sup>6</sup> look-alike and sound-alike drug names are demonstrated risks to consumer health.<sup>7</sup> FDA's current Drug Products Associated with Medication Errors<sup>8</sup> list is filled with examples of approved names—such as Durasal and Durezol—that may be confusing to prescribers, dispensers and consumers.

To avoid the most glaring look-alike/sound-alike naming issues, the draft guidance advises against using the same root proprietary name for two or more products that do not share active ingredients with the original marketed product. This direction, however, leaves the door open for BNEs that do share an active ingredient. FDA recognizes, in some scenarios, the use of a root proprietary name in a new product may be permissible, but clarifies that drugmakers need to be especially cautious to ensure the repeated use of roots, with modifiers, will not confuse users as to the product's composition or intended use. Given the safety concerns associated with look-alike/sound-alike names, what does FDA see as the potential use of a BNE and why would a drug sponsor go to the trouble of pursuing one?

### How to Marry a Millionaire: Hatch-Waxman and Brand-Name Extensions

The draft guidance shows FDA sees as much potential risk in names that fail to communicate a shared active ingredient as in those that misleadingly imply a shared active ingredient when there is none. Cautions related to dual proprietary names (e.g., “Safety concerns could arise, for example, if practitioners are unaware that two products prescribed for concomitant use contain the same active ingredient.”) are counterbalanced by those related to BNEs (e.g., “[For nonprescription products with a shared ‘family name’], it is essential that consumers are able to identify an appropriate product at the point of purchase based on the product name and other information on the principal display panel...”).

This narrowing of acceptable names presents a great challenge to drug sponsors in deciding how to market their products. BNEs create obstacles in the name approval process sponsors could avoid by giving products unique proprietary names. Since the passage of *Hatch-Waxman*, however, BNEs have proliferated among the most popular products, giving rise to a large number of drug families that have become household names.

To understand how *Hatch-Waxman* gave power to the BNE as a marketing tool that functions within FDA's current scope of acceptable naming practices, it is useful to consider some of the many familiar drug brands. For example, a half-dozen types of Advil and Tylenol likely come to mind, followed by Zyrtec, Zyrtec-D, Children's Zyrtec Dissolve Tabs and Children's Zyrtec Allergy Syrup, just to name a few. These products are some of the best-selling and most recognizable brands on the market, and their names were all approved under FDA's purview to grant BNEs.

According to a study published in the *Journal of Managed Care Pharmacy*, “Generic drugs began to erode market shares of brand-name drugs. To continue the success of patent-expiring brand-name drugs, the firms had to introduce new extensions and then shift demand from original brands to their new extensions.”<sup>9</sup> This study investigated price rigidity of patent-expired brand-name drugs observed (much to policymakers' confusion) after *Hatch-Waxman*. Evidence shows that more-popular brand-name drugs—for which the proprietary name is already valuable promotional capital—are more likely to spawn BNEs when facing the entry of generic competition. Examination of these products suggests BNEs, which effectively marry the value of an existing brand to new products that are still in their exclusivity period, help the innovative drug maintain its price despite the entry of cheaper generics. Prescriptions written for BNEs during this period have the added benefit to the company of being relatively resistant to therapeutic substitution (“dispensing a generic version of the original brand for a prescription written for the line extension of the original brand”<sup>10</sup>), even where health plans or state laws typically encourage generic substitution.

### What's Next for Proprietary Drug Names?

By allowing market exclusivity for drugs that qualify as BNEs, *Hatch-Waxman* helped drug sponsors capitalize on a style of promotional branding used for products in less-regulated

In 2010, FDA received several reports of serious medication errors related to Maalox Total Relief, which contains active ingredients that are different from those in the rest of the Maalox line of liquid antacid products. Importantly, FDA noted, “Maalox Total Relief is not appropriate for individuals who want to use an antacid.”<sup>13</sup> At the time, FDA declared, “The agency encourages drug companies to consider the potential for name confusion when choosing OTC product names.” Even though the agency's authority to regulate names was as powerful in 2010 as it is today, the recent draft guidance provides significantly greater clarity on what FDA would consider appropriate BNE names, perhaps incorporating lessons learned directly from the Maalox mix-up.

Celebrex, Cerebyx, Celexa: The introduction of Celebrex in 1999 caused numerous medication errors related to confusion among these three prescription drugs with unrelated formulations and dissimilar indications. The Institute of Medicine (IOM) cites this example of a major look-alike/sound-alike naming problem,<sup>14</sup> and it is easy to see how a prescription order for one could easily be misunderstood, leading to the dispensing or consumption of another drug. As IOM notes, however, “Once a product is on the market, adjustments to naming, labeling, and packaging are made only when providers and patient safety experts exert significant effort to get problems acknowledged and accepted by industry and FDA representatives. In many instances, however, known problems continue to be inadequately addressed over extended periods of time.”<sup>15</sup> A recent draft guidance is intended to help FDA and industry better avoid these types of medication errors.

industries (i.e., Coca-Cola, Diet Coke, Coca-Cola Zero). The release of the draft guidance indicates FDA, although exercising great caution in the approval of all new names, does not intend to further limit BNEs. Marketing of brand names, particularly nonprescription or over-the-counter brands, through the use of BNEs has become so commonplace over the last 30 years, it is difficult to envision a market without them. Informed by past medication errors, the draft guidance offers industry a practicable process to address many safety concerns related to proprietary names. Although no comments to the draft guidance were made available before the close of the comment period, three requests for an extension<sup>11</sup> indicate industry does have opinions. FDA recently reopened the comment period in response to these requests.

Proprietary names are inherently valuable to the promotion of innovative drugs, giving them name recognition that generics cannot match. As biologics grow in popularity and biosimilars advance to market under the pathway established by the *Biologics Price Competition and Innovation Act* in the 2010 *Patient Protection and Affordable Care Act*, industry faces a dearth of guidance surrounding biosimilar naming.

Now that the first biosimilar application under the new pathway has been submitted by Sandoz, all eyes are on FDA. A 1 August 2014 letter from the Senate Committee on Health, Education, Labor and Pensions to Secretary Sylvia Matthews Burwell of the US Department of Health and Human Services was a stern reinforcement of industry’s need for guidance. The senators wrote, “We have heard there is some difference of opinion on these matters, making it even more important that these policies, which are integral to the success of the biosimilar pathway, be released in draft form as soon as possible.... Does the FDA intend to approve the first biosimilar before policies on these key scientific questions are publicly released?”<sup>12</sup> The decision about whether Sandoz’s filgrastim biosimilar product will be approved with an established name that is distinct from Amgen’s product, Neupogen, is critical.

Drug and biologic naming considerations are numerous and complex and have very real implications for both consumer safety and products’ market viability. Now, 30 years after *Hatch-Waxman* created the contemporary dichotomy between innovative and generic drug products, supercharging the value of a brand-name extension, a variety of contemporary regulatory events are redefining proprietary names in the market for drugs and biologics.

#### References

1. *Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Amendments)*. FDA website. <http://www.fda.gov/newsevents/testimony/ucm115033.htm>. Updated 24 July 2009. Accessed 6 August 2014.
2. Hong SH, Shepherd MD, Scoones D, Wan TT. Product-line extensions and pricing strategies of brand-name drugs facing patent expiration. *J Manag Care Pharm*. 2005 Nov-Dec; 11(9):746-54. <http://www.ncbi.nlm.nih.gov/pubmed/16300418>. Accessed 29 August 2014.
3. 21 U.S.C. § 502(a).
4. PDUFA Pilot Project: Proprietary Name Review Concept Paper. FDA website. <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM072229.pdf>. Published September 2008. Accessed 6 August 2014.
5. *Draft Guidance for Industry: Best Practices in Developing Proprietary Names for Drugs*. FDA website. <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM398997.pdf>. Published May 2014. Accessed 6 August 2014.
6. Merchant L, Taylor K. Draft Guidance for Industry: Best Practices in Developing Proprietary Names for Drugs. FDA webinar, 15 July 2014. <http://www.fda.gov/downloads/Drugs/DevelopmentApprovalProcess/SmallBusinessAssistance/UCM405028.pdf>. Accessed 6 August 2014.
7. Please see sidebars for examples.
8. Drug Products Associated with Medication Errors. FDA website. <http://www.fda.gov/drugs/drugsafety/medicationerrors/ucm286522.htm>. Updated 6 April 2012. Accessed 6 August 2014.
9. Op cit 2.
10. Ibid.
11. Draft Guidance for Industry on Best Practices in Developing Proprietary Names; Availability. Docket Folder Summary. Docket ID: FDA-2014-D-0622. Regulations.gov website. <http://www.regulations.gov/#!docketDetail;D=FDA-2014-D-0622>. Accessed 6 August 2014.
12. Alexander, Hatch Call on Burwell to Immediately Release Guidance on Biosimilar Drugs [news release]. Washington DC: 1 August 2014. <http://www.help.senate.gov/newsroom/press/release/?id=d3a2624c-2410-4d08-b76e-883592c3885a&groups=Ranking>. Accessed 29 August 2014.
13. FDA Drug Safety Communication: Product Confusion with Maalox Total Relief and Maalox Liquid Products. FDA website. <http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm199476.htm#SA>. Updated 19 February 2010. Accessed 6 August 2014.
14. Aspden P, Wolcott JA, Bootman JL, Cronenwett LP *Preventing Medication Errors*. Washington DC: The National Academies Press; 2007. [http://books.nap.edu/openbook.php?record\\_id=11623&page=276](http://books.nap.edu/openbook.php?record_id=11623&page=276). Accessed 6 August 2014.
15. Ibid.

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