Reshaping the Regulatory Landscape for Chinese MedTech Industry

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Ting Wu of Haiwen & Partners discusses how the recently introduced Medical Device Regulations will impact consumers and companies in the MedTech industry by highlighting major breakthroughs provided by the legislation while at the same time striking a balance with compliance

The Chinese government recently released the new Regulations for the Regulation of Medical Devices , which will become effective on June 1, 2021, (the New MDR) (医疗器械监督管理条例) to replace the current Medical Device Regulations amended in 2017 (the Old MDR).

The New MDR, which is a fundamental piece of legislation for medical device regulation, has restructured the medical device legal framework in China. The New MDR reflects Chinese regulator' s intention and efforts to strike an appropriate balance between innovation and compliance. It would foreseeably generate a sweeping impact on business strategy for both R&D assets, as well as mature brand assets.

Early market access to innovative devices

The New MDR provides multiple green channels to accelerate patients in China access to innovative products with clinical

values either prior to or after-market authorization granted by the Chinese National Medical Products Administration (NMPA) including:

expanded companionate access to investigational medical devices at clinical stage by patients with critical, life-threatening diseases upon ethics committee' s approval and the patients' informed consent;

emergency use authorization by NMPA for medical devices not yet marketed in China so as to address public health emergency;

a special import permit granted by NMPA or its authorized local counterparts to allow designated medical institutions to import a limited number of Class 2 or Class 3 medical devices not yet marketed in China to meet urgent clinical needs;

conditional approvals for medical devices treating rare or critical diseases or responding to public health emergency;

priority review of certain medical devices demonstrating apparent clinical value, such as devices treating rare diseases, life-threatening diseases and pediatric patients; and

removal of the country of origin (COO) approval for imported innovative devices.

COO approval no longer required for imported innovative devices

Among others, the removal of the COO approval requirement is perceived by the industry as one of the major breakthroughs for imported innovative devices. Previously, a foreign device manufacturer which intends to submit the market authorization

application for an imported medical device with NMPA, it first had to obtain and receive foreign market approval for such a device in the country of origin. The COO approval requirement would usually delay Chinese patients' access to imported innovative devices for two to three years or even longer.

Under the New MDR, a foreign medical device manufacturer is not required to obtain COO approval for an innovative device when it files the product market authorization application with NMPA. However, to what extent foreign device manufacturers can benefit from the exemption is unclear. To be eligible for the exemption, a foreign medical device manufacturer must apply for an innovation device designation with NMPA, which would take at least three months and oftentimes more than six months when taking into consideration the time required for preparing innovation device designation submissions.

During the period from 2014 to 2020, NMPA had only granted innovative device designations to four foreign device manufacturers, and the average passing rate for innovative device designation is as low as around 20%. Hence, it remains to be seen whether NMPA will lower the threshold for innovative device designations under the New MDR so as to allow more imported innovative devices to benefit from the COO approval exemption.

New MDR legalizes LDT devices with conditions

Article 53 of the New MDR provides another widely perceived breakthrough which is the legalization of laboratory-

developed tests (LDTs). LDTs are defined by the U.S. FDA, and usually refer to a type of in vitro diagnostic tests that are designed, manufactured and used within a single laboratory. Article 53 allows qualified medical institutions (including certified medical labs) to use their in-house developed LDTs for clinical purposes if no equivalent LDTs have been approved by NMPA for marketing and sales in China.

Previously, the legal status of LDT services had never been formally recognized by PRC law. For the first time, the New MDR allows medical labs to use LDTs that have not been registered with and approved by the NMPA for clinical use, on condition that, among others, no alternative tests are available in the market.

However, this provision does not necessarily create a safe harbor for all LDTs. It may largely benefit LDTs that are developed under proprietary technology and that no equivalent tests are likely to be developed and marketed by peers. For medical labs that develop non-proprietary LDTs, they would face great pressure under the New MDR to register their LDTs with NMPA ahead of their competitors. Once an LDT product receives market approval by NMPA, other equivalent LDTs may no longer be legitimately used by peer labs under the New MDR.

Given that LDTs have been widely used by many medical laboratories to accommodate increasing clinical demand for specific laboratory testing procedures in China, it seems unrealistic for all the non-proprietary LDTs to receive NMPA' s

approval within a short period of time once New MDR becomes effective on June 1, 2021. It remains to be seen whether NMPA will grant a grace period to LDT service businesses and to what extent NMPA will actively enforce Article 53 of the New MDR in practice.

Further, it is not uncommon that many medical labs use LDTs that are developed by their affiliates within the group. To be eligible for safe harbor under Article 53, medical labs must use in-house developed LDTs. It is unclear whether LDTs developed by affiliates would be deemed eligible "in-house" LDTs and if this is not the case, companies offering LDT services may have to restructure their current business assets by grouping their R&D function and clinical testing function within a single medical lab.

Device MAHs will be liable under the New MDR

Since 2017, selected Chinese provinces have implemented the pilot program of the Marketing Authorization Holder (MAH) system for devices and the New MDR now rolls out the MAH system nationwide. Except for certain high-risk medical devices, device MAHs are permitted to outsource device manufacturing activities to contract manufacturers organizations (CMOs) and may focus on R&D activities without substantive capital investment in manufacturing facilities.

As the essential part of the MAH system, the New MDR greatly emphasizes MAHs' regulatory obligations to ensure product quality, safety and effectiveness throughout the entire product

life cycle. For this purpose, MAHs are required to establish adequate quality management systems and risk control mechanisms to proactively monitor, evaluate and mitigate the product risk profile during the entire life cycle.

MAHs will be facing increasing severe penalties under the New MDR for their non-compliance, such as fines up to 30 times of the sales value (as opposed to 20 times under the Old MDR) for serious violations under the former. Moreover, the New MDR introduces personal liability on responsible individuals of MAHs, where income during the period of non-compliance may be confiscated. Under serious circumstances, they may receive fines up to three times their income and lifetime debarment from engaging in the MedTech industry.

In particular, for foreign MAHs, if they refuse to fulfill any penalties imposed on them under the New MDR, they may receive an import ban for selling and distributing their products in the PRC market for up to ten years. In other words, foreign MAHs would not be given a chance to enter into the Chinese market for a specified period of time if they do not comply with the New MDR.

This import-ban penalty on foreign MAHs reflects Chinese regulator' s shift in position towards foreign MAHs since the enactment of the Drug Administration Law 2019(DAL) (药品管理法). Under DAL, the PRC regulator required local agents of foreign MAHs to assume liabilities applicable to foreign MAHs under DAL for violations under the legislation. The PRC regulator followed the rationale under DAL when it developed

the draft measures for regulating local legal agents of imported medical devices in 2018.

However, since the Chinese government released the Regulations for Cosmetics Regulation (化妆品监督管理条例) in 2020 and the New MDR in 2021, it has re-positioned foreign MAHs to be the entities primarily and ultimately responsible for their violations under PRC law. PRC local agents, which provide foreign MAHs with on-ground assistance to facilitate their performance of the regulatory obligations, would face less severe liabilities, such as fines up to Rmb500,000, and a five-year debarment for responsible individuals under the New MDR.

Further implications under other legislation

Shortly after the release of the New MDR, the PRC Biosecurity Law (中华人民共和国生物安全法) became effective on April 15, 2021. The PRC Biosecurity Law presents the Chinese government's clear intent to position bio-resources (including human genetic resources or HGRs) as one of its national security priorities. HGRs consist of HGR materials and HGR data. The Regulations for the Administration of Human Genetic Resources (HGR Regulations) (人类遗传资源管理条例) define HGR materials as bio-specimens that contain human genome information, and HGR data refers to the data derived from bio-specimens.

The PRC Bio-security Law and the HGR Regulations highlight national security as the critical rationale for regulating R&D

activities involving Chinese HGRs. These laws will play an increasingly important role in terms of medical device development activities conducted by foreign device manufacturers in China.

For example, if any foreign party, (which may include a company incorporated within China under the PRC law but invested by or controlled by foreign entities) is involved in local clinical trials (e.g., studies on innovative or high-risk devices as required by NMPA) in China, these clinical trials must be conducted in the form of an international collaboration project between the Chinese party and foreign party, and subject to an advance approval by the Human Genetic Resources Administration of China (HGRAC). The HGARC review and approval process for a clinical trial usually takes around one and a half to two months on average.

Further, the HGR Regulations separately regulate HGR data from HGR materials. The HGRAC broadly interprets HGR data to include clinical data, imaging data, biomarker data, genetic data, protein data and metabolism data and pose a great challenge to data analysis projects and digital health initiatives taken by medical device companies. For example, a device company developing an AI-powered medical imaging tool that intends to train its AI-powered tool using large volumes of the medical images of Chinese patients collected via Chinese hospitals may have to seek HGRAC approval to engage in such training activities.

Traditionally, most of the HGRAC submissions were made by or

for foreign pharmaceutical companies that conduct drug development activities in China. In recent years, an increasing number of medical device companies have gradually realized the importance and relevance of the PRC Biosecurity Law and the HGR Regulations to their business activities (especially R&D activities) in China. Many of them have started taking actions to seek HGRAC approvals where necessary for device-related research projects in China and to review and assess the HGR compliance level in the company' s business operations.

Outlook under the New MDR

The New MDR brings both opportunities and challenges to medical device companies. On the one hand, R&D-driven companies may benefit from the green channels under the New MDR to accelerate market access time. Foreign device manufacturers with mature assets may also be able to leverage the NMPA' s simplified regulatory pathway to localize mature products in China, as well as the clinical evaluation waiver granted by the New MDR for mature products. The New MDR grants a clinical evaluation waiver to mature products whose safety and effectiveness can be evaluated and proven through non-clinical means (e.g., real world evidence or analysis of clinical literature) other than clinical evaluation as previously required by the Old MDR

On the other hand, device MAHs are under pressure to build a robust quality management system to fulfill enhanced regulatory obligations (including the adequate capability of managing their vendors (including CROs, CSOs, CMOs and local

agents in the PRC) under the New MDR and build a robust compliance program to avoid or mitigate potentially severe legal liabilities under the New MDR.

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