State Laws and Legislation Related to Biologic Medications and Substitution of Biosimilars

July 2015 - Covering 2013-2015 legislative sessions

For several decades, every state has regulated the use of brand-name and generic prescription drugs through statutes and agency or board rules. These state actions include when and how generics may be substituted for brand-name prescriptions, by pharmacists or others. Generic drugs typically have active ingredients that are identical to those of their brand-name counterpart. These traditional drugs include both familiar pills used by tens of millions of Americans weekly and some specialty drugs.

Biologic medicines are much more complex than traditional chemically synthesized drugs. Biologics are manufactured from living organisms by programming cell lines to produce desired therapeutic substances and consist of large molecules. Common biologics in use today include human growth hormone, injectable treatments for arthritis and psoriasis, the Hepatitis B vaccine and stem cell therapy.

Regulating biologics raises new issues for both state and federal policymakers. Because of their complexity, biological drugs are much more difficult to replicate than the chemically produced generics for other drugs. The cell lines used and modifications in the manufacturing process affect biologic medicines. As a result, truly identical "generic" versions are currently virtually impossible to produce. However, once patents expire for the existing brand-name biologic drugs, "biosimilar" medicines can be produced and states face regulatory issues about them.

Currently, there is concern that traditional statutes regulating "generic drugs" may be misapplied to new products that are not identical. This has led to a recent move to amend older state laws, or add new sections, to address the medical and chemical characteristics of these "biologics" and any future generic-style "follow-on biologics", "biosimilars", or "interchangeable biological products."

In the past three years at least **30 states plus Puerto Rico have considered legislation** establishing state standards for substitution of a "biosimilar" prescription product to replace an original biologic product.

Typical Features of State Legislation

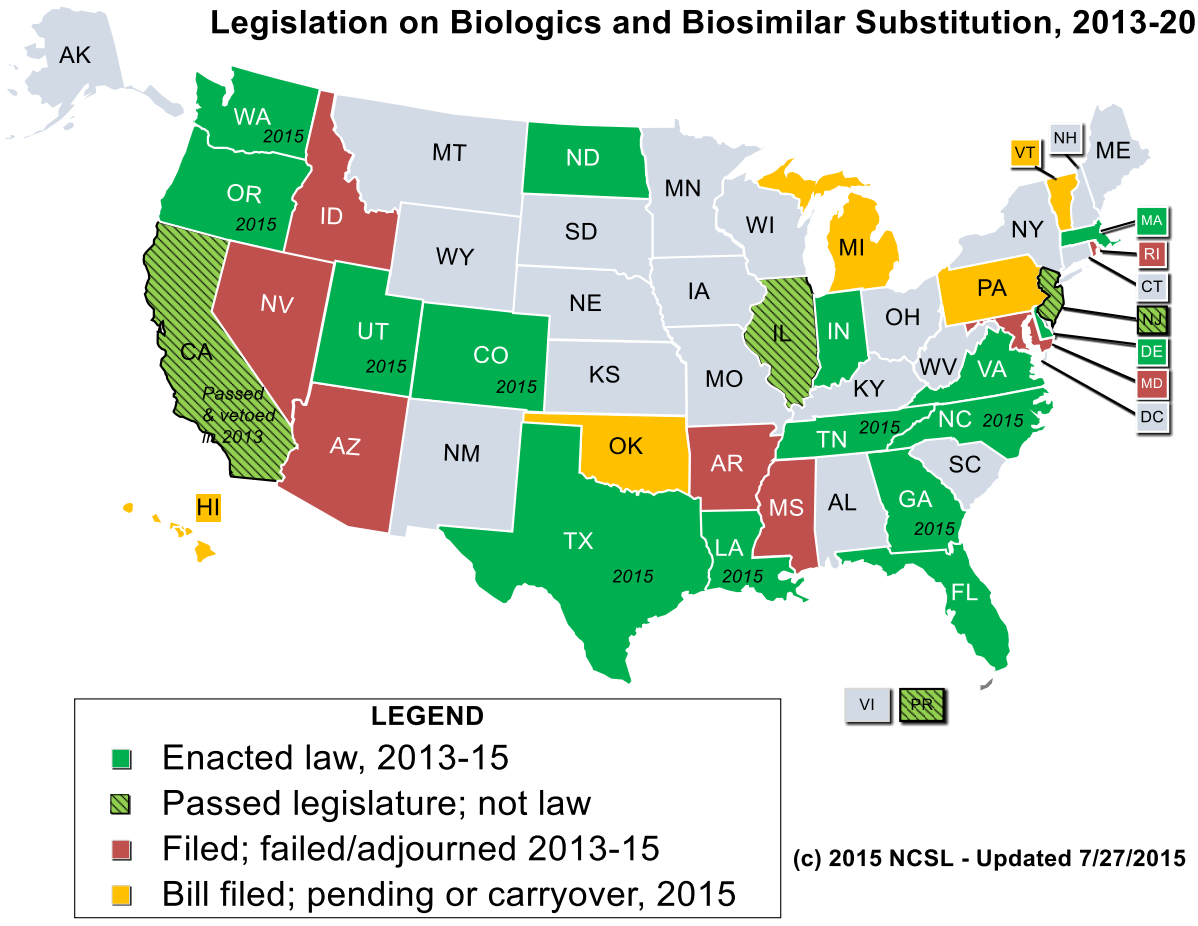
The provisions of state legislation vary, but there are several features and requirements that frequently are included. (Some of these differ from revised language described as compromise legislation, and announced in Dec. 2014):

- Any biological product under consideration for substitution must first be approved as "interchangeable"* for substitution by the U.S. Food and Drug Administration (FDA). (The first such product has gained FDA approval as a biosimilar in the United States as of March 6, 2015)
- The prescriber (such as a physician, oncologist, physician assistant, etc.) would be able to prevent substitution by stating "dispense as written" or "brand medically necessary."

- The prescriber must be notified of any allowable substitution made at a pharmacy. (This would allow a physician to assess and compare the patient experience.) Most legislation in 2015 uses the term "communicate", which includes "make an entry" of the substitution into an electronic record.
- The individual patient must be notified that a substitute or switch has been made. In some cases, state law would require patient consent before any such switch is made.
- The pharmacist and the physician must retain records of substituted biologic medications.
- The pharmacist would not be liable in any way for the dispensing of an interchangeable biological product if it complied with the listed state law provisions.
- The state must maintain a public list of permissible interchangeable products.

The state legislation tally (as of July 27, 2015)

- 15 states have enacted and signed biosimilar substitution statutes.
- Bills were filed or pending in 15 additional states and Puerto Rico. (2014-15, see map)
- Bills had passed both chambers in Illinois, New Jersey and Puerto Rico; California had a 2013 passed bill that was vetoed.



Several other bills addressed use of biologics from different approaches. These other measures, not included in this report, include:

- "Right to Try" legislation, proposing to allow use of experimental drugs prior to full FDA approval.
- Requirements for health insurance to cover or reimburse costs under certain circumstances.
- Economic incentive measures intended to expand Bio research and manufacturing in individual states.

2013 – 2015 State Laws and Legislation

See full text for exact terms and conditions and other features not listed in table columns

State	Citation/ Bill # / Lead sponsor Links: blue	Summary Description (The brief summaries reproduced below are not intended to describe all statutory provisions – see full text for further information)	FDA must certify interchangeability	Doctor/prescriber Notify / Communicate	Patient notification	Prescriber's "Brand medically necessary" blocks substitution	Substitute must cost	Pharmacy records must be retained	Posted list of interchangeable
ENACTED LAWS		**Signed in 15 states**							
Colorado	S 71; **Act 77 signed 4/3/2015** Sponsor: Sen. Jahn (D)	Allows a pharmacist to substitute a biological product if the FDA has determined that it is interchangeable and if the practitioner has not indicated that the prescription must be dispensed as written, provides the dispensing pharmacist or the pharmacist's designee must communicate "within a reasonable time" to the prescribing practitioner the specific biological product dispensed to the patient, provides when communication is not necessary.	**Yes**	**Yes** communicate		**Yes**	**Yes**	**Yes 2 yrs.**	**Yes**
Delaware	S 118; **Ch. 238, signed 5/28/2014** Sponsor: Sen. Poole (D) (Same as S 262)	Authorizes pharmacists to substitute FDA-approved interchangeable biosimilar biological products for prescribed biological reference products with specified safeguards. To substitute a biosimilar product, pharmacists must notify the patient and prescriber in writing; the authorized prescriber did not state expressly that the prescription is to be dispensed only as directed; record information on the label and dispensing record; and maintain a three year record of such substitutions. Also provides liability protections for pharmacists who substitute biosimilars.	**Yes**	**Yes** communicate	**Yes**	**Yes**		**Yes 3 yrs.**	
Florida	H 365; **Ch. 2013-102; signed 6/3/2013** Sponsor: Rep. Matt Hudson (R)	Relates to pharmacy substitutions; provides requirements for pharmacist to dispense substitute biological product, requiring the FDA to have determined substitute biological product is "biosimilar to and interchangeable for prescribed biological product." The prescribing provider must not "express a preference against substitution; "the pharmacist must notify the patient or person at the counter of the substitution and substitution record retained for two years. Also requires the state Board of Pharmacy to maintain current list of interchangeable biosimilar products. Effective as of July 1, 2013.	**Yes**		**Yes**	**Yes**		**Yes2 yrs.**	**Yes**
Georgia	S 51; **Act 189 signed 5/6/2015** Sponsor: Sen. Dean Burke (R)	Provides for the substitution of a biological product with an interchangeable biological product by a pharmacist, provides the pharmacist shall dispense the lowest retail priced interchangeable biological product which is in stock. Substitution must be indicated on the label as "interchangeable biological product;" provides labeling exceptions, requires maintaining a record of such transaction into interoperable electronic records.	**Yes**	**Yes 48 hrs.** communicate	**label**	**Yes**	**Yes** Lowest cost	**Yes**	**Yes**

Indiana	**S 262; Ch. 96, signed 3/31/2014** Sponsor: Sen. Hershman (R)	Allows a pharmacist to substitute an interchangeable biosimilar product for a prescribed biosimilar product if the prescriber and patient are notified; and the prescribing practitioner has signed "May substitute" on the prescription; requires the pharmacist to keep related records; requires the Board of Pharmacy to maintain on its website a current list of all approved products that are interchangeable; prescribed written or electronic prescriptions must comply with existing prescription form requirements.	**Yes**	**Yes**	**Yes** prior	**Yes**		**Yes**	**Yes**
Louisiana	**H 319; signed as Act 391 of 2015 on 7/1/2015.** Sponsor: Rep. Simon	Relates to interchangeable biological products and equivalent drug products, requires, following the dispensing of a biological product, the dispensing pharmacist to communicate "by any means," without any cause for action, to the prescriber the specific product provided to the patient, the name of the product and the manufacturer. Does not apply if the prescription is a refill or the prescription is indicated "dispense as written."	**Yes**	**Yes 5 days** **communicate**		**Yes**			
Massa-chusetts	**H 3734; Ch. 143 signed 6/23/2014** Sponsor: Rep. Cusack (D)	Provides that a pharmacist may substitute an interchange-able biological product for a trade or brand name biological product unless "the prescriber instructs otherwise in writing." If a substitution is made, the prescriber must be notified in writing within a "reasonable time," including via an electronic health record (EHR); also must notify the patient or patient's authorized representative of the substitution. Pharmacist, prescriber and administering practitioner must retain a record of substitutions for at least one year. Authorizes the Dept. of Public Health to issue regulations and specify enforcement.	**Yes**	**Yes incl. EHR**	**Yes**	**Yes**		**Yes 1 yr.**	
North Carolina	**H 195; Enacted 5/21/2015** Sponsor: Rep. Dollar	Amends the Pharmacy Practice Act to allow for the substitution of an interchangeable biological product. Pharmacist must communicate "within a reasonable time" to the prescriber; may use an interoperable electronic medical records system." Effective date: Oct. 1, 2015	**Yes**	**Yes 48 hrs.** **Communicate**			**Yes**		**Yes**
North Dakota	**S 2190; Ch. 181; signed 6/26/2013** Sponsor: Sen. Dever (R); co-chair HHS Comm.	Provides that a pharmacy may substitute a prescription biosimilar product for a prescribed product only if the biosimilar product has been determined by the FDA to be interchangeable; the prescribing practitioner does not specifically indicate that the brand is medically necessary and the pharmacist informs the prescriber and the patient of the substitution; the patient has a right to refuse the biosimilar product selected by the pharmacist and the individual chooses not to refuse. Requires records retention for five years and public posting of such products.	**Yes**	**Yes 24 hrs.**	**Yes**	**Yes**		**Yes 5 yrs.**	**Yes**
Oregon	**S 460; Ch. 342, signed 6/6/2013** Sponsor: Sen. Monnes Anderson (D)	Provides a pharmacy or pharmacist filling a prescription order for a biological product may not substitute a biosimilar product for the biological product *unless* certain conditions are met including the notification of the patient for whom the product is being prescribed and the practitioner or the practitioner's staff; requires the pharmacy and pharmacist to retain a record of the substitution; requires the Board of Pharmacy to post on its	**Yes**	**Yes 3 days**	**Yes**	**Yes**		**Yes 3 yrs.**	**Yes**

		website a list of interchangeable biosimilar products. Effective upon passage, June 6, 2013.							
Tennessee	**S 984; Enacted, signed 5/4/2015** Sponsor: Sen. Norris (R)	Defines an "interchangeable biological product" within the Tennessee Affordable Drug Act of 2005; providing that "a prescriber shall allow for substitution with an interchangeable biological product of a prescribed biological product under all circumstances…" unless an adverse reaction, ineffective or other clinically based, prescriber based need.	**Yes**	**Yes** 5 days: communicate		**Yes**		**Yes**	**Yes**
Texas	**H 751; Enacted; signed 6/19/2015** Sponsor: Rep. Zerwas	Amends existing statute on generic substitution to add requirements of prior FDA "interchangeable" biologics; including communication by pharmacist to prescriber within 3 days. The label on the container must include words such as "Substituted for brand prescribed"	**Yes**	**Yes** 3 days: communicate				**Yes**	**Yes**
Utah	**S 78; Ch. 423; signed 4/26/2013** Sponsor: Sen. Stuart Adams (R)	Allows a pharmacist or pharmacy intern to substitute an interchangeable biosimilar product in the place of prescribed biological products if the FDA has determined that the biosimilar product is interchangeable; if the purchaser specifically requests or consents to the substitute; if the prescriber has not prohibited the substitute; also requires prescriber notification within three days (This provisions sunsets May 15, 2015). Also regulates out of state pharmacies; relates to labeling and recordkeeping.	**Yes**	**Yes** communicate notify	**Yes**	**Yes**		**Yes**	
	HB 279; Signed, 3/27/2015 Sponsor Rep. Dee (R)	Amends and **replaces 2013 provisions** enacted as Chapter 423 of 2013 (above) or scheduled to expire as of May 15, 2015. Deletes the term interchangeable "biosimilar" replaces it with interchangeable "biological product." Deletes "notify", replaces with "communication and" "make an entry" in electronic record.	(unchanged)	**Yes** 5 days: communicate				**Yes**	
Virginia	**H 1422; Ch. 412, signed 3/16/2013** Sponsor: Rep. O'Bannon (R)	Relates to dispensing of interchangeable biosimilar biological products; permits pharmacists to dispense a biosimilar that has been licensed by the FDA as interchangeable with a prescribed biological product unless the prescriber indicates such substitution is not authorized or the patient insists on dispensing of the prescribed biological product. The pharmacist or his designee must inform the patient prior to dispensing the interchangeable biosimilar and must disclose the retail cost. The notification provisions sunset July 1, 2015.	**Yes**	**Yes** 5 days	**Yes** prior	**Yes** (MD or patient)		**Yes** 2 yrs.	
	H 1422; Ch. 412, signed 3/16/2013 Sponsor: Rep. O'Bannon (R								
Washington	**S 5935; Ch. 242, signed 5/11/2015** Sponsor: Sen. Parlette (R)	An act relating to biological products; provides that "unless the prescribed biological product is requested by the patient or the patient's representative, if "substitution permitted" is marked on the prescription the pharmacist must substitute an interchangeable biological product that he or she has in stock for the biological product prescribed if the wholesale price for the interchangeable biological product to the pharmacist is less than the wholesale price for the biological product prescribed.	**Yes**	**Yes** 5 days communicate		**Yes**			**Yes**

Mandatory Prescription Drug Substitution Laws

For a number of years, before the discussion of biosimilars, at least 14 states and Puerto Rico mandatorily have required the state-regulated pharmacist to substitute a generic version of the prescribed drug if all prescription requirements are met. These laws are not invalidated by biosimilar substitution measures enacted as of June 2014. These jurisdictions include:

Florida	**Mississippi**	**Puerto Rico**
Kansas	**Nevada**	**Rhode Island**
Kentucky	**New Jersey**	**Washington**
Massachusetts	**New York**	**West Virginia** (Unless in pharmacist's judgment; must be less expensive)
Minnesota	**Pennsylvania**	

Source: NABP: 2014 Survey of Pharmacy Law, pp. 67 – 70.

Differing Views and Opinions

Not all health policy stakeholders agree on the role of state laws in regulating biological and biosimilar medications. These are some additional views expressed during the current session deliberations. As always, NCSL takes no position for or against state legislation or laws.

AHIP: "Remove barriers at the state level that restrict the use of biosimilars. While the Affordable Care Act authorized the FDA to develop an abbreviated licensure pathway for biosimilar drugs, it has yet to issue final standards that will determine when a biosimilar drugs is truly interchangeable with an already approved biologic. Ahead of these standards, some states have already adopted legislation that may restrict the availability of biosimilars before they even reach the market. These proposals will limit patient access to drugs that are not clinically different, yet cost substantially less than their brand-name counterparts." *(America's Health Insurance Plans In "Specialty Drugs - Issues and Challenges", June 2014)*

Biotechnology Industry Organization (BIO). "While the U.S. Food and Drug Administration (FDA) oversees approval of biologic medicines and designation of interchangeability, policies governing whether one product may be substituted in place of a doctor's prescription and whether a pharmacist must inform patients and doctors are covered by state law. (Indiana) SB 262 seek to properly preserve patient access to accurate prescription information, maintain incentives for innovation and promote a competitive market for biologic therapies. BIO will continue to advocate for full transparency in the substitution process as patients and their physicians should have the right to know what biologic medicine the patient receives from the pharmacy. Bills such as this, that properly addresses the important aspect of physician communication, represent model legislation necessary in all 50 states to address this cutting-edge technology." *(BIO statement in support of Indiana legislation, Feb. 26, 2014)*

Governor Brown of California: Bill 598 would effect two changes to our state's pharmacy law. First, it would allow interchangeable "biosimilar" drugs to be substituted for biologic drugs, once these interchangeable drugs are approved by the federal Food and Drug Administration (FDA). This is a policy I strongly support. Second, it requires pharmacists to send notifications back to prescribers about which drug was dispensed. This requirement, which on its face looks reasonable, is for some reason highly controversial. Doctors with whom I have spoken would welcome this information. CalPERS and other large purchasers warn that the requirement itself would cast doubt on the safety and desirability of more cost-effective alternatives to biologics. The FDA, which has jurisdiction for approving all drugs, has not yet determined what standards will be required for biosimilars to meet the higher threshold for "interchangeability." Given this fact, to require physician notification at this point strikes me as premature. For these reasons, I am returning SB 598 without my signature. *(Governor's veto message, Oct. 8, 2013)*

GPhA: "Interchangeability or substitution is the engine that drives generic competition."
(Generic Pharmaceutical Association, "Biosimilars")
Compromise Agreement Announced

"As state legislatures prepare for their 2015 sessions, I am pleased to announce that GPhA has agreed to support compromise automatic substitution legislation that would allow interchangeable biologics to be automatically substituted

at the pharmacy. This step brings millions of Americans closer to the day when they will be able to access safe alternatives to costly biologic medicines. Indeed, Express Scripts projects savings of $250 billion in 10 years should only the 11 likeliest biosimilars enter the market.

The compromise legislation was put forward by several GPhA members and reflects our core principles: upholding the current pharmacy practice of automatic substitution; insisting on the science-based FDA determination of interchangeability; and treating all interchangeables and their corresponding brand biologics the same once an interchangeable is approved. The compromise language is a vast improvement over 2012 language that we strongly opposed, and which originally erected numerous barriers to the automatic substitution of interchangeable biologics…" *(Statement by GPhA President and CEO, Dec. 9, 2014)*

Biosimilars Council: "The Generic Pharmaceutical Association (GPhA) and its Biosimilars Council applaud the enactment of legislation in five states to allow automatic substitution for Food and Drug Administration (FDA) approved interchangeable biologic products. Bills in Colorado (SB 71), Georgia (SB 51), Tennessee (SB 984), Utah (HB 279) and Washington (SB 5935) reflect core principles embraced in language agreed upon by GPhA and a wide coalition of brand manufacturers, Express Scripts, and others. ... passing laws that create a competitive market for biosimilar products and provide patient access to affordable versions of these critical medicines," (GPhA/Biosimilars Council release, May 13, 2015). Additional information is available at www.biosimilarscouncil.org.

HRSA - U.S. Health Research and Services Administration (HRSA distributed the following advisory to providers on March 30, 2015)

On Friday, March 6, 2015, the U.S. Food and Drug Administration (FDA), using the authority provided in the Affordable Care Act, approved the first biosimilar product in the United States. Since the introduction of biosimilar products to the market could yield measurable cost savings and greater access to therapeutic treatment for chronic conditions, the following information may be relevant to the patients and populations you serve.

Biosimilars are a type of biological product that is licensed (approved) by the FDA because they are highly similar to an already FDA-approved biological product, known as the biological reference product (reference product) and have been shown to have no clinically meaningful differences from the reference product. Minor differences in clinically inactive components are allowed. But there must be no clinically meaningful differences between the biosimilar and the reference product it was compared to in terms of the safety, purity, and potency of the product

Health care professionals can prescribe biosimilars just as they would prescribe other medications—by writing the proprietary name or nonproprietary name of the biosimilar on the prescription.

A biosimilar can be approved only for those indications and condition(s) of use previously approved for the reference product, but a biosimilar can be approved for fewer than all the indications and condition(s) of use approved for the reference product. Therefore, it is important for health care professionals to review the product labeling (prescribing information) to determine which conditions of use and routes of administration the biosimilar was approved for.

The FDA has developed a website about biosimilars specifically for providers. And, to learn more about biosimilars and Medicare Part B, please visit this website developed by the Centers for Medicare and Medicaid Services (CMS). You are encouraged to share both of these resources broadly.

Institute for Patient Access: "Biological medications differ substantially from conventional drugs and are classified differently by the FDA; as a result, laws and regulations developed for conventional drugs cannot be applied to biologics. Under current state laws, pharmacists may substitute conventional generic drugs for name-brands without notifying the physician. However, with therapeutically interchangeable biologics, underlying differences in the medications or their manufacturing methods may cause adverse events in some patients or may lead individual patients to respond better to one biologic than another. Physicians must be able to determine exactly which biological medication was given so that they can optimize treatment for each patient. Moreover, in a transparent healthcare system, patients and physicians have a right to know exactly which medication patients receive." Source: http://1yh21u3cjptv3xjder1dco9mx5s.wpengine.netdna-cdn.com/wp-content/uploads/2014/01/tppnp1.pdf (2014)

Appendix: Definitions

The following are some key definitions for policymakers to understand in considering regulations, with examples directly from state laws:

"**Biological product**" means a virus, therapeutic serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product, protein other than a chemically synthesized polypeptide, or analogous product, or arsphenamine or any derivative of arsphenamine or any other trivalent organic arsenic compound, applicable to the prevention, treatment, or cure of a disease or condition of human beings. *[from VA H1422 of 2013]*

"**Biosimilar**" means a biological product that is highly similar to a specific reference biological product, notwithstanding minor differences in clinically inactive compounds, such that there are no clinically meaningful differences between the reference biological product and the biological product that has been licensed as a biosimilar pursuant to 42 U. S. C. Section 262(k) in terms of safety, purity, and potency of the product. *[from VA H1422 of 2013]*

"**Interchangeable**" means a biosimilar that meets safety standards for determining interchangeability pursuant to 42 U. S. C. Section 262(k)(4). *[Federal law is excerpted below]*

TITLE VII—IMPROVING ACCESS TO INNOVATIVE MEDICAL THERAPIES: Subtitle A—Biologics Price Competition and Innovation.

U. S. C. (United States Code) Section 262(k)(4)

Safety Standards For Determining Interchangeability.—Upon review of an application submitted under this subsection or any supplement to such application, the Secretary shall determine the biological product to be interchangeable with the reference product if the Secretary determines that the information submitted in the application (or a supplement to such application) is sufficient to show that—

> ‘‘(A) the biological product— ‘‘(i) is biosimilar to the reference product; and ‘‘(ii) can be expected to produce the same clinical result as the reference product in any given patient; and
>
> ‘‘(B) for a biological product that is administered more than once to an individual, the risk in terms of safety or diminished efficacy of alternating or switching between use of the biological product and the reference product is not greater than the risk of using the reference product without such alternation or switch.
>
> *(Full text of FDA-related federal law: http://www.fda.gov/downloads/drugs/guidancecomplianceregulatoryinformation/ucm216146.pdf*

"Interchangeable biological product" means a biological product licensed by the United States food and drug Administration and determined to meet the safety standards for interchangeability pursuant to 42 U.S.C. § 262(k)(4) (relating to regulation of biological products) or a biological product determined by the United States Food and Drug Administration to be therapeutically equivalent as set forth in the latest edition or supplement of the United States Food and Drug Administration approved drug products with therapeutic equivalence evaluations, sometimes referred to as the "Orange Book." *[from PA S405, September 2014 amendment]*

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NATIONAL CONFERENCE of STATE LEGISLATURES

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