REMS are unique to a particular drug or class of drug; they can include the following elements: additional medication inserts to be included with the drug, a campaign or "communication plan" to inform key stakeholders about the risks of the drug, and, most notably, "Elements to Assure Safe Use" ("ETASU").[5]

ETASU are the most restrictive requirement of a REMS program because they directly influence how and when the drug can be used. ETASU can include elements such as patient monitoring or testing while taking the drug, special certification for prescribers or pharmacies, or limitations on how and where the drug can be dispensed (e.g. only in a hospital or certified infusion site).[6] REMS can be modified or completely withdrawn after further assessment.[7] While only about 75 total REMS programs exist,[8] their prevalence is increasing, with one industry group noting that 40 percent of new drug approvals are subject to some form of REMS.[9]

REMS plans affect millions of patients. Just one drug, Suboxone, had 9 million prescriptions filled in the United States in 2012, for a total of $1.5 billion in sales. As we will describe in this chapter, Suboxone is a classic drug that needs a REMS plan, given serious concerns about abuse of this particular drug. A safety plan, however, is meant to protect patients. It should not be used as a trick to block competition in the marketplace.

The fact that REMS programs can impose restrictions on the sale, distribution, or marketing a drug has made the program ripe for abuse by branded drug manufacturers seeking to prevent generics from entering the market. For example, a common safety element restricts sales of a particular medication to hospitals and specially certified pharmacies. This, however, has been used to create obstacles for companies seeking generic approval. Specifically, a generic company must prove that its drug is bioequivalent to the brand-name drug,[10] and testing for bioequivalence requires that the generic applicant use the brand-name drug as a comparison to the generic formulation.[11] Therein lies the problem. A number of cases have involved complaints that the brand-name drug company refused to sell a small amount of their drug to the generic on the grounds that the REMS plan limits the drug's distribution to

[5] *Ibid*. at 13.

[6] *Ibid*.

[7] *Ibid*. at 17. *See also* Press Release, Lundbeck, U.S. FDA Approves Changes to the SABRIL® (vigabatrin) REMS Program (June 23, 2016), http://finance.yahoo.com/news/u-fda-approves-changes-sabril-183500071.html (offering an example of REMS requirements being reduced).

[8] *Approved Risk Evaluation and Mitigation Strategies (REMS)*, U.S. Food & Drug Admin., www.accessdata.fda.gov/scripts/cder/rems/ (last visited Sept. 5, 2016).

[9] Alex Brill, *Lost Prescription Drug Savings from Use of REMS Programs to Delay Generic Market Entry*, Matrix Global Advisors (July 2014), at 2, www.gphaonline.org/media/cms/REMS_Studyfinal_July2014.pdf. The study was sponsored by the Generic Pharmaceutical Association.

[10] 21 U.S.C. § 355(j)(2)(A)(iv) (2012).

[11] 21 U.S.C. § 355(j)(8) (2012).