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FDA Issues Draft Guidance on the Distribution of Journal Articles and Reference Publications on Unapproved New Uses of Approved or Cleared Medical Products

On Friday, February 15, 2008, the Food and Drug Administration (FDA) issued draft guidance entitled "Good Reprint Practices for the Distribution of Medical Journal Articles and Medical or Scientific Reference Publications on Unapproved New Uses of Approved Drugs and Approved or Cleared Medical Devices." This draft guidance describes FDA's current thinking regarding the distribution of medical journal articles and scientific or medical reference publications that discuss unapproved new uses of approved drugs (including biological products licensed under the Public Health Service Act) or approved or cleared medical devices. Comments on the draft guidance must be submitted within sixty (60) days of the publication in the Federal Register of the notice announcing the availability of the draft guidance.[1]

Background. The dissemination of medical and scientific information regarding unapproved uses of approved medical products was previously governed in part by sections 551-557 of the Federal Food, Drug, and Cosmetic Act (FDCA), added to the statute by Congress in 1997 through section 401 of the Food and Drug Administration Modernization Act of 1997 (FDAMA). If a manufacturer disseminated this information in accordance with the conditions set forth in section 551, FDA would not view the dissemination as evidence of intent that the product be used for an unapproved new use. If a manufacturer chose to disseminate materials without adhering to the strict conditions of section 551, failure to adhere to those conditions did not in itself constitute a violation of the FDCA.[2] The FDAMA provisions, in other words, created a "safe harbor" from enforcement action. Sections 551-557 of the FDCA were subject to a sunset provision and ceased to be effective on September 30, 2006. In light of the expiry of the statutory safe harbor, FDA has issued draft guidance to explain its current view on the dissemination of medical and scientific information regarding unapproved uses of approved products.

In General. FDA explains that the draft guidance reflects the agency's recognition that there are important public policy reasons to allow manufacturers to disseminate truthful and non-misleading medical and scientific information regarding unapproved uses of approved medical products. Healthcare professionals may lawfully use or prescribe approved medical products for unapproved uses, and in some cases these uses or treatment regimens may be important or even constitute a medically recognized standard of care. The public health may therefore be advanced when healthcare professionals receive medical journal articles and other medical or scientific reference publications on unapproved uses of approved products. The agency adds, however, that an approved new drug that is marketed for an unapproved use becomes misbranded and an unapproved

[1] As of February 19, 2008, the notice had not been published in the Federal Register.

[2] Moreover, the dissemination of truthful and not misleading information about approved drugs in the form of peer reviewed articles or textbooks and without promotional activities has been found to be protected speech under the First Amendment. *Washington Legal Foundation v. Henney*, 56 F. Supp. 2d 81 (D.D.C. 1999).

new drug with respect to that use. Similarly, a medical device promoted for a new use that has not been approved or cleared is adulterated and misbranded. FDA's legal authority to determine whether distribution of medical or scientific information constitutes unlawful promotion of a new use (or otherwise causes the product to be misbranded or adulterated), therefore, has not changed. But the agency has issued this guidance to industry in recognition of the "public health value to healthcare professionals of receiving truthful and non-misleading scientific and medical information."

Recommendations. FDA's recommendations fall in two categories: recommendations regarding the types of reprints, article, and publications to be disseminated (including recommendations about the content), and recommendations regarding the manner of dissemination.

Types of Publications. A journal article relating to an unapproved use should be peer-reviewed, if it is to be disseminated by the manufacturer. It should be published by an organization that has a publicly stated (and followed) policy of full disclosure of conflicts of interest or biases for all authors, contributors, and editors. It should not be in the form of a special supplement or publication funded in whole or in part by the manufacturer. A medical or scientific reference publication should be generally available in bookstores or through other distribution channels where medical textbooks are sold. It should not be written, edited, excerpted, or published specifically for the manufacturer. It should not be edited or significantly influenced by the manufacturer. The journal article or reference material should address adequate and well-controlled clinical investigations to evaluate the safety or effectiveness of the product (although, in the case of medical devices, information relating to significant non-clinical research may be appropriate). Further, the information provided should not be false or misleading (concepts further elaborated in the draft guidance), and it should not pose a significant risk to the public health.

Manner of Dissemination. Scientific or medical information about an unapproved use that is distributed by a manufacturer should be unabridged and should not be highlighted, marked, summarized, or characterized in any way. It should be accompanied by the product's approved labeling, as well as a comprehensive bibliography of publications discussing adequate and well-controlled clinical studies previously published about the use. If the conclusions of the article or publication have been called into question, the information should be accompanied by a representative publication reaching the contrary conclusion. The scientific or medical information should be distributed separately from information that is promotional in nature, and it should be accompanied by a prominent statement including -- among other things -- the fact that the use is not approved and any significant risks or safety concerns concerning the use that are known to the manufacturer and not discussed in the article.

Safe Harbor. FDA concludes the draft guidance by stating that if a manufacturer follows the recommendations in the draft guidance and if there is no unlawful promotion of the product, the agency does not intend to use the distribution of the information in question as evidence of intent that the product be used for an unapproved use.

Please address any questions regarding this "Good Reprint Practices" draft guidance to any of the attorneys listed below.

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This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our food & drug practice group:

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