Docket No. FDA-2016-D-1307

COMMENTS

of

WASHINGTON LEGAL FOUNDATION

to the

FOOD AND DRUG ADMINISTRATION
DEPARTMENT OF HEALTH & HUMAN SERVICES

Concerning

DRUG AND DEVICE MANUFACTURER COMMUNICATIONS WITH PAYORS, FORMULARY COMMITTEES, AND SIMILAR ENTITIES

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED
AT 82 FED. REG. 6568 (JANUARY 19, 2017)

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Submitted Electronically (www.regulations.gov)
Division of Dockets Management (HFA-305)
Food and Drug Administration
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Re: Drug and Device Manufacturer Communications With Payors, Formulary Committees, and Similar Entities—Questions and Answers; Draft Guidance for Industry and Review Staff
82 Fed. Reg. 6568 (January 19, 2017)

Dear Sir/Madam:

Washington Legal Foundation (WLF) is pleased to submit these comments in response to the Food and Drug Administration's (FDA) draft guidance regarding manufacturer communications with "payors, formulary committees, and similar entities" (the "Draft Guidance"). WLF applauds FDA for its effort to provide long-overdue guidance to drug and device manufacturers that wish to provide truthful economic information to those responsible for deciding whether and under what circumstances to reimburse the costs of medical products. Congress created a "safe harbor" for the provision of such information in 1997. *See* Food and Drug Administration Modernization Act of 1997 (FDAMA), Pub. Law No. 105-115, § 114, 11 Stat. 2312 (1997). But in the absence of any FDA guidance for the past 20 years regarding the scope of that safe harbor, manufacturers have been very reluctant to provide the sorts of information authorized and encouraged by Congress.

In general, WLF supports FDA's interpretation of the statute in question, Section 502(a) of the Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 352(a). As we have expressed repeatedly in comments previously submitted to the agency, WLF believes that FDA has failed to appreciate the full extent of the protections afforded by the First Amendment to manufacturer speech. But while we are concerned that the Draft Guidance suffers from some of the same First Amendment deficiencies we have previously outlined with regard to other FDA guidance documents, the Draft Guidance does a relatively good job in effectuating Congress's intent to encourage widespread dissemination of truthful economic information about FDA-approved drugs to those adequately trained to understand the information. WLF is particularly pleased by FDA's endorsement of truthful speech about investigational drugs.

FDA has a strong interest in preventing the dissemination of false and misleading speech. But in the past, FDA has established unrealistically narrow definitions of what constitutes "truthful" speech, a policy that frequently has placed FDA in conflict with First Amendment

strictures. The Draft Guidance avoids that conflict by adopting a definition of truthfulness that better conforms with the commonly understood meaning of that term. It provides that FDA will not consider "health care economic information" (HCEI) to be "false or misleading" if it is "based on competent and reliable scientific information," which FDA defines as information "developed using generally-accepted scientific standards, appropriate for the information being conveyed, that yield accurate and reliable results." WLF applauds that definition of truthfulness and urges FDA to apply it to *all* its speech regulation, not simply to regulation of HCEI disseminated to a small group of payors.

WLF's principal reservation regarding the Draft Guidance is its failure to take account of Congress's December 2016 amendments to § 352(a). *See* 21st Century Cures Act, Pub. Law No. 114-255, § 3037. Before December 2016, § 352(a) stated that manufacturer dissemination of truthful HCEI to formulary committees, etc. was entitled to safe-harbor protection if the information "directly relate[d]" to an FDA-approved use of the drug in question. The 21st Century Cures Act eliminated the word "directly," thereby considerably broadening the scope of the safe harbor. WLF respectfully submits that the Draft Guidance adopts an unduly restrictive understanding of when HCEI should be deemed to "relate" to an FDA-approved use of the drug.

I. *Interests of WLF*

Washington Legal Foundation is a public-interest law and policy center with supporters nationwide. WLF regularly appears before federal and state courts and administrative agencies to promote economic liberty, free enterprise, a limited and accountable government, individual and business civil liberties, and the rule of law. In particular, WLF has devoted substantial resources over the years to promoting the free-speech rights of the business community, appearing before numerous federal courts in cases raising First Amendment issues. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Nike v. Kasky*, 539 U.S. 654 (2003). WLF has successfully challenged the constitutionality of FDA restrictions on speech by pharmaceutical manufacturers. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd*, 202 F.3d 331 (D.C. Cir. 2000). As a result of that litigation, FDA is subject to a permanent injunction limiting FDA authority to suppress manufacturer dissemination of certain journal articles/medical texts discussing off-label uses of their FDA-approved products. More recently, WLF played a key role in overturning—on First Amendment grounds—the criminal conviction of a pharmaceutical representative for conspiring to violate the Food, Drug, and Cosmetic Act (FDCA); the representative's "crime" consisted of speaking truthfully about off-label uses of a drug manufactured by his company. *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012).

WLF also regularly participates in FDA administrative proceedings in support of expanded First Amendment rights. *See, e.g.*, FDA Docket No. FDA-2016-N-1149 (December 30, 2016) (response to FDA request for input on manufacturer communications regarding off-

label uses of approved medical products); FDA Docket No. FDA-2015-N-2002 (November 24, 2015) (response to FDA Proposed Regulation defining "intended use"); FDA Docket No. FDA-2008-D-0053 (May 15, 2014) (response to revised FDA Draft Guidance on distributing scientific and medical publications on off-label uses); FDA Docket No. FDA-2013-N-1430 (April 14, 2014) (response to FDA Draft Guidance on postmarket submissions to FDA of interactive promotional media); FDA Docket No. FDA-2011-D-0868 (March 29, 2012) (response to FDA Draft Guidance on unsolicited requests for off-label information); FDA Docket No. 2008-D-0053 (April 21, 2008) (response to FDA Draft Guidance on good reprint practices); FDA Citizen Petition No. 2006P-0319/CPI (August 11, 2006) (documenting repeated First Amendment violations by FDA's Division of Drug Marketing, Advertising, and Communications (DDMAC) and calling on DDMAC to conform to constitutional constraints on its activities); FDA Docket No. 02N-0209 (October 28, 2002) (response to FDA's request for public comments on First Amendment issues).

II. *FDA's Statutory Authority*

Congress adopted the FDCA in 1938 to regulate the sale of drugs and medical devices to the public. In 1976, Congress adopted the Medical Device Amendments of 1976 (the "MDA"), 21 U.S.C. §§ 360c *et seq.*, to give FDA greater regulatory authority over medical devices.

Section 505(a) of the FDCA, 21 U.S.C. § 355(a), provides that no "new drugs" may be introduced into interstate commerce unless they are approved by FDA. The MDA imposes similar restrictions on new medical devices. Once FDA has approved a drug or device for introduction into interstate commerce, it has only limited statutory authority to control dissemination of information regarding the product. For example, FDA is authorized by statute to restrict what manufacturers have to say about their drugs and medical devices to the extent that such materials constitute "labeling" of those products within the meaning of § 201(m) of the FDCA, 21 U.S.C. § 321(m). FDA's statutory authority also extends to "advertisements" of prescription drugs (21 U.S.C. § 352(n)) and a small subset of medical devices referred to as "restricted" devices, *i.e.*, hearing aids (21 U.S.C. § 352(q)). The FDCA grants FDA no authority to control what people other than manufacturers and distributors say about the proper uses of FDA-approved drugs and medical devices.

FDA nonetheless seeks to exercise considerable control over manufacturer speech by asserting that such speech may properly be used as evidence of improper conduct. First, if a manufacturer discusses potential off-label uses of an FDA-approved medical product, FDA asserts that such speech is evidence that the manufacturer may be distributing the product for a new (and thus not yet approved) intended use—a violation of 21 U.S.C. § 355(a). Second, because (by definition) the product labeling will not include directions for this alleged new intended use, FDA asserts that the manufacturer speech may render the product misbranded, in violation of 21 U.S.C. § 352. A medical product is deemed "misbranded" if, among other things,

"its labeling is false or misleading in any particular." 21 U.S.C. § 352(a).

FDAMA, adopted by Congress in 1997, amended the misbranding statute in order to provide manufacturers greater leeway when providing truthful HCEI to those with an especial need to receive such information. Congress again amended the misbranding statute in December 2016. As currently drafted, the statute provides a safe harbor for such speech by significantly limiting the circumstances under which HCEI provided to such individuals can be deemed "false or misleading":

> Health care economic information provided to a payor, formulary committee, or other similar entity with knowledge or expertise in the area of health care economic analysis, carrying out its responsibilities for the selection of drugs for coverage or reimbursement, shall not be considered to be false or misleading under this paragraph if the health care economic information relates to an indication approved [by FDA] for such drug, is based on competent and reliable scientific evidence, and includes, where applicable, a conspicuous and prominent statement describing any material differences between the health care economic information and the labeling approved for the drug under section 355 of this title or under section 262 of Title 42.

21 U.S.C. § 352(a)(1). The safe harbor also states that such speech may not be cited as evidence that the manufacturer is distributing the drug for an unapproved new use in violation of 21 U.S.C. § 355. *Ibid*.

Section 3037 of the 21st Century Cures Act expanded the safe harbor by deleting the requirement that the HCEI must "directly relate[ ]" to an FDA-approved indication; as indicated above, it is now sufficient if the HCEI merely "relates" to the approved indication. Section 3037 also added the following sentence to the safe harbor, regarding the definition of HCEI: "Such term does not include any analysis that relates only to an indication that is not approved under section 355 of this title or under section 262 of Title 42 for such drug." 21 U.S.C. § 352(a)(2)(B).

III. *The First Amendment Imposes Significant Restrictions on FDA's Authority to Regulate Manufacturer Speech*

The federal courts have long recognized that the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages conveyed by private individuals. *See, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). "As a general matter, 'state action to punish the publication of truthful information can seldom satisfy constitutional standards.'" *Barnicki v. Vopper*, 532 U.S. 514, 527 (2001) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979)). The heavy burden of justifying content-based restrictions on speech rests on the government. *R.A.V. v. St.*

Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid," and the government bears the burden to rebut that presumption.).

"Speech in the aid of pharmaceutical marketing ... is a form of expression protected by the ... First Amendment ... ." *Sorrell*, 564 U.S. at 557. And when regulating purely commercial speech, the government must still "justify its content-based law as consistent with the First Amendment." *See id.* at 563-66, 571 (Regulation of speech in pharmaceutical marketing was "presumptively invalid" and the "outcome [was] the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny applied."). "The government cannot 'completely suppress information when narrower restrictions on expression would serve its interests as well.'" *Caronia*, 703 F.3d at 164 (quoting *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 565 (1980)). This is because "bans against truthful, nonmisleading commercial speech ... usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth ... ." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996).

"The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Ibid.* So when regulating non-misleading speech that concerns lawful activity, the government must prove that its regulation is "narrowly drawn" and advances a substantial government interest "to a material degree." *Id.* at 505; *Central Hudson*, 447 U.S. at 565-66.

Over the past several decades, federal courts have repeatedly held that FDA's restrictions on manufacturer speech are subject to significant First Amendment constraints and on numerous occasions have struck down FDA speech restrictions as constitutionally impermissible. *See, e.g.*, *Amarin Pharma, Inc. v. FDA*, 119 F. Supp. 3d 196 (S.D.N.Y. 2015); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002); *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999); *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd*, 202 F.3d 331 (D.C. Cir. 2000).

The permanent injunction issued against FDA in *Washington Legal Found. v. Friedman* invokes the First Amendment to prohibit FDA from, among other things, restricting medical-product manufacturers from disseminating any article published in "a bona fide peer-reviewed professional journal" or any "reference textbook" to "physicians or other medical professionals." 13 F. Supp. 2d at 73-74. FDA has not accepted the judicial determination that such information qualifies as "truthful." Instead, it has adhered to its view that scientific information does not

qualify as "truthful" unless it is the product of a "well-controlled" medical study—*e.g.*, a placebo-controlled, double-blind study.

FDA has an interest in preventing the dissemination of false or misleading speech regarding medical products. But as the cases discussed above demonstrate, federal case law does not permit FDA to invoke its overly restrictive definition of "truthful" speech when seeking to justify its speech restrictions. In one recent case, a federal district court explicitly rejected FDA's challenge to the truthfulness of scientific information that, FDA claimed, did not meet its exacting requirements. *Amarin Pharma, Inc. v. FDA,* 119 F. Supp. 3d 196 (S.D.N.Y. 2015). Experience demonstrates that medical professionals regularly make medical decisions on the basis of information lacking the pedigree often demanded by FDA. If that were not so, off-label uses (and payor reimbursement for those uses) would not be so prevalent within the medical profession.

IV. *The Draft Guidance Defines Truthful Speech in a Manner that Largely Complies with the First Amendment and the Safe Harbor*

The § 352(a)(1) safe harbor defines truthful HCEI as information that "is based on competent and reliable scientific evidence, and includes, where applicable, a conspicuous and prominent statement describing any material differences between the health care economic information and the labeling approved for the drug." For the most part, the Draft Guidance complies with that statutory definition as well as with First Amendment constraints.

WLF applauds the Draft Guidance for abandoning the definition of truthfulness—information that is the product of one and sometimes two "well-controlled" medical studies—that FDA has adopted in other contexts. While the well-controlled-study standard may be appropriate for determining whether a drug is sufficiently safe and effective to warrant marketing approval, applying that standard for the purpose of determining truthfulness is not consistent with common understandings (or the Constitution's understanding) of what constitutes truthful (and thus constitutionally protected) commercial speech. The Draft Guidance proposes a more appropriate standard for determining the truthfulness of HCEI. Such information is deemed "based on competent and reliable scientific evidence" (and thus truthful) if it "has been developed using generally-accepted scientific standards, appropriate for the information being conveyed, that yield accurate and reliable results." Draft Guidance at 9. FDA states that in undertaking competent-and-reliable-evidence determinations, it "will consider the merits of existing current good research practices for substantiation developed by authoritative bodies." *Ibid.*

WLF believes that this standard for determining truthfulness properly balances FDA's desire to prevent the dissemination of false or misleading information with the important healthcare objectives served by permitting the free flow of HCEI. WLF urges FDA to adopt a

similar standard for determining the truthfulness of manufacturer speech in other contexts as well. We note, for example, that the Draft Guidance does not apply to information supplied by manufacturers to physicians. As WLF has repeatedly argued in other contexts, FDA's adherence to its well-controlled-study standard for determining truthfulness of off-label information supplied to doctors is inconsistent with First Amendment protection afforded to commercial speech.

WLF is also pleased that the Draft Guidance explicitly acknowledges that the information protected by the § 352(a)(1) safe harbor includes "the clinical data" underlying "the analysis of a drug's economic consequences." Draft Guidance at 9. If such clinical data—*e.g.*, data regarding a drug's safety and effectiveness in a variety of settings—can be freely disseminated to payors, formulary committees, and similar entities, WLF can see little basis for restricting dissemination of that data to other medical professionals, including doctors.

WLF also applauds FDA for explicitly authorizing manufacturer dissemination of truthful HCEI concerning *investigational* drugs and devices. Draft Guidance at 15-17. Supplying such information is vitally important to effective healthcare delivery. Unless payors, formularies, and similar entities can obtain such information in advance of final product approval by FDA, they are unlikely to be in a position to make timely coverage determinations—thereby delaying patient access to important medical advances. FDA also requests comments on whether the scope of the Draft Guidance should be expanded to cover dissemination of HCEI regarding FDA-approved medical devices. WLF fully supports such an expansion. WLF can see no reason why medical-device manufacturers should enjoy any fewer First Amendment rights to speak truthfully regarding their products than do drug manufacturers.

WLF has some concerns with the extent of the disclosure requirement imposed on drug manufacturers by the Draft Guidance. Section 352(a)(1) merely requires that truthful HCEI be accompanied by "a conspicuous and prominent statement describing any material differences between the [HCEI] and the labeling approved for the drug." The Draft Guidance, on the other hand, includes a lengthy list of information that must be included with the HCEI. Draft Guidance at 9-14. That list extends far beyond the statutory requirement (inclusion of a "material differences" statement) and may impose significant burdens on manufacturers—burdens that could result in the chilling of truthful speech. WLF urges FDA to trim its list of mandatory disclosures; disclosures should be required only to the extent necessary to ensure that the omission of relevant information does not render the HCEI potentially misleading.

V. *The Draft Guidance Unduly Restricts Dissemination of Information that "Relates" to Approved Uses of the Drug in Question*

The Draft Guidance correctly recognizes that HCEI frequently "relates" to an FDA-approved indication for a drug "despite incorporating information that does not appear within, and may vary in certain respects from, information presented in the FDA-approved labeling." Draft Guidance at 6. FDA provides very helpful guidance to manufacturers by listing 10 types of HCEI that it believes meet § 352(a)(1)'s "relates to" standard.

WLF nonetheless believes that FDA is interpreting the "relates to" standard too restrictively. Indeed, the Draft Guidance makes no mention of Congress's December 2016 amendments to § 352(a)(1), amendments that make clear that Congress wished the standard to be broadly construed. Before December 2016, the safe harbor stated that manufacturer dissemination of truthful HCEI would not cause the drug at issue to become "misbranded" (and would not constitute evidence of distribution of an unapproved new drug) if, among other things, the HCEI "directly relates to an indication approved [by FDA] for such drug." In December 2016, Congress amended § 352(a)(1) by removing the word "directly." Congress also added the following sentence to the statutory definition of HCEI: "Such term does not include any analysis that relates *only* to an indication that is not approved" by FDA. 21 U.S.C. § 352(a)(2)(B) (emphasis added). The import of these amendments is clear: the safe harbor applies to the dissemination of truthful HCEI, provided only that the information bears *some* relationship to an FDA-approved indication.

At least one of the Draft Guidance's examples of information that, according to FDA, does *not* "relate" to an FDA-approve indication is inconsistent with the safe harbor's expansive "relates to" standard. The Draft Guidance states:

> An economic analysis of disease course modification related to use of a drug that is approved only to treat the *symptoms* of the disease would not be considered related to the approved indication. Thus, for example, if an analysis for a drug indicated for the *acute relief* of angina discussed the effect of the drug on delaying the *worsening of coronary artery disease* (disease course modification), FDA would not consider this to relate to the approved indication. Similarly, an analysis based on *prolonged patient survival* (disease course modification) for patients with heart failure would not be considered related to an indication for a drug approved only for the treatment of the *signs and symptoms* of heart failure. As illustrated by these examples, if a drug is approved only to relieve the symptoms of a disease, HCEI analysis regarding use of the drug to prevent, cure, or mitigate/change the course of the disease would not be considered related to the drug's approved indication.

Draft Guidance at 8 (emphasis in original).

FDA's analysis cannot be squared with the language of § 352(a), particular the December 2016 amendments to the statute. Under any commonly understood definition of the word "relates," HCEI regarding the effect of a drug on "delaying the worsening of coronary artery disease" "relates" to the drug's approved use for treating "acute relief of angina." Moreover, that is information that any payor, formulary committee, or similar entity would like to know, in order to assist with coverage/formulary decisions. Obviously, if a patient is suffering from angina and a formulary committee has a choice between two drugs demonstrated to be safe and effective in providing acute relief from angina, the committee (all other things being equal) would want to steer its patient toward a drug that may also be effective in changing the course of the disease.

By seeking to prevent manufacturers from disseminating such information, the Draft Guidance directly conflicts with the statutory mandate of § 352(a)'s safe harbor. Moreover, as WLF has explained at length elsewhere, FDA's attempted suppression of truthful speech in this manner violates the First Amendment rights of both manufacturers and their intended audiences.

VI. *Conclusion*

WLF appreciates this opportunity to submit these comments related to communications by manufacturers to payors, formulary committees, and similar entities. WLF believes that FDA has an important role to play in ensuring that such communications are truthful and non-misleading and that the Draft Guidance provides invaluable assistance to manufacturers who seek to disseminate truthful HCEI. WLF urges FDA to modify the Draft Guidance, as outlined above, to bring it into full compliance with both the First Amendment and the safe harbor created by 21 U.S.C. § 352(a).

Sincerely,

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/s/ Mark S. Chenoweth
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