

June 15, 2018

FDA Issues Final Guidance Documents Relating to Medical Product Manufacturer Communications

On June 12, 2018, the Food and Drug Administration (“FDA”) issued two key documents outlining the agency’s current thinking regarding drug and device manufacturers’ communication of information not contained in product labeling. In particular, FDA issued final guidance documents laying out the agency’s position with respect to (1) manufacturer communications with payors, formulary committees, and similar entities (“the Payor Guidance”), and (2) manufacturer communications consistent with FDA-required labeling (“the Consistent with the Labeling Guidance”). These guidance documents are the final versions of draft guidance documents issued on January 18, 2017, as [previously reported](#) by Ropes & Gray. The changes to the guidance documents are extensive, but generally provide additional flexibility for manufacturers to convey certain types of product information.

In announcing the final guidance documents, Commissioner Gottlieb emphasized his hope that “these two guidances will provide clarity to companies as they develop communications about their medical products and help ensure that patients, providers and insurers have access to a range of relevant, truthful and non-misleading information from companies about medical products.” He also emphasized that the new guidance documents aim to “facilitate contracting for new medical products . . . based on the value that these products are delivering to health systems, providers, and especially patients.”

FDA issued the Payor Guidance in response to a request from the Medical Information Working Group (“MIWG”), an *ad hoc* coalition of drug and device manufacturers co-represented by Ropes & Gray. MIWG and other industry groups have long urged FDA to clarify and modernize its regulations and policies on a range of topics relating to manufacturer communications, building on recent First Amendment case law emphasizing that the Constitution constrains FDA’s ability to restrict manufacturers’ communication of truthful, non-misleading information about their products, regardless of whether the information appears in the product labeling. In both guidance documents, FDA acknowledges that there is a variety of information not contained in product labeling that is nevertheless valuable to payors, prescribers, and patients. Below, we summarize the key changes from the draft guidance documents and discuss implications for product manufacturers.

Final Guidance on Payor Communications

- The Payor Guidance provides additional context about the role of payors, formulary committees, and similar entities, as well as the types of information that these parties consider. For example, the Payor Guidance acknowledges that payors in certain cases will need to look to information that is different from what FDA would consider as part of the product approval process. The Payor Guidance also stresses that, because payors and other similar entities make coverage and reimbursement decisions that impact many patients, it is vital that the information provided be truthful and non-misleading and include appropriate background and contextual information.
- The draft version of the Payor Guidance would have created a safe harbor for manufacturers to convey information only about investigational products with payors, formulary committees, or similar entities (collectively, “payors”) prior to FDA approval. The final version expands the safe harbor for preapproval communications to cover new uses of legally marketed products, removing a restriction that could have sharply limited the information manufacturers could provide about the value of their products.

- The draft version of the Payor Guidance also provided recommendations for drug manufacturers' communications with payors about health care economic information ("HCEI"), but was silent on the guidance's applicability to device manufacturers. The final version states that the recommendations relating to HCEI communications are applicable both to drug and device manufacturers.
- The Payor Guidance reiterates the earlier view that it does not apply to the provision of information to individual health care professionals ("HCPs"). However, the final version also includes new and helpful language clarifying that if an individual serves both as an HCP *and* on a formulary committee (or in a similar role), the provision of HCEI to that individual when the individual is acting in his or her capacity as a formulary committee member would be within scope of the Guidance.
- The Payor Guidance provides several new examples setting forth types of HCEI communications that are or are not appropriate. For example, the Payor Guidance states that it may be appropriate to base an HCEI communication on a dataset that includes both patients who are within the indicated patient population and patients who are outside of the indicated patient population.
- In general, the Payor Guidance provides greater flexibility and clarity with respect to the types of disclosures and contextual information that manufacturers should provide to payors in connection with HCEI. For example, FDA provides a list of disclosures that it believes are "generally material" to HCEI communications but expressly acknowledges that not all disclosures are required in all cases.
- The Payor Guidance now explicitly states that "FDA does not regulate the terms of contracts between firms and payors, and such contracts are not subject to FDA reporting requirements" (*e.g.*, the requirement to submit drug advertising at the time of first use to FDA on Form 2253). This statement is consistent with the agency's objective, as expressed by Commissioner Gottlieb, to facilitate value-based contracting.
- Near the end of the Payor Guidance, FDA asserts that there are potentially competing interests at stake between the need of payors and other similarly sophisticated audiences to obtain information, on the one hand, and the public health risk of manufacturers providing harmful and unsubstantiated information, on the other hand. The agency claims that the Payor Guidance appropriately balances and harmonizes these interests. Although FDA does not explicitly reference the First Amendment, the balancing language echoes language contained in the January 2017 First Amendment Memorandum described in a [prior Ropes & Gray Alert](#) and suggests that FDA may be attempting to ensure that the new guidance is both appropriate as a matter of policy and consistent with the Constitution.

Final Guidance on Communications Consistent with FDA-Required Labeling

- While the draft version of the Consistent with the Labeling Guidance referred generally to product communications, the final applies only to labeling and advertising, *i.e.*, the communications over which Congress granted FDA regulatory authority. A reasonable inference from this change is that "scientific exchange" and other types of communications outside of FDA's statutory purview are not within the scope of the guidance.
- The Guidance retains the three-factor test from the draft guidance for determining whether a communication is consistent with the FDA-required labeling:
 - Are the conditions of use described in the communication consistent with the product labeling?
 - Does the communication alter the risk-benefit profile of the product in such a way that may result in increased harm to health?
 - Does the product labeling enable the product to be used safely and effectively for the conditions of use described in the communication?

FDA provides a number of additional examples that manufacturers can rely on in applying the factors, including examples related to communications about compliance, adherence, and tolerability.

- FDA states that manufacturers of 510(k) and 510(k)-exempt devices should not rely on the three-factor test described above. Instead, for 510(k)-cleared devices, FDA directs firms to analyze communications in accordance with 21 C.F.R. § 807.81(a)(3) and FDA's guidance *Deciding When to Submit a 510(k) for a Change to an Existing Device*. For 510(k)-exempt devices, FDA directs firms to analyze communications in accordance with the limitations of exemptions in the device classification regulations. The Consistent with the Labeling Guidance notes, "FDA views communications that trigger a need for a 510(k) as inconsistent with FDA-required labeling. Conversely, FDA views communications that do not trigger the need for a 510(k) to be consistent with the FDA-required labeling, and does not intend to rely on such communications to establish a new or significantly modified intended use, or one that is different from the use for which the product is legally marketed." This FDA "clarification" may prove unhelpful to device manufacturers, particularly given the paucity of FDA guidance on the often-vexing question of when a specific use of a 510(k)-cleared device falls within the scope of a broader 510(k)-cleared indication.
- The Consistent with the Labeling Guidance also provides additional context on the "scientifically appropriate and statistically sound" substantiation standard that product communications consistent with the labeling should meet. Specifically, FDA states that information based on "speculation or belief," as well as information "based on a poorly designed or conducted study or analysis," would not meet the substantiation standard, but it does not elaborate on data sources that may be inappropriate. In general, the Guidance explains that the standard is a flexible one, and it states that "FDA believes that a variety of types and studies and analyses can provide useful additional information about a medical product for its approved/cleared conditions of use" so long as "firms' product communications [do] not overstate the findings of or the conclusions that can be drawn from such studies or analyses, or fail to disclose their material limitations."
- Finally, the Consistent with the Labeling Guidance acknowledges, which the draft guidance did not, the apparent conflict between the "scientifically appropriate and statistically sound" standard it endorses and the regulatory requirement in 21 C.F.R. § 202.1(e)(6) that prescription drug advertising claims be supported by "substantial evidence." The Consistent with the Labeling Guidance now explicitly states that "evidence other than that which meets the new drug approval standard of 'substantial evidence' of effectiveness could be used to support certain representations or suggestions about a prescription drug in a [Consistent with FDA-required labeling ("CFL")] promotional communication." FDA goes on to state that it "does not intend to interpret its regulations . . . to the contrary," citing Section 202.1(e)(6). Because that formal regulation expressly requires substantial evidence for such claims, this statement in the Consistent with the Labeling Guidance seems to indicate that FDA intends, as a matter of enforcement discretion, not to enforce the regulatory standard in cases where product communications comply with the Consistent with the Labeling Guidance.

Conclusion

The two finalized guidance documents issued by FDA on June 12 contain extensive changes from the draft versions released in January 2017. Overall, the changes provide additional flexibility to medical product manufacturers to convey certain types of truthful, non-misleading product information, and provide more examples of information that FDA believes would or would not be appropriate to convey. Although these guidance documents address certain aspects of FDA regulation of manufacturer communications about unapproved uses of approved or cleared medical products, FDA has additional work to do in order to complete its comprehensive review of its policies in this area, as the MIWG and other industry groups have urged.

If you would like to discuss the foregoing or any other related matter, please contact any member of Ropes & Gray's [FDA regulatory](#) or [government enforcement](#) practices or your usual Ropes & Gray advisor.