

FDA issues draft guidance for dissemination of 'off-label' information regarding approved medical products

On February 15, 2008, the U.S. Food and Drug Administration ("FDA") issued draft guidance on industry dissemination of medical or scientific journal articles and reference publications (hereafter "reprints") that discuss unapproved uses -- or "off-label" uses -- of FDA-approved drugs, biologics, and medical devices.

Previously, Section 401 of the Food and Drug Administration Modernization Act ("FDAMA") provided for a safe harbor under which a manufacturer could disseminate off-label reprints. If a manufacturer complied with the conditions set forth in FDAMA Section 401, including a certification that it would submit a supplemental new drug application ("sNDA") for the new use discussed in the reprint, the dissemination would not be used as evidence of an intent to promote the product off-label. Failure to distribute off-label information in accordance with FDAMA Section 401 would not, however, constitute an independent violation of the law. Because the FDA never issued any other formal regulations or policies on its view of the dissemination of reprints outside of the safe harbor, however, industry practices regarding the distribution of off-label information varied widely. To further muddy the waters, FDAMA Section 401 ceased to be effective in 2006.

The FDA's issuance of the draft guidance is significant because it fills the gap left by FDAMA and also because it represents the FDA's current thinking on best practices for industry dissemination of off-label reprints. These best practices are similar to FDAMA's safe harbor conditions limiting the types of information that may be disseminated to the following:

- (1) peer reviewed journal articles published by an organization that has an editorial board composed of independent experts; and
- (2) reference publications that are not significantly influenced by, written, edited, or published for a manufacturer, and which are generally available in bookstores or other distribution channels.

These best practices are, however, generally less burdensome and less restrictive than FDAMA's. Importantly, the FDA does not expect that manufacturers will:

- (1) submit the reprint to the FDA for pre-clearance prior to disseminating an off-label reprint;
- (2) certify to the FDA that it will file an sNDA for the off-label use within a certain timeframe; or
- (3) maintain records of the persons or category of persons who received the reprint.

In addition, the draft guidance does not require manufacturers to state, where applicable, that the FDA-approved products or treatments exist for the disease or condition discussed.

Nevertheless, the draft guidance does include certain new limitations that were not contemplated by FDAMA Section 401:

- (1) a manufacturer should not disseminate an off-label reference publication if it has been edited by “any individuals having a financial relationship” with the manufacturer;
- (2) reprints of reports of Phase I studies and reference publications that contain “little or no substantive discussion of the relevant investigation or data” would not be considered by FDA to be worthy of dissemination; and
- (3) reprints must be accompanied by statements disclosing “any significant risks or safety concerns” known to the manufacturer concerning the off-label use if such risks or concerns are not discussed in the reprint itself.

FDAMA Section 401 only required safety information to accompany the reprint if the FDA determined it was necessary. Furthermore, if the conclusions of a reprint have specifically been called into question by another article(s) or text(s), the reprint must be disseminated along with a representative publication that reaches contrary or different conclusions regarding the off-label use. Finally, while both FDAMA Section 401 and the draft guidance prohibit off-label reprints from being disseminated in conjunction with information that is promotional in nature, the draft guidance explicitly states that reprints may not be “marked, highlighted, summarized, or characterized by the manufacturer in any way.”

The FDA is seeking public comments on the draft guidance. Comments should be submitted within 60 days of the Federal Register’s notice announcing the draft guidance’s availability. Ropes & Gray attorneys have been following this issue closely and have significant experience both in advising companies on reprint dissemination policies and in submitting comments to FDA on proposed rules and guidance documents.

Contact Information

If you have any questions about the draft guidance and its effect on your business activities, please do not hesitate to contact one of our attorneys below, or your regular Ropes & Gray attorney.

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