FDA Issues Final Guidance for Dissemination of 'Off-Label' Information Regarding Approved Medical Products

On Monday, January 12, 2009, the U.S. Food and Drug Administration (FDA) made available a final 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 or cleared drugs, biologics, and medical devices.

As with the draft guidance issued in February 2008, the final guidance recognizes the public health and policy justification supporting the dissemination of truthful and non-misleading information on off-label uses. The final guidance permits manufacturers, including their sales representatives, to disseminate off-label information about their products if such information is in the form of:

1. a peer-reviewed journal article published by an organization that has an editorial board composed of independent experts (but not including special supplements funded in whole or in part by the manufacturer of the product discussed in the article); or
2. a scientific or medical reference publication that is not significantly written, edited, or influenced by, or published for, a manufacturer, or edited by any individual having a financial relationship with the manufacturer, and which is generally available in bookstores or other commercial distribution channels.

In a change from the draft guidance, the final guidance states that reprints discussing historically controlled studies, pharmacokinetic and pharmacodynamic studies, and meta-analyses testing a specific clinical hypothesis may be disseminated. Letters to the editor, journal abstracts, and reports of Phase I trials, however, continue to be viewed by the agency as information that cannot be disseminated under the final guidance.

All of the recommendations in the draft guidance regarding the manner in which reprints may be disseminated have been preserved in the final guidance, including recommendations that reprints be:

1. unabridged and not marked, summarized, or characterized by the manufacturer in any way;
2. accompanied by a comprehensive bibliography of previously published studies of the off-label use and, if applicable, by a copy of a representative publication that comes to a different or contrary conclusion regarding such use; and
3. distributed separately from information that is promotional in nature.

The recommendation that reprints be permanently affixed with a prominent disclosure statement also remains in the final guidance, although the disclosure regarding authors has been revised. Under the final guidance, the disseminating manufacturer should disclose any author, *whether credited in the reprint or not*, known to it as having a financial interest in the product discussed or in the manufacturer, as well as (a) the affiliation of the author if known by the manufacturer and (b) the "nature and amount" of such financial interest or of compensation received by the author from the manufacturer. These changes increase transparency and appear to be intended to address the so-called "ghostwriting" issue.

In addition, the final guidance "encourages" manufacturers to seek approval or clearance of new indications and intended uses. The agency also makes clear that it does not intend to consider a manufacturer's distribution of reprints in accordance with the final recommendations as establishing intent that the manufacturer's product be used for an off-label use.

Ropes & Gray attorneys have been following this issue closely and have significant experience in advising companies on reprint dissemination and scientific exchange policies, as well as on promotional best practices. If you have any questions about the final guidance and its effect on your business activities, please do not hesitate to contact your regular Ropes & Gray attorney.