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Via Hand Delivery

Dockets Management Branch
Food and Drug Administration
5630 Fishers Lane - Room 1061
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**Re: Docket No: 02N-0209
King & Spalding's Comments on FDA's Regulations and Policies Implicating
the First Amendment**

On May 16, 2002, the Food and Drug Administration ("FDA") published a request for comment seeking input on the agency's compliance with the First Amendment. This request is particularly timely given recent court rulings regarding FDA's commercial speech policies. We commend FDA for seeking guidance regarding these important issues and appreciate the opportunity to comment on behalf of our clients.

I. OVERVIEW AND EXECUTIVE SUMMARY

FDA's notice posed a series of multi-faceted questions regarding its commercial speech policies. Our comments focus on the issues raised by those questions including: (1) FDA's inappropriate classification of many categories of commercial speech as "inherently misleading"; (2) FDA's ability -- and constitutional obligation -- to achieve its public health objectives with far fewer commercial speech restrictions; (3) FDA's responsibility to proffer evidence that speech is actually misleading before excluding it from First Amendment protections; and (4) how FDA should rectify the internal inconsistencies in its current commercial speech policies. In particular, we believe the following changes are necessary to bring FDA's policies into compliance with the letter and spirit of the First Amendment.

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A. FDA's Policy Restricting A Manufacturer From Disseminating Truthful And Non-Misleading Information Regarding Off-Label Uses And Unapproved Products Is Unconstitutional And Should Be Revised

FDA should permit manufacturers to disseminate truthful and non-misleading information regarding off-label uses and unapproved products. Specifically, FDA should permit the following types of speech as long as there is no evidence that the speech at issue is untruthful or misleading:

- the dissemination to health care organizations and providers¹ of truthful and non-misleading (1) peer-reviewed scientific journal articles and/or abstracts and (2) reference text excerpts that discuss an off-label use or unapproved product. (Note: FDA has always recognized that manufacturers could disseminate these materials to healthcare providers upon receiving a request for that information);
- the dissemination of letters or brochures to health care organizations and providers providing: (1) the citation(s) of journal article(s) discussing an off-label use or an unapproved product and/or (2) a truthful and non-misleading summary of the article(s); if requested, full copies of all articles cited or discussed or the materials would be provided to the healthcare organization and providers;
- the propagation of educational advertisements in scientific or medical journals and on webpages (the webpage would be clearly designated as intended "for health care organizations and providers") that provide: (1) the citation(s) of journal article(s) discussing an off-label use or an unapproved product and/or (2) a truthful and non-misleading summary of the article(s); if requested, full copies of the articles would be disseminated to the healthcare organization and provider;
- a continuing medical education (CME) program sponsored by a manufacturer which would generally conform to FDA's Guidance for Industry on Industry-Supported Scientific and Educational Activities (December 1997), except that the manufacturer would be permitted to develop CME program content and generate a list of speakers and invitees, even when the manufacturer was not requested to do so by a third party; and
- FDA should extend the permitted content of CME programs regarding an off-label use of a medical device to include not only oral training and demonstrations, but also "hands on" training of attendees.

¹ The term "health care organizations and providers" includes, but is not limited to, physicians, nurses, and other health care personnel. It also includes important healthcare patient advocacy groups such as the Leukemia and Lymphoma Society and the Susan G. Komen Breast Care Foundation as well as formulary committees and other managed care/insurance organizations that make determinations regarding medical product reimbursement.

These types of speech should be allowed assuming that the speaker (1) discloses its financial interest in the product discussed; (2) discloses that the use or product discussed is not FDA-approved; (3) provides all information related to off-label uses and unapproved product in written form to health care organizations and providers (i.e., the sales force could directly hand out a copy of the peer-reviewed journal article during a sales call), but no oral communications regarding these subjects would be permitted in face-to-face meetings with health care providers; and (4) targets its speech to health care organizations and providers. Additionally, if requested, full copies of the articles cited or discussed would be provided to health care organizations and providers. Finally, company personnel that are medical directors or other science or medical personnel would continue to be able to answer physicians' questions on off-label use, as is currently permitted.

The unsolicited dissemination of journal articles and scientific information is very important to providing the public, and healthcare organizations and providers with current scientific and technological information. This type of information warrants protection given its conveyance of educational, not promotional, information.

As discussed in greater detail below, FDA's current restrictions on the types of off-label use and unapproved product speech described above do not satisfy the Central Hudson standard when such speech is truthful and not misleading because (1) the speech does not concern an unlawful activity; (2) the restrictions do not directly advance a substantial government interest; and (3) even if they did advance a substantial government interest, they are more extensive than necessary to advance that interest. Simply stated, as long as manufacturers are limited to the types of speech described above, there is no danger to the viability of the FDA approval process.

Even if FDA permitted the types of speech described above, manufacturers would still have significant incentives to seek FDA approval for either unapproved products or unapproved new indications for use. Specifically, in order to (1) make safety and effectiveness claims and (2) use their sales force in promotion, manufacturers would be required to seek FDA approval for the new indication for use. Similarly, there is no reason to restrict the types of speech described above regarding unapproved products because there is no fear either of misuse of the information or that the FDA approval process will be undermined. After all, the products are not commercially available, so they cannot be misused. The only way the manufacturer will be able to market the product is by receiving FDA approval.

Moreover, with FDA approved medical devices, some courts have recognized federal preemption defenses with state law claims in connection with medical devices subject to approved premarket applications. See, e.g., Mitchell v. Collagen Corp., 126 F.3d 902 (7th Cir. 1997); see also 21 U.S.C. § 360k(a) (federal preemption provision in Medical Device Amendments); cf. Medtronic Inc. v. Lohr, 518 U.S. 470 (1996) (rejecting that § 360k(a) preempts certain state law claims for a device subject to premarket clearance; case did not address preemption for devices subject to premarket approval). This protection from certain state law claims provides an additional incentive for manufacturers of medical devices to seek FDA approval for their products. Therefore, disallowing the types of speech described above restricts far more speech than is necessary to preserve the new product approval process. As a

result, FDA's current restrictions on off-label use and unapproved product speech are unconstitutional.

B. When Asserting That Particular Speech Is Not Constitutionally Protected, FDA Should Demonstrate By A Preponderance Of The Evidence That It Is Misleading

FDA should not rely on unsupported assertions that certain categories of speech are "inherently misleading" in order to avoid complying with the First Amendment. Instead, FDA should analyze speech on a case-by-case basis and proffer evidence that the particular speech at issue is actually untruthful or misleading before excluding it from First Amendment protections.

C. FDA Should Ensure That Its Commercial Speech Policies Are Internally Consistent And Consistent Agency-wide

FDA should make its commercial speech policies internally consistent and consistent agency-wide. To that end: (1) CDRH should adopt direct-to-consumer advertising policy and pre-approval promotion policy (*i.e.*, the use of "institutional" and "coming soon" promotion), which CDER has already implemented for drugs; and (2) FDA should permit manufacturers to inform physicians and consumers when they have received 510(k)-clearance for a medical device.

D. Conclusion: FDA Should Revise Its Commercial Speech Policies To Comport With Recent Constitutional Decisions

As FDA acknowledged in its request for comment, it has been consistently unsuccessful in recent First Amendment challenges of its regulations. FDA has taken an important first step in reversing this trend by requesting public comment on its commercial speech policies. In order to ensure its policies conform to First Amendment requirements and prevent future challenges, however, FDA must take the next step -- implementing the policy changes outlined above.

II. OVERVIEW OF FDA'S REGULATION OF COMMERCIAL SPEECH

FDA's regulation of commercial speech has become a dynamic area of the law in recent years. The key cases -- Washington Legal Foundation, Pearson, and Western States -- have sent FDA a clear signal. Unlike in the past, these decisions stated in no uncertain terms that the agency cannot ignore First Amendment protections by simply referencing the importance of its public health mission. Judicial sensitivity to commercial speech protections has grown and FDA's policies must respond accordingly.

A. History Of Commercial Speech Protections Under The First Amendment

FDA's difficulties in constitutional challenges of its speech restrictions is a relatively recent phenomenon. There was a time when FDA could silence even truthful statements merely by asserting that the agency was concerned about the potential to mislead. See United States v.

95 Barrels of Vinegar, 265 U.S. 438, 443 (1924) (“Deception may result from... statements... literally true...[Claims] which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the [Federal Food Drug and Cosmetic Act]...”).

Times, however, have changed. In the 1970s, the Supreme Court began to recognize the value of speech that proposes a commercial transaction (“commercial speech”). See, e.g., Bigelow v. Virginia, 421 U.S. 809 (1975) (holding that commercial speech has significant value in the marketplace of ideas). In Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-64 (1976), the Court concluded that the First Amendment protects accurate and non-misleading commercial information. The Court stated that “[i]t is a matter of public interest that [private economic decisions], in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.” 425 U.S. at 765; see also 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 495-97 (1996). Central to the Court’s reasoning was the idea that the speaker and the audience, not the government, should assess the value of the information presented. See Virginia Board, 425 U.S. at 762; see also Edenfield v. Fane, 507 U.S. 761, 767 (1993).

Once again confirming the value of commercial speech, the Court announced a test for the regulation of commercial speech in Central Hudson Gas and Elec. Corp. v. Public Serv. Comm. of N.Y., 447 U.S. 557, 566 (1980). Under the test, truthful and non-misleading commercial information cannot be proscribed unless the regulation directly serves a substantial government interest and is not more extensive than necessary. Id. Clearly, under Central Hudson, the bar FDA faces is far higher than the one it faced fifty years earlier in 95 Barrels of Vinegar.

B. Failing To Clear The Central Hudson Bar -- FDA’s Recent Commercial Speech Cases

As the judiciary became more sensitive to commercial speech protections, it was not surprising that FDA’s speech restrictions were challenged. There is perhaps no arena in which the free flow of commercial information is more indispensable than healthcare. With a patient’s life or quality of life at stake, healthcare decisions must be well-informed. As FDA’s request for comments states, “FDA must balance the need and right of Americans to speak and hear information vital to their every day lives against the need to ensure that people are not misled.”

Unfortunately, some of FDA’s policies have tipped this balance by classifying whole categories of speech about medical products as inherently misleading, and thus outside of First Amendment protections. Alternatively, FDA has also argued that speech by manufacturers falls outside of First Amendment protection because of the federal government’s extensive power to regulate the food and drug industry under the Federal Food, Drug, and Cosmetic Act (“FDCA” or “the Act”). The agency has argued that because it has extensive power to regulate the industry, it may also freely regulate the speech component of that industry (i.e., “the greater includes the lesser” approach). The Supreme Court, however, has squarely rejected this argument on more than one occasion. See 44 Liquormart, 517 U.S. at 504; see also Washington Legal Foundation v. Friedman, 13 F. Supp.2d 51, 60-63 (D.D.C. 1998). Finally, FDA has

attempted to justify its regulation of non-misleading speech by claiming that “substantial” government interests are directly advanced by the regulations.

An examination of recent cases, however, reveals that all of these arguments have consistently failed, requiring FDA to consider new alternatives. In rigorously applying the Central Hudson standard, courts will not accept FDA’s blanket assertion that certain categories of speech are inherently misleading. Nor will courts uphold regulations that burden speech when non-speech alternatives are available. The cases have sent a strong signal to FDA; in the words of Justice O’Connor in Thompson v. Western States Medical Center, “[i]f the First Amendment means anything, it means that regulating speech must be a last--not first--resort.” 122 S. Ct. 1497, 1506-07 (2002).

1. **Washington Legal Foundation: FDA Cannot “Exaggerate Its Overall Place In The Universe”**

Washington Legal Foundation v. Friedman, 13 F. Supp.2d 51, 74 (D.D.C. 1998) and Washington Legal Foundation v. Henney, 56 F. Supp.2d 81, 87 (D.D.C. 1999) demonstrate that FDA cannot merely assert that speech is inherently misleading or that its regulations do not burden more speech than necessary. In Friedman and Henney, the District Court for the District of Columbia invalidated both FDA’s CME’s guidance² and the Food and Drug Administration Modernization Act’s (FDAMA) provisions restricting speech by manufacturers concerning off-label uses of drugs and devices. See 13 F. Supp.2d at 74; 56 F. Supp.2d at 87. While FDA claimed that manufacturers’ speech promoting unapproved uses of approved products was inherently misleading, the court rejected this notion. First, the court reasoned that the agency had failed to show that the speech was “more likely to mislead than inform.” Friedman, 13 F. Supp.2d at 66-67. Also, the court concluded that because the agency only considered the speech misleading when disseminated by manufacturers, and not misleading when shared between physicians or provided by a manufacturer to a physician at the physician’s request, the speech could not be inherently misleading. Friedman, 13 F. Supp.2d at 66-7, quoting Greater New Orleans Broad. Assoc. v. United States, 527 U.S. 173, 194 (1999) (“...decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment”).

The Friedman court concluded that the government could not justify its restrictions on the grounds that physicians might misuse the information, and relied on Virginia Board’s skepticism of “regulations that seek to keep people in the dark for what the government perceives to be their own good.” 425 U.S. at 772. In the alternative, the district court suggested that disclaimers disclosing both that the use was unapproved and the manufacturer’s interest in the product would assuage any concerns that the speech would be misleading. See Friedman, 13 F. Supp.2d at 68-9. Although the District Court’s decisions were ultimately vacated by the Court of Appeals for the District of Columbia, its reasoning under the First Amendment and application of Central

² See Guidance for Industry on Industry-Supported Scientific and Educational Activities, 62 Fed. Reg. 64093 (Dec. 1997) (“CME guidance”).

Hudson is still viable. See Washington Legal Foundation v. Henney, 202 F.3d 331, 337 n.7 (D.C. Cir. 2000) (“[i]n disposing of the case in this manner, we certainly do not criticize the reasoning or conclusions of the district court...we do not reach the merits of the district court’s First Amendment holdings....”)

2. Pearson v. Shalala: Disclaimers Are “Constitutionally Preferable To Outright Suppression”

Similar to the District Court in Friedman, the D.C. Circuit suggested the use of disclaimers when it struck down FDA’s regulations requiring sellers of dietary supplements to obtain FDA authorization before labeling such supplements with health claims. See Pearson v. Shalala, 164 F.3d 650, 655 (D.C. Cir. 1999). The Pearson court again rejected the agency’s arguments that speech not approved by the FDA was inherently misleading. It ruled that while FDA had a substantial interest in preventing consumer fraud caused by potentially misleading health claims on supplements, the agency violated the First Amendment because it failed to consider less speech-restrictive alternatives. Id. at 657. In stating that disclaimers were a less restrictive alternative, the court noted that the use of disclaimers was “constitutionally preferable to outright suppression.” Id.; see also Bates v. State Bar of Arizona, 433 U.S. 350, 376 (1977) (“the preferred remedy is more disclosure, rather than less”); In re R.M.G., 455 U.S. 191, 203 (1982) (holding that the government’s interests may not be substantial if a misleading communication can be corrected so that the information is presented in a non-deceptive manner through qualifications and disclaimers).

3. Thompson v. Western States Medical Center: “Regulating Speech Must Be A Last--Not First--Resort.”

Perhaps the clearest signal to FDA that commercial speech is being vigorously protected came from the Supreme Court in Thompson v. Western States Medical Center. 122 S. Ct. 1497 (2002). In Western States, the Supreme Court held that FDAMA’s prohibitions on advertising prescriptions for compounded drugs were unconstitutional restrictions on non-misleading commercial speech. Id. at 1506-07. The Court reasoned that even if there was a substantial government interest at stake, the agency could have implemented less speech-intrusive restrictions, such as limitations on the volume of compounded drugs that could be sold or prohibitions on drug compounding not in response to a prescription. Id. Additionally, the Court concluded that the provisions placed an intolerable burden on beneficial speech:

[i]f the Government’s failure to justify its decision to regulate speech were not enough to convince us that the FDAMA’s advertising prohibitions were unconstitutional, the amount of beneficial speech prohibited by the FDAMA would be....The fact that FDAMA would prohibit such seemingly useful speech even though doing so does not appear to directly further any asserted governmental objective confirms our belief that the prohibition is unconstitutional.

Id. at 1508-09.

C. FDA Has Taken The First Step To Ensuring Its Compliance With The First Amendment By Requesting Public Comment

FDA's solicitation of comments on this important issue is the first step towards ensuring that FDA's policies regarding this type of speech comply with First Amendment principles. The real reform, however, will occur in the next step - when FDA revises its policies in a way that will both promote its interests as well as place the least burdensome restrictions on speech.

The trend in recent commercial speech cases is clear. First, FDA cannot restrict more speech than is strictly necessary to achieve important objectives. Second, if it does restrict more speech than necessary, it cannot merely assert that the entire category of speech is "inherently misleading" and thus excluded from constitutional protection. Therefore, as discussed in greater detail below, FDA must revise its speech policies to ensure they can survive constitutional scrutiny. Specifically, FDA must (1) permit certain types of manufacturer speech regarding off-label uses and unapproved products; (2) abandon its unsupported assertions that certain speech is "inherently misleading," and instead demonstrate by a preponderance of the evidence that particular speech is misleading; and (3) ensure its commercial speech policies are internally consistent and consistent agency-wide.

III. FDA'S CURRENT RESTRICTIONS ON MANUFACTURER SPEECH REGARDING OFF-LABEL USES AND UNAPPROVED PRODUCTS INFRINGE ON CONSTITUTIONALLY PROTECTED COMMERCIAL SPEECH RIGHTS

Currently, FDA is regulating truthful, non-misleading speech by manufacturers regarding off-label uses and unapproved products. Unfortunately, the restrictions are unconstitutional because they are far more burdensome than necessary to achieve FDA's purported objectives. Obviously, among other things, FDA's objectives include protecting the public health and ensuring that health care organizations and providers and consumers receive accurate and complete information. It is important to analyze whether FDA's purported objectives can be achieved by policies that are less restrictive - we believe they can. By permitting certain types of truthful and non-misleading speech regarding off-label uses and unapproved products, as discussed in greater detail below, FDA will not only ensure that its policies comply with the First Amendment, but will also ensure that health care organizations and providers receive the most current healthcare information available.

A. FDA Policy Restricts Truthful And Non-Misleading Manufacturer Speech Regarding Unapproved Drugs And Devices And Off-Label Uses Of Approved Products

In a purported effort to protect the public health and preserve the FDA product approval process, FDA severely restricts a manufacturer's ability to disseminate information regarding: (1) unapproved products, *i.e.*, products under investigation that have yet to be approved by FDA; and (2) new uses, *i.e.*, off-label uses, for products that have been approved by FDA. This would

be FDA's absolute right if the speech at issue was false or misleading. Unfortunately, however, FDA currently restricts these types of speech even when they are truthful and non-misleading.

As an initial matter, FDA logically bars manufacturers from making safety and effectiveness claims for unapproved products or off-label uses until the manufacturer has demonstrated, through the FDA new product approval process, that such claims are not false or misleading. See 21 U.S.C. §351(a) (deeming a drug or device to be misbranded if "its labeling is false or misleading in any particular"). This prohibition also preserves the FDA approval processes by ensuring that manufacturers have a significant incentive to pursue FDA approval. Unfortunately, FDA's speech restrictions go far beyond safety and effectiveness claims. FDA restricts manufacturers from disseminating balanced, truthful and non-misleading information regarding unapproved products and off-label uses even when such information, for example, was previously published in peer-reviewed scientific journal articles and reference texts.

1. FDA's Policy Regarding Unapproved Product Speech

With regard to unapproved products, FDA outright prohibits manufacturers from informing physicians about published peer-reviewed studies in any "promotional" form -- e.g., letters, internet sites, article reprints, or CME programs. See 21 C.F.R. §§ 812.7(b)(d) (prohibiting manufacturers from "promot[ing] . . . an investigational device, until after FDA has approved the device for commercial distribution"); see also Pre-Approval Promotion Guidance (April 1994) (permitting only two types of pre-approval promotion of pharmaceutical products -- "institutional" promotion and "coming soon" promotion).

2. FDA's Current Policy Regarding Off-Label Use Speech

With regard to off-label uses of approved products, the status of FDA's speech restrictions is murky at best. FDA has attempted to restrict a manufacturer's off-label use speech including the (1) dissemination of truthful and non-misleading journal articles and reference text excerpts, and (2) sponsorship and control of CME programs. See 21 U.S.C. § 360aaa (provisions enacted by FDAMA delineating extensive requirements -- including the filing of an application for approval of the off-label use -- that manufacturers must meet to disseminate journal articles and reference texts regarding off-label uses); Guidance to Industry: Industry-Supported Scientific and Educational Activities, 62 Fed. Reg. 64,093, 64,096-99 (1997) (explaining FDA's factors in determining whether a manufacturer's influence on a CME program discussing off-label uses violates the FDCA). These efforts were held unconstitutional, however, by the U.S. District Court. See Friedman, 13 F. Supp.2d 51 (D.D.C. 1998); Henney, 56 F. Supp.2d 81 (D.D.C. 1999). Moreover, as discussed above, although the D.C. Circuit vacated the District Court's decision, it did not reach the First Amendment issue. See 202 F.3d 331 (D.C. Cir. 2000); see also Washington Legal Foundation v. Henney, 128 F. Supp.2d 11, 15 (D.D.C. 2000) (acknowledging that the District Court's CME and FDAMA injunctions had been vacated in their entirety). Therefore, a shroud of uncertainty currently surrounds FDA's off-label use policies.

According to FDA, the extensive requirements applicable to the dissemination of journal articles and the CME guidance do not restrict speech, but rather create the boundaries of a “safe harbor” within which a manufacturer may disseminate off-label use information free from fear of FDA enforcement. See 65 Fed. Reg. 14,286 (2000). It is doubtful, however, whether FDA could actually sustain an enforcement action for a violation of the “safe harbor.” FDA acknowledges that if it took enforcement action against a manufacturer for disseminating information outside of the “safe harbor,” the manufacturer could argue that the First Amendment was violated. See id. Most recently, FDA practically admitted that the speech restrictions lack real teeth. See Response to Washington Legal Foundation’s Citizen Petition at 6 (January 28, 2002) (stating that FDA “is unlikely to initiate an enforcement action where the only evidence of an unapproved intended use is the distribution of enduring materials [e.g., journal reprints] or sponsorship of CME” outside of the “safe harbor”). That is to say, FDA appears to recognize that if it actually took enforcement action, the manufacturer would undoubtedly prevail in challenging the action on First Amendment grounds. FDA's policies are overly broad because they restrict more speech than necessary. Nevertheless, FDA permits the hollow threat of enforcement action to remain -- creating a powerful chilling effect on a manufacturer’s exercise of its commercial speech rights under the First Amendment.

3. Conclusion: FDA’s Policies Regarding Manufacturer Speech Should Be Amended To Permit More Truthful And Non-misleading Information To Be Disseminated

FDA current policies restrict -- both directly and by creating a chilling effect -- broad categories of manufacturer speech regarding off-label uses and unapproved products. As described in detail below, assuming that the speech is truthful and non-misleading, many types of the speech prohibited are constitutionally protected. Moreover, if challenged, FDA’s restrictions would not withstand constitutional scrutiny.

B. FDA Should Revise Its Policies To Permit Manufacturers To Engage In Certain Types Of Speech Which Are Constitutionally Protected

FDA should revise its current policies restricting manufacturer speech regarding unapproved products and off-label uses to permit the dissemination of truthful and non-misleading information--i.e., journal articles, summaries and abstracts of peer-reviewed journal articles--to health care organizations and providers, under the following conditions:

- The speech would fully disclose the manufacturer’s interest in the product discussed.
- The speech would not claim that the products are safe and effective for the use discussed.
- The speech would disclose that the product or use has not been approved by FDA.

- The manufacturer would not use salespeople (or other third parties employed on behalf of the manufacturer) to engage in oral communications regarding the off-label use or unapproved product.
- Finally, while much of the speech at issue would be appropriate for patients, all of the speech would be targeted at health care organizations and providers.

Assuming these conditions are met, the following types of speech are protected by the First Amendment, particularly in light of the target audience of health care organizations and providers trained to evaluate such speech. Thus, these categories of speech in the aggregate are referred to as “protected commercial speech” throughout the remainder of the comments.

1. Scientific Journal Articles and Reference Texts Regarding Off-Label Uses And Unapproved Products

There is a constitutionally protected right for manufacturers to disseminate to health care organizations and providers truthful, non-misleading scientific journal articles or reference text excerpts discussing an off-label use or an unapproved product. The journal articles would have been previously published in peer-reviewed scientific journals that use experts to evaluate and critique proposed articles. The articles would only contain truthful and non-misleading information about the off-label use or unapproved product. For example, no promotional claims regarding safety and effectiveness would be made; rather the information would convey important medical information related to unapproved uses or unapproved products. If an excerpt came from a reference text published by entities with common ownership or corporate affiliation with a manufacturer, that information would be disclosed to the health care organizations and providers when the excerpt was provided. As mentioned above, the manufacturer would fully disclose that the articles discuss a product or use not approved by FDA, as well as its interest in the product. Finally, the articles or reference texts would be disseminated in written form by the manufacturer (i.e., its sales force).

2. Abstracts Of Peer- Reviewed Scientific Journal Articles Regarding Off-Label Uses And Unapproved Products

Similarly, there is a constitutionally protected right for a manufacturer to provide truthful and non-misleading abstracts of peer-reviewed journal articles to health care organizations and providers. Abstracts could be accompanied by a copy of the relevant article. If an abstract alone was sent, the manufacturer would offer to provide a copy of the full article upon request. Again, the manufacturer would be required to disclose (1) that the abstract discusses an off-label use or unapproved product and (2) its interest in the product. The abstracts would be disseminated by the manufacturer to health care organizations and providers in written form. No oral communications between the sales representatives and health care organizations and providers would be made regarding the off-label use and unapproved products.

3. “Dear Doctor” Letters

Manufacturers have a First Amendment right to send non-misleading unsolicited “Dear Doctor” letters to health care organizations and providers. “Dear Doctor” letters would either accompany articles or abstracts, or simply be sent alone to advise the health care organizations and providers of an article or list of articles of interest. These letters would be on manufacturer letterhead and would state that the article concerns an off-label use or an unapproved product that may be of interest to the physician. Any letter not providing the entire article would offer to provide the full article upon request. The “Dear Doctor” letter would not make claims, but could report a balanced view of the findings in the article. Again, the letters would be disseminated from the manufacturer to health care organizations and providers in written form. No oral communications would be made about the materials.

4. Advertisements In Medical Or Scientific Journals

Truthful and non-misleading advertisements in medical or scientific journals that provide a reference to an article on an off-label use or unapproved product are also constitutionally protected commercial speech. The advertisements could include a truthful, non-misleading summary of the article. They would clearly disclose that (1) the referenced article concerns an unapproved product or off-label use, and (2) the manufacturer has paid for the advertisement. The advertisement would provide a citation to the full article and means for the health care organizations and providers to obtain the complete article from the manufacturer so the health care organizations and providers could obtain it if interested in reading the complete text of the article.

5. Brochures And Other Labeling

Truthful, non-misleading brochures summarizing information in articles or abstracts of peer-reviewed articles are also protected commercial speech. Like abstracts, brochures would provide an accurate summary of the article, and would fully disclose that the article pertains to off-label uses or unapproved products. The brochure would provide a full citation to the article and provide that the full article would be made available upon request. The brochure would also offer to send the health care organizations and providers a copy of the full article upon request.

6. Continuing Medical Education Programs

Manufacturers also have a constitutionally protected right to suggest content and speakers for CME programs discussing off-label uses and unapproved products. The provisions of FDA’s CME guidance are largely reasonable, except that manufacturers should be allowed to (1) suggest CME program content and speakers, and (2) invite health care providers to attend, even if that input was not requested by a third party. All CME programs would be conducted by third-party entities engaged in the business of creating and producing such programs, and could be accredited by a national accrediting organization. If the entity has any ownership or corporate affiliation with the manufacturer, the program would explain the manufacturer’s financial interest in the product. Similarly, manufacturers should be permitted to provide financial

support to editorial or medical education companies that provide assistance to physicians in developing, drafting and publishing study results. Any editorial support provided through medical education companies would be appropriately disclosed.

In addition, CME programs sponsored and developed by a manufacturer regarding an off-label use of a medical device should not be limited to only oral training and demonstrations, but also should include "hands on" training of attendees. Expanding the permitted content of manufacturer-sponsored CME programs to include "hands on" training of physicians on off-label use device techniques is a logical extension to the education that is currently permitted by FDA. This "hands on" training is an important complement to constitutionally protected off-label use speech and should be afforded the same First Amendment protection that is afforded to general training programs and medical demonstrations. In particular, if physicians are receiving information regarding an off-label use, in the interest of the public health, they should be adequately trained to apply that information in their practice.

7. Internet Sites

Finally, manufacturer-created internet sites providing truthful, non-misleading information (i.e., scientific journal articles or abstracts) on off-label uses and unapproved products are also protected commercial speech. The sites would clearly disclose an affiliation with the manufacturer, and would provide a link to, or reprint of, a journal article on an off-label use or an unapproved product behind a "For Health Care Organizations and Providers" tab. The site would also disclose that such information concerns a use or product not currently approved by FDA. In addition, manufacturers should be permitted to sponsor CME programs on the internet. As discussed above, the manufacturers have a constitutional right to suggest the content and speakers for the CME programs (through the internet) that discuss off-label uses and unapproved products.

8. Revision to "Intended Use" Regulation

FDA should revise its intended use regulation for medical devices set forth in 21 C.F.R. § 801.4, which is the provision that defines the "intended use" of a device based on the device manufacturer's knowledge that one of its products is being used off-label. As drafted, the so-called "catch 22" provision potentially conflicts with a manufacturer's ability to freely disseminate information about off-label uses or unapproved products. In its current form, this provision could be invoked to require a manufacturer to provide labeling on those off-label uses or unapproved product information contained in the peer-reviewed article or abstract---effectively requiring the manufacturer to submit a marketing application upon dissemination of this type of information.

This, however, would undermine a manufacturer's ability to disseminate truthful and non-misleading information about its medical device products without automatically seeking FDA approval or clearance for every new off-label use discussed in the scientific literature. This provision should be revised to allow manufacturers to disseminate truthful non-misleading information without imposing restrictions on speech.

9. Conclusion: FDA Should Amend Its Off-Label Use And Unapproved Product Speech Policies To Permit Constitutionally Protected Speech

Assuming the information disseminated through the types of speech described above is truthful and non-misleading, the speech is constitutionally protected. In addition, allowing this type of speech also helps meet FDA's goals -- i.e., the dissemination of truthful and non-misleading journal articles and abstracts provides physicians with important, meaningful and educational information. The information is appropriately qualified; it is clearly positioned; and it is geared toward improving patient healthcare. As a result, to regulate such speech FDA must comply with the Central Hudson commercial speech standard. As discussed in greater detail below, FDA's current restrictions on protected commercial speech do not withstand constitutional scrutiny.

C. FDA's Regulation Of Constitutionally Protected Speech Cannot Withstand Central Hudson Scrutiny

The constitutionally protected speech described above may only be restricted if the regulation satisfies the commercial speech test articulated in Central Hudson, 447 U.S. 557 (1980). Under that case, lawful, non-misleading commercial speech may not be restricted unless the government demonstrates that (1) a substantial interest is served by the regulation; (2) the regulation directly advances the asserted interest; and (3) the regulation is not more extensive than is necessary to serve the interest. 447 U.S. at 566. Simply stated, FDA's current restrictions fail to satisfy this standard.

1. Protected Commercial Speech Does Not Concern An Unlawful Activity Nor Is It Inherently Misleading

Before a court will even reach a constitutional evaluation of a speech regulation, the speech at issue must satisfy two threshold requirements to warrant commercial speech protection. First, the speech must be truthful and non-misleading. Second, the speech cannot concern an illegal activity. The types of protected commercial speech described above satisfy these two threshold requirements.

a. Protected Commercial Speech Is Not Inherently Misleading

The first threshold for constitutional protection is that the speech in question must be truthful and not misleading. FDA may not proscribe speech that it labels as merely "potentially misleading." See Ibanez v. Florida Dept. of Bus. and Prof'l Regulation, 512 U.S. 136, 146 (1994). Instead, FDA may only regulate speech that is inherently misleading, or speech that is "more likely to deceive the public than to inform it." Central Hudson, 447 U.S. at 563. In classifying speech as inherently misleading, FDA must consider the "possibilities for deception," see Friedman v. Rogers, 440 U.S. 1, 13 (1979), as well as "the ability of the intended audience to evaluate the claims made." Association of Nat'l Advertisers v. Lungren, 44 F.3d 726, 731 (9th Cir. 1994).

FDA may not consider speech regarding off-label uses and unapproved products “inherently misleading” merely because the agency has not had the opportunity to evaluate the speech. Nor may it consider the same speech misleading in only one context. Finally, FDA may not consider speech regarding off-label uses and unapproved products inherently misleading when the speech is targeted at an educated audience of health care professionals. In keeping with Friedman and Pearson, full disclosure is sufficient to ensure this speech is not misleading.

- i. *FDA May Not Classify Protected Commercial Speech As Inherently Misleading Simply Because The Agency Has Not Had The Opportunity To Approve Such Speech*

FDA has tried to describe the aforementioned types of protected commercial speech as “inherently misleading” merely because FDA has not had an opportunity to review the speech. FDA, however, may not condition the ability to speak upon its approval of speech. In Friedman, the court stated that by “asserting that any and all scientific claims about the safety, effectiveness, contraindications, side effects, and the like regarding prescription drugs are...misleading until the FDA has had the opportunity to evaluate them, FDA exaggerates its overall place in the universe.” 13 F. Supp.2d at 67. While the Friedman court only considered the dissemination of articles or sponsorship of CME programs, the court’s reasoning is equally applicable to all types of protected commercial speech. To the extent any protected commercial speech discusses unapproved products, it is of even lesser concern because health care organizations and providers cannot obtain these products and the speech is, therefore, for informational purposes only.

- ii. *The Fact That FDA Is Only Concerned When A Manufacturer Disseminates Protected Commercial Speech Demonstrates That The Speech Cannot Be Labeled “Inherently Misleading”*

FDA’s position that protected commercial speech is only inherently misleading when disseminated by manufacturers proves too much. See Friedman, 13 F. Supp.2d at 66-67. An article or abstract cannot be “inherently misleading” when distributed by manufacturers if the exact same published article or abstract is not “inherently misleading” when provided to a health care providers by a manufacturer upon request or if passed from health care provider to health care provider. Id. at 67 (“Obviously, the exact same journal article or textbook reprint cannot be inherently conducive to deception and coercion when it is sent unsolicited, yet of significant clinical value when mailed pursuant to a request.”); see also Greater New Orleans, 119 S. Ct. at 1935 (“Even under the degree of scrutiny that we have applied in commercial speech cases, decisions that select amongst speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.”). The same rationale applies to CME programs. FDA cannot label the exact same off-label use or unapproved product information “inherently misleading” when manufacturers are involved in the CME program, but not “inherently misleading” when there is no manufacturer involvement. Friedman, 13 F. Supp.2d at 67-8.

iii. *As Speech Targeted To Health Care Organizations and Providers, Protected Commercial Speech Is Not Inherently Misleading*

The ability of an audience to evaluate the speech at issue is an important factor in considering whether speech is inherently misleading. See Lungren, 44 F.3d at 731. Because all protected commercial speech is targeted at health care organizations and providers, there is little possibility the speech will mislead. As the court in Friedman reasoned, “a physician’s livelihood depends upon the ability to make accurate, life-and-death decisions based upon the scientific evidence before them. They are certainly capable of critically evaluating journal articles or textbook reprints that are mailed to them, or the findings presented at CME seminars.” 13 F. Supp.2d at 70. This reasoning is equally applicable to abstracts, “Dear Doctor” letters, and brochures, all of which would either include the entire article or make it available upon request. Additionally, the health care organizations and providers may obtain the speech contained in the manufacturer-disseminated materials independently. Health care organizations, like the Susan G. Komen Breast Care Foundation, employ sophisticated, well-educated staff whom are fully capable of carefully and critically evaluating this type of scientific information. FDA does not question the health care organizations and providers’ ability to evaluate articles or abstracts when they are independently obtained, and thus it makes little sense to question a health care organizations and providers’ evaluative capabilities when manufacturers provide the information.

Likewise, the advertisements described above are targeted solely at health care organizations and providers. Advertisements with appropriate disclosures would appear in medical and scientific journals, and would provide a reference to a relevant journal article that may be of interest to a doctor. The health care organizations and providers would be made aware that the advertisement was paid for by the manufacturer, and could employ their own judgment about the usefulness of the product. Even if a patient were to see the advertisement and review the suggested article, courts would still consider the patient’s judgment in determining that the advertisements are not inherently misleading. See Pearson, 164 F.3d 650 at 655 (rejecting FDA’s argument that all health claims lacking significant scientific agreement are inherently misleading because their persuasive effect encourages consumers to buy without exercising any judgment). In addition, even if a patient viewed the advertisements, the patient would still have to go to his or her doctor and ask for the product. As described above, health care providers would already have access to the scientific information regarding the product, and thus could independently evaluate the merits of the product for the off-label use. The health care providers would also evaluate the patient’s condition to determine whether the product was suitable for his or her particular needs.

Similarly, internet sites as described above would provide all relevant information behind a “For Health Care Organizations and Providers” tab. As a result, it is unlikely that patients would access the information. The need to actively seek out information on the internet has been recognized by the Supreme Court in Reno v. ACLU, 117 S. Ct. 2329, 2348-49 (1997). The Court reasoned that the internet might be a particularly valuable medium for exchange of informative speech and that “[u]sers seldom encounter content by accident.” Id. at 2343-44 (internal quotations omitted). Here, health care organizations and providers must first access the

home page of the manufacturer before gaining access to any material on off-label uses or unapproved products. From the outset, then, health care organizations and providers are well aware that the information comes from the manufacturer with a financial interest in the product. Even if patients viewed the information behind the “For Health Care Organizations and Providers” tab, they would not be able to obtain the product without going to a doctor, who presumably would not prescribe a product that was unsuitable.

b. Constitutionally Protected Commercial Speech Does Not Concern Unlawful Activities

The second threshold requirement for constitutional protection is that the speech not concern an illegal activity. FDA has long recognized that physicians may use or prescribe drugs for unapproved uses, and thus speech about such uses is not speech about an unlawful activity. See Friedman, 13 F. Supp.2d at 66.

Protected commercial speech regarding unapproved products similarly does not concern an illegal activity. Health care organizations and providers cannot obtain products that are unapproved, and thus any speech about such products should present no concern that the information will be misused. According to Friedman, “[i]t is clear that when the Supreme Court declares that the First Amendment does not protect illegal activity, it is referring to the conduct that the speech is promoting...”. 13 F. Supp.2d at 66. Because health care organizations and providers will not be able to obtain unapproved products, there is effectively no “conduct that the speech is promoting.” Similarly, protected commercial speech governing off-label uses does not concern an illegal activity. FDAMA made clear that the off-label use of a product by physicians was considered the practice of medicine and therefore could not be regulated by FDA. Therefore, protected commercial speech as described above does not concern an illegal activity.

c. Conclusion: Protected Commercial Speech Satisfies Threshold Requirements

Before a court will even constitutionally evaluate a speech regulation, the speech at issue must (1) not be inherently misleading, and (2) not concern an illegal activity. Protected commercial speech of the types described above satisfy these two threshold requirements. Therefore, such speech may only be restricted by a regulation that is not more extensive than necessary to directly advance a substantial government interest.

2. Any Substantial Interests That FDA May Proffer Are Not Directly Advanced By Its Off-label Use and Unapproved Product Speech Policies

Under the second and third prongs of Central Hudson, FDA must demonstrate that its off-label use and unapproved product speech restrictions directly advance a substantial government interest. If FDA’s regulations of protected commercial speech were challenged under Central Hudson, the agency would not prevail under these two prongs. Even if FDA were able to successfully argue that it has a substantial interest in protecting the public health or preserving

the new product approval process, it would be hard pressed to demonstrate that the regulations directly advance the interests because the regulations (1) are paternalistic; (2) restrict information that is already publicly available; (3) are designed to limit access to information and thus can be at odds with the public health; and (4) do not encourage manufacturers to seek approval for off-label uses (or otherwise protect the integrity of the product approval process).

a. FDA's Asserted Substantial Interests Face Rigorous Judicial Scrutiny

FDA faces significant obstacles when defending the interests that supposedly support its regulations. FDA's general interest in protecting citizens' health and safety may be substantial, but courts place little analytical weight on this type of general interest. Compare Pearson, 164 F. 3d at 656 (finding substantial interest at a "level of generality") with Friedman, 13 F. Supp.2d at 69-70 (finding a substantial general interest in promoting health but striking down the more specific interest of ensuring that physicians are not misled). On the other hand, FDA has met with other difficulties when it has tried to assert more specific interests, e.g., the prevention of consumer fraud, preserving the integrity and effectiveness of the drug approval process, preserving the availability of compounded drugs for those who need them, and achieving a balance between sometimes competing substantial interests. See Pearson, 164 F.3d at 655-56 (finding a substantial interest in preventing fraud but also finding that the agency's regulations did not advance that interest); Western States, 122 S. Ct. at 1504-05 (finding substantial interests in preserving the drug approval process and in preserving the ability of patients to obtain medications suited to their needs, but also finding that the government's regulations did not advance these interests); Friedman, 13 F. Supp.2d at 69 (finding no legitimate interest in the agency's paternalistic suggestion that it must prevent physicians from being misled). In sum, few of the interests proffered by FDA have been sufficient to sustain commercial speech regulations. As a result, FDA faces rigorous judicial scrutiny of the interests supposedly underlying its speech regulations.

b. FDA's Regulations Of Protected Commercial Speech Do Not Directly Advance The Agency's Interest In Promoting The Public Health Or In Preserving The FDA Approval Process

Assuming FDA convinces a court that its interests in promoting the public health and creating incentives for manufacturers to seek approval of off-label uses are substantial, the agency will face difficulty in claiming its regulations directly advance either interest. Simply put, the agency's regulations do not advance these interests in a direct and material way as Central Hudson requires. In demonstrating that speech regulations directly advance a substantial interest, FDA may not rely on "mere speculation or conjecture" but instead "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield, 507 U.S. at 770-71 (1993). FDA's regulations of protected commercial speech do not directly advance the agency's interests for three reasons: (1) the regulations are solely based on a paternalistic fear that the information will be misused; (2) the information at issue is already publicly available; and (3) the prevention of information from reaching physicians actually harms the public health.

- i. *FDA's Restrictions Of Protected Commercial Speech Do Not Directly Advance the Agency's Interests Because They Stem Solely From The Agency's Paternalistic Fear That Information May Be Misused*

FDA's regulations do not directly advance the agency's interests because they are paternalistic at heart, particularly given that the protected commercial speech is targeted to health care organizations and providers. FDA's only argument that this speech protects the public health is based on fear -- the fear that the information will be misused. Courts, however, have consistently rejected such paternalistic rationales. As stated in 44 Liquormart, "[b]ans against truthful, non-misleading commercial speech usually rest solely on the offensive assumption that the public will respond irrationally to the truth. 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." 517 U.S. at 503; see also Virginia Board, 425 U.S. at 772 (holding that a state cannot suppress the dissemination of truthful information because of a concern about the effect of that speech on recipients).

FDA's regulations seek to do exactly what the Court in 44 Liquormart was concerned about -- the regulations aim to keep health care organizations and providers in the dark about information important to medical education and physicians' practices, and thus cannot be said to directly advance FDA's aims. As cited above, "a physician's livelihood depends upon the ability to make accurate, life-and-death decisions based upon the scientific evidence before them. They are certainly capable of critically evaluating journal articles or textbook reprints that are mailed to them, or the findings presented at CME seminars." Friedman, 13 F.Supp.2d at 70.³ Similarly, sophisticated health care organizations can also critically evaluate journal articles or textbook reprints.

The Friedman court concluded that the agency's paternalistic assertion that it must prevent health care providers from being misled was not a substantial interest and called the regulation based on this interest "wholly and completely unsupportable." Id. at 69. Even in Pearson, where the speech was targeted not to an educated audience of health care organizations and providers but to consumers, the court found that FDA could not prevent manufacturers from making health claims so long as the public was provided adequate information through disclaimers. 164 F.3d at 658-60. If consumers are capable of evaluating health claims made with disclaimers, health care organizations and providers are certainly capable of evaluating speech regarding an off-label use or unapproved product when accompanied by appropriate disclosures.

While the Friedman court only considered articles and CME programs, the court's reasoning is equally applicable to health care organizations and providers' ability to evaluate abstracts, advertisements, internet sites, and brochures. If manufacturers can provide articles to

³ The Friedman court was not asked to address the dissemination of information to health care organizations. Nevertheless, the reasoning the court applied to information disseminated to physicians/health care providers is equally applicable to health care organizations.

health care providers under Friedman, then surely it is acceptable for them to provide health care organizations and providers with truthful, non-misleading abstracts of those articles, particularly when such abstracts are disseminated after being published and are abstracts of peer-reviewed journal articles. The Friedman court's reasoning is also applicable to internet sites. While the internet site may be accessible to the general public, the information in question will be published behind a "For Health Care Organizations and Providers" tab. Furthermore, even if consumers were to read about an off-label use or unapproved product on the internet site, they could not obtain it without a prescription from their health care provider. Advertisements in medical journals are similarly targeted at health care organizations and providers, and are an even more passive form of manufacturer involvement than the provision of articles as health care organizations and providers would have to obtain the actual article for themselves. Therefore, any paternalistic rationales underpinning FDA's speech restrictions will be insufficient to satisfy Central Hudson scrutiny.

- ii. *Since Protected Commercial Speech Is Already Publicly Available, No Substantial Interest Is Served By Preventing Its Re-Dissemination*

FDA cannot successfully argue that barring manufacturers from disseminating off-label use and unapproved product information to health care organizations and providers directly advances a substantial government interest when the information is already publicly available. See, e.g., Friedman, 13 F. Supp.2d at 70 (rejecting FDA's argument that it has a substantial interest in regulating speech distributed by manufacturers to physicians, as physicians could readily get the same information through other means). To the contrary, a manufacturer's incentive to submit an application for FDA approval is minimally impacted, if at all, by the prohibition on re-disseminating publicly available information. Similarly, health care organizations and providers can receive this information despite FDA's restrictions. So how do the restrictions on protected commercial speech benefit the public health or preserve the new product approval process?

Consider, for example, articles in scientific, peer-reviewed journals regarding off-label uses and unapproved products. They are published frequently in journals reviewed by health care organizations and providers. FDA does not claim that their publication harms the public health. Therefore, it makes little sense to suggest that banning advertisements or "Dear Doctor" letters directing health care organizations and providers to the same publicly available article, or truthful non-misleading internet sites and brochures discussing the article somehow advances a government interest. If the information at issue is already available, how is the public's health protected by suppressing its re-dissemination? Similarly, since the information is already available, the incentive for manufacturers to submit new product applications in order to re-disseminate the information is minimal. Therefore, FDA's interests in promoting the public health and preserving its approval processes are not directly advanced.

iii. *Preventing Information On Off-Label Uses And Unapproved Products From Reaching Health Care Organizations And Providers Actually Harms Public Health*

FDA's regulations preventing the dissemination of scientifically-valid information do not promote the public health. In fact, preventing the dissemination of information regarding off-label uses and unapproved products actually harms the public health because it undermines health care organizations and providers' ability to stay abreast of the most recent advances in medical technology.

Similarly, prohibiting manufacturers from sponsoring CME programs that provide "hands on" training on off-label uses of medical devices harms the public health. Since doctors will be prescribing and using products off-label, it promotes the public health to train them on proper off-label usage. Regulation of internet sites would also not directly promote FDA's interest in the public health, because health care organizations and providers' significantly benefit from internet research on medical conditions and treatments.

Pursuant to the FDCA, FDA already provides for the dissemination of truthful and non-misleading scientific information related to dietary supplements. In that context, the statute provides a mechanism for manufacturers to disseminate truthful/non-misleading scientific information to health care providers and the public regarding dietary supplements. What is being proposed here is a similar regime for other FDA-regulated products. Given FDA's experience with this statutory provision and dietary supplements, FDA should apply a similar rubric to other products it regulates.

c. Conclusion: FDA's Policies Restricting Protected Commercial Speech Do Not Directly Advance A Substantial Government Interest

If FDA's current policies restricting protected commercial speech were challenged, the agency could not meet the second and third prongs of Central Hudson. In short, its speech restrictions are based on paternalistic concerns and potentially harm the public health as opposed to "directly advancing" it. Similarly, the new product approval process is not directly advanced, because the incentive to submit an application in order to re-disseminate information that is already publicly available is minimal at best.

3. FDA's Regulation Of Protected Commercial Speech Is Unconstitutional Because It is More Extensive Than Necessary

FDA's restrictions on protected commercial speech also fail the fourth prong of Central Hudson because they unconstitutionally restrict more speech than necessary. See Western States, 122 S. Ct. at 1507 ("if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so."). According to the Supreme Court, "[i]f the First Amendment means anything, it means that regulating speech must be a last--not a first--resort." Id. at 1507; see also, Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (holding that commercial speech regulations are impermissible if they burden more

speech than necessary). Additionally, the government must “carefully calculate the costs and benefits associated with the burden on speech imposed [by the regulations].” Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993).

One common thread runs through all recent FDA commercial speech cases -- in each case, courts have reasoned that FDA’s regulations burden more speech than is necessary. See Western States, 122 S. Ct. at 1506; Pearson, 164 F.3d at 656; Friedman, 13 F.Supp.2d at 72-74. This is particularly troubling given that much of the speech burdened by FDA regulations is beneficial to health care organizations and providers and their patients. As noted in Friedman, FDA-regulated speech “may be life saving information, or information that makes a life with a debilitating condition more comfortable.” 13 F. Supp.2d at 73. In short, FDA’s regulations are more extensive than necessary because (1) they amount to constitutional blackmail, (2) the less restrictive alternative of full disclosure adequately serves FDA’s interests, and (3) incentives for manufacturers to seek FDA approval exist independent of the speech restrictions. Additionally, the agency’s regulations preclude the ability of a legitimate audience to receive truthful and non-misleading commercial information.

a. FDA May Not Condition First Amendment Benefits Upon Compliance With A Statutory Scheme As This Amounts To “Constitutional Blackmail”

FDA’s regulations effectively condition a manufacturer’s ability to speak upon compliance with a statutory scheme, and this tactic is impermissible. In Washington Legal Foundation v. Henney, 56 F. Supp.2d 81, 87 (D.D.C. 1999), the court concluded that the supplemental application provisions of FDAMA failed the fourth prong of Central Hudson. The court struck down these provisions, reasoning that they were an illegal “kind of constitutional blackmail -- comply with the statute or sacrifice your First Amendment rights.” 56 F. Supp.2d at 87. Thus, FDA may not condition a manufacturer’s dissemination of protected commercial speech upon its submission of an application for FDA approval. Manufacturers have a constitutional right to disseminate truthful, non-misleading commercial information and FDA’s attempts to condition this upon compliance with a statutory scheme constitutes a more extensive than necessary regulation.

b. In Furthering Its Interest In Encouraging Manufacturers To Seek FDA Approval and Preventing Fraud, FDA May Only Require Full Disclosure

In recent holdings, courts have made clear that FDA must adopt less speech-restrictive alternatives for achieving its objectives, when such alternatives are available. In the present case, the less speech-restrictive alternative available to FDA is to permit protected commercial speech, but require full disclosure of (1) the manufacturer’s financial interest in the product discussed and (2) the fact that the product or use is not FDA approved. In Friedman, for example, the court concluded that FDA regulations pertaining to articles and CME programs were more extensive than necessary because FDA could have simply required the less restrictive alternative of full disclosure by the manufacturer. 13 F.Supp.2d at 73. The court stated that not

only was full disclosure less restrictive, but it also addressed the concerns of FDA more effectively for the following reasons: (1) full disclosure assuages concerns that the information is inherently misleading or deceptive to health care organizations and providers; (2) full disclosure still preserves incentives for manufacturers to get off-label uses approved; (3) full disclosure does not preclude often very beneficial information from reaching health care organizations and providers; and (4) full disclosure is consistent with precedent holding that troublesome speech should be combated by more speech, not less. Id.

Likewise, abstracts, brochures, “Dear Doctor” letters, and internet sites should be of little concern. If article dissemination can be remedied by full disclosure, then the same holds for abstract dissemination. Brochures and “Dear Doctor” letters automatically disclose manufacturer involvement as both would be printed with the manufacturer’s logo. Internet sites similarly automatically disclose manufacturer involvement. The user must go to the relevant internet site, in this case sponsored by the manufacturer, and must look for the particular information. There can be no mistake that this information comes from the manufacturer. An additional disclaimer that the article referenced by the site pertains to uses or products not approved by FDA is certainly sufficient disclosure.

With respect to advertisements, the Pearson court’s reasoning governs. There, the court concluded that FDA’s regulation of health claims on supplements was more extensive than necessary because the commercial speech doctrine favors disclosure over suppression. 164 F.3d at 657; see also In re R.M.G., 455 U.S. at 203 (holding that the FDA may not place an absolute ban on even potentially misleading information if there is an alternative way to present the information that is not deceptive). The court reasoned that disclaimers were the constitutionally-preferable alternative, and there was even more reason to be concerned about fraud in Pearson than there is in the advertising discussed here. In Pearson, the advertisements were directed to consumers, whereas here the advertisements are in scientific and medical journals which will most often only be seen by doctors. Moreover, they will merely refer doctors to articles that may be of interest to them. As suggested by Pearson, FDA can only require an advertisement to state that the use or product discussed in the advertisement is not FDA approved. Therefore, by restricting speech as opposed to merely requiring disclosure, FDA’s speech restrictions are more extensive than necessary.

c. FDA’s Regulations Are More Extensive Than Necessary Because Incentives For Manufacturers to Seek Approval Exist Independent Of The Speech Restrictions

FDA’s restrictions are also more extensive than necessary because even if protected commercial speech was permitted, a manufacturer would still have numerous incentives to seek FDA approval. Until a manufacturer received FDA approval, it would not be able to make safety and effectiveness claims, nor could it initiate promotional person-to-person contact with physicians regarding the off-label use or unapproved product. Furthermore, health care organizations and providers consider FDA approval an indication of product safety and effectiveness. Therefore, manufacturers would have to seek FDA approval to improve their

product's marketability or in the case of an unapproved product, to be able to market the product at all.

As a result, simply by barring manufacturers from making safety and effectiveness claims and restricting their use of salespeople, FDA could preserve the FDA approval process. Thus, its current policies hinder far more speech than is necessary.

d. FDA Regulations Restrict The Right Of Physicians To Receive Protected Commercial Speech And Are Thus More Extensive Than Necessary

Courts have long recognized that a legitimate audience has the right to receive truthful, non-misleading commercial information. See, e.g., Virginia Board, 425 U.S. at 765; 44 Liquormart, 517 U.S. at 503. For example, in Reno the Court held that provisions of the Communications Decency Act were unconstitutional because they pursued a legitimate state interest by suppressing a large amount of speech that adults have a constitutional right to send and receive. 117 S. Ct at 2346-47. This reasoning is applicable to FDA's regulation of protected commercial speech. FDA regulations that prevent an audience of health care organizations and providers from receiving truthful, non-misleading information about off-label uses and unapproved products are more extensive than necessary. For example, health care organizations and providers have an interest in obtaining information about off-label uses since, with physicians in particular, off-label prescription is currently a legal part of their practice. FDA may not preclude health care organizations and providers from receiving protected commercial speech on the theory that an unintended audience might also access the information. Internet sites provide a good example. While the agency may be concerned about consumer access to such sites, following Reno, the agency may not silence this speech out of fear that an unintended audience will gain access and be misled. Any such regulation that prevents an audience with a right to information from receiving it is more extensive than necessary.

4. Conclusion: FDA's Speech Restrictions Do Not Satisfy The Central Hudson Standard and Must Be Amended

FDA's restrictions on the types of protected commercial speech described above simply do not satisfy Central Hudson's requirements. The speech does not concern illegal activities, nor is it inherently misleading as long as there is full disclosure. The agency's asserted interests are not served by the regulations which are paternalistic and are unnecessary to preserve the new product approval process. Finally, even if FDA could reach the final Central Hudson prong, the regulations are more extensive than necessary given that full disclosure would serve the agency's interests equally well. As a result, FDA's restrictions on protected commercial speech regarding off-label uses and unapproved products violate the First Amendment and must be revised to permit the types of speech described above.

IV. WHERE FDA CLAIMS THAT PROTECTED COMMERCIAL SPEECH IS FALSE OR MISLEADING, FDA SHOULD BE REQUIRED TO PROVE IT BY A PREPONDERANCE OF THE EVIDENCE

In addition to revising its specific policies regarding off-label use and unapproved product speech, FDA needs to look more broadly at its approach to regulating commercial speech. Western States, Pearson, and Washington Legal Foundation suggest that its approach is inconsistent with the First Amendment. This result stems largely from the agency's failure to tailor its regulations to restrict as little speech as possible. It also, however, stems from the agency's tactic of classifying categories of speeches as "inherently misleading" when it cannot meet its burden of proving that the speech in question is false or misleading.

To ensure that both its current and future policies comply with the First Amendment, FDA must assume the obligation to generate evidence that speech is false or misleading before considering it excluded from constitutional protection. The relevant test is articulated in Ibanez, where the Supreme Court stated that it would not allow "rote invocation of the words 'potentially misleading' to supplant the [government's] burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." 512 U.S. at 146; see also Edenfield, 507 U.S. at 771 (striking down a ban on solicitation where the government failed to present "studies" or "anecdotal evidence" showing that solicitation posed dangers of fraud or overreaching). While the agency has consistently argued that claims by manufacturers are "inherently misleading," this "rote invocation" with little proof fails to satisfy the standard articulated in Ibanez.

The Federal Trade Commission (FTC), which also regulates advertising, employs a much sounder approach to the regulation of commercial speech. Section 5(a) of the Federal Trade Commission Act prohibits "unfair and deceptive acts and practices in or affecting commerce." 15 U.S.C. § 45(a). An advertisement can be regulated as "deceptive" if it contains material misrepresentations or omissions that are likely to mislead reasonable consumers. See Kraft, Inc. v. FTC, 970 F.2d 311, 314 (7th Cir. 1992). To regulate an advertisement as deceptive, the FTC must either (1) prove its falsity, or (2) show that the advertiser failed to adequately substantiate his claims. See FTC v. Pantron I Corp., 33 F.3d 1088, 1096 (9th Cir. 1994); Thompson Medical Co. v. FTC, 791 F.2d 189, 193-194 (D.C. Cir. 1986). This substantiation may require "[v]alid scientific evidence, including...clinical tests." FTC v. California Pacific Research, Inc., 1991 WL 208470, at 4 (D. Nev. 1991); see also Pantron I, 33 F.3d at 1096 n.23 (stating in dicta that clinical studies may be necessary to substantiate hair loss product claims). Furthermore, the FTC approach is compatible with current FDA law -- for example, the FDCA's misbranding provisions -- and therefore the FTC approach is a logical extension to current FDA statutory provisions.

FDA should employ the FTC's approach and regulate only speech that the agency can prove is false and misleading by a preponderance of the evidence. This approach makes even more sense for the regulation of the protected commercial speech discussed in these comments than it does for the direct-to-consumer speech regulated by the FTC. First, the speech here is targeted at health care organizations and providers, so there is a second opportunity for

“substantiation” before the products in question reach the public. For example, articles and abstracts on an off-label use will be substantiated as part of the publishing process; additionally, though, the information contained in those articles will be evaluated by individual doctors before the prescribing the off-label product to a patient. Secondly, the FTC’s approach strikes a workable balance between access to helpful information and protection from deceptive practices.

Therefore, FDA should cease to make unsupported assertions that categories of speech are “inherently misleading.” Instead, it should examine the particular speech at issue and demonstrate by persuasive evidence that it is, in fact, untrue or misleading.

V. FDA SHOULD ENSURE THAT ITS COMMERCIAL SPEECH POLICIES ARE NOT ONLY INTERNALLY CONSISTENT, BUT ALSO CONSISTENT AGENCY-WIDE

When, as suggested above, FDA looks broadly at its approach to commercial speech regulation, it should also consider whether its policies are consistent. Specifically, FDA should evaluate whether its particular commercial speech policies are internally consistent, and whether its commercial speech policies are consistent agency-wide. In particular, we recommend that FDA rectify inconsistencies with regard to two commercial speech policies. First, the Center for Devices and Radiological Health (CDRH) permits manufacturers to advertise if a product is PMA-approved, but not 510(k)-cleared. As discussed below, the differential treatment is inconsistent and detrimental to the public health. Second, the Center for Drug Evaluation and Research (CDER) administers well-established direct-to-consumer and pre-approval promotion policies with regard to pharmaceutical products. It is inconsistent that a similar policy has not been adopted by CDRH. We recommend that FDA rectify these inconsistencies in its commercial speech policies.

A. A Manufacturer Should Be Permitted To Inform Health Care Organizations And Providers And Patients If Its Product Is 510(k)-Cleared

In keeping with the spirit of the First Amendment, FDAMA permitted a manufacturer to include a statement in its promotional materials indicating that its product is FDA approved. See FDAMA § 421 (November 21, 1997). As a result, a medical device manufacturer is permitted to state that its product is the subject of an approved PMA. FDA continues, however, to prevent device manufacturers from representing that their products have been 510(k)-cleared by FDA. See 21 C.F.R. § 807.97. Assuming such a statement is truthful, we question the purpose served by barring manufacturers from informing health care organizations and providers and/or consumers that their device is legally marketed in the United States. Certainly, it would only promote FDA’s public health mission to assist health care organizations and providers and consumers from distinguishing between legally marketed devices and those that may be on the market illegally. Moreover, by permitting manufacturers to inform health care organizations and providers and consumers of their 510(k) clearance, FDA would be advancing the intent of both FDAMA and the First Amendment.

B. CDRH Should Adopt Direct-to-Consumer And Pre-Approval Promotion Policies

To ensure consistency in FDA's commercial speech regulation, CDRH should adopt direct-to-consumer and pre-approval promotion policies for medical devices, which CDER has already done for drugs. CDER's direct-to-consumer policy has been well-received by both industry and the public. For example, CDER's policy is well-established and appropriately seeks to balance information regarding a product's benefits with relevant information regarding a product's potential risks. See, e.g., Guidance for Industry: Consumer-Directed Broadcast Advertisements (August 1999); Guidance for Industry: Consumer-Directed Broadcast Advertisements, Questions and Answers (August 1999); Draft Guidance for Industry: Using FDA-Approved Patient Labeling in Consumer-Directed Print Advertisements (March 2001). CDRH should allow for direct-to-consumer advertising with medical devices.

Similarly, CDRH should adopt a pre-approval promotion policy that would allow for the use of "institutional" and "coming soon" advertising. CDER has already adopted similar policy. See Pre-Approval Promotion Guidance (April 1994) (defining CDER's pre-approval promotion policy including permitting manufacturers to use either "institutional" or "coming soon" promotion).

C. Conclusion: Consistency Should Be Sought In FDA's Commercial Speech Policies

The First Amendment protects the speech of all manufacturers equally -- regardless of whether their product is a drug or a device, is 510(k)-cleared or PMA-approved. Therefore, FDA's commercial speech policies should similarly apply equally. By permitting a manufacturer to advertise if its product is 510(k)-cleared and adopting direct-to-consumer and pre-approval promotion policies, CDRH will ensure that FDA's commercial speech policies are consistent.

VI. CONCLUSION

Recent First Amendment cases have sent FDA a strong signal that change is needed both (1) in specific FDA policies; and (2) in FDA's general approach to commercial speech regulation. FDA should be commended for recognizing the need for change. Now it is faced with the tougher challenge -- actually implementing the changes required to bring its policies into compliance with the First Amendment.

First, FDA should permit manufacturers to disseminate truthful and non-misleading information regarding off-label uses and unapproved products. In particular, FDA should permit the following types of speech as long as there is no evidence that the speech at issue is untrue or misleading:

- the dissemination to health care organizations and providers of truthful and non-misleading (1) peer-reviewed scientific journal articles and/or abstracts

and (2) reference text excerpts that discuss an off-label use or unapproved product. (Note: FDA has always recognized that manufacturers could disseminate these materials to healthcare providers upon receiving a request for that information);

- the dissemination of letters or brochures to health care organizations and providers providing: (1) the citation(s) of journal article(s) discussing an off-label use or an unapproved product and/or (2) a truthful and non-misleading summary of the article(s);
- the propagation of educational advertisements in scientific or medical journals and on webpages (the webpage would be clearly designated as intended “for health care organizations and providers”) that provide: (1) the citation(s) of journal article(s) discussing an off-label use or an unapproved product and/or (2) a truthful and non-misleading summary of the article(s);
- a CME program sponsored by a manufacturer which would generally conform to FDA’s CME guidance, except that the manufacturer would be permitted to develop CME program content and generate a list of speakers and invitees, even when the manufacturer was not requested to do so by a third party; and
- FDA should extend the permitted content of CME programs regarding an off-label use of a medical device to include not only oral training and demonstrations, but also “hands on” training of attendees.

These types of speech should be allowed assuming that the speaker (1) discloses its financial interest in the product discussed; (2) discloses that the use or product discussed is not FDA-approved; (3) provides all information related to off-label uses and unapproved product in written form to health care organizations and providers (i.e., the sales force could directly hand out a copy of the peer-reviewed journal article during a sales call), but no oral communications regarding these subjects would be permitted in face-to-face meetings with health care providers; and (4) targets its speech to health care organizations and providers.

Second, FDA must end its reliance on unsupported assertions that certain categories of speech are “inherently misleading” as a means of avoiding constitutional scrutiny of its regulations. Instead, FDA should employ the FTC’s approach and regulate only speech that the agency can prove is false and misleading by a preponderance of the evidence.

Third, FDA should endeavor to ensure its commercial speech policies are consistent. Specifically, CDRH should allow device manufacturers to provide direct-to-consumer advertising and pre-approval promotion (i.e., the use of “institutional” and “coming soon” promotion). In addition, FDA should permit manufacturers to inform health care organizations and providers and consumers when they have received 510(k)-clearance for a medical device.

By implementing these three changes, FDA will demonstrate its commitment to complying with the First Amendment. These changes will not only ensure that manufacturers are able to exercise their constitutionally protected commercial speech rights, they will also ensure that health care organizations and providers and patients are able to base healthcare decisions on the most current information available.

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Thank you for the opportunity to comment. We look forward to FDA's implementation of changes to its commercial speech policies.

Sincerely,

Edward M Basile

Edward M. Basile

Ashley Whitesides

Ashley Whitesides