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Charles M. Balch, MD

September 13, 2002

Dockets Management Branch
Food and Drug Administration
5630 Fishers Lane, Room 1061
Rockville, MD 20852

Re: Docket No. 02N-0209; Request for Comment on First Amendment Issues

The American Society of Clinical Oncology (ASCO) submits these comments in response to a Food and Drug Administration (FDA) *Federal Register* notice soliciting public comments on the constitutionality of its approach to regulating advertising and marketing of drugs, foods, cosmetics, and other regulated products (May 16, 2002). ASCO is the national organization representing physicians and other health care professionals who specialize in the treatment of cancer.¹

While FDA's notice poses a number of broad questions, ASCO would like to focus its comments on three specific areas: (1) the importance of the dissemination of off-label drug information to oncology; (2) the ability of trained oncologists to evaluate data from published peer-reviewed studies related to cancer treatment; and (3) the fact that permitting off-label dissemination by drug sponsors will not affect the incentives for drug manufacturers to obtain approval for cancer indications. In brief, ASCO recommends that FDA refrain from placing any unnecessary restrictions on the sharing of sound off-label research and treatment information between the drug industry and the oncology community.

Importance of Off-Label Information Dissemination in Oncology

ASCO believes that unnecessary restraints on the dissemination of off-label information are detrimental to patient care in general, but are particularly harmful within the cancer care community. In contrast to many other diseases, the gold standard of care for many cancers frequently involves the off-label use of approved drug products. This is a fact that has been

¹ ASCO is a non-profit organization comprised of more than 18,000 professional members from all oncology disciplines and sub-specialties. ASCO's mission is: (1) to facilitate the delivery of high quality health care; (2) to foster the exchange and diffusion of information and ideas related to cancer, including the biology, diagnosis, staging, treatment, and psychosocial impact of cancer; (3) to further the training of all persons in clinical research and in the total care of patients with cancer; and (4) to encourage optimal communication among the various specialties concerned with cancer.

2003 Annual Meeting
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acknowledged by FDA, the Department of Health and Human Services (DHHS), the United States Congress and state legislatures on numerous occasions. For instance, the Social Security Act, at 42 U.S.C. § 1395x(t)(2), requires Medicare to cover all “medically accepted indications” for drugs used in anticancer chemotherapeutic regimens, with such medically accepted indications including off-label uses listed in certain compendia or supported by clinical evidence in peer-reviewed medical literature in publications identified by the Centers for Medicare and Medicaid Services (CMS). This unique provision underscores the key roles of both off-label drug use in cancer and medical literature in explaining and supporting such use.

Given the fact that off-label uses are widely recognized in statute and elsewhere, it can fairly be said that governmental policy should not discourage access to such uses or information about them. Moreover, at a time when medical information is rapidly increasing, no opportunity for dissemination of truthful objective material such as that found in peer-reviewed journals should be overlooked. Pharmaceutical sponsors can play a beneficial role in rapid and responsible dissemination of information about new off-label uses of drugs, as they have both the resources and the incentive to support such dissemination. So long as the information thus provided has been subject to peer review, the sponsors serve as little more than a conduit for its transmission through such mechanisms as reprints of published articles or sponsorship of continuing medical education (CME) programs or original research seminars and symposia.

Ability of Oncologists to Evaluate Peer-Reviewed Literature

Presumably the rationale for restricting dissemination of information on off-label uses is to avoid the risk that physicians will be misled by such information to prescribe drug therapy that is not safe or effective for their patients. Oncologists, however, are trained to evaluate off-label uses of drugs for cancer therapy, and, in fact, off-label uses often constitute the standard of care in oncology. If there were ever a justification for restricting dissemination of essentially factual information like that contained in peer-reviewed journals, it certainly would not apply in the case of oncology, where the audience for such information is completely capable of evaluating it with skill and knowledge while utilizing it to the benefit of their patients.

Permitting the Dissemination of Off-Label Information does not Minimize the Incentives for Drug Sponsors to Obtain Approval of Cancer Indications

In the past, FDA has expressed its concerns that permitting a drug manufacturer to share information on the off-label applications of its drug products would remove the incentive for manufacturers to expend the time and resources necessary to gain a new labeled indication for that product.² This logic is inapplicable to oncology. The incentive to add labeled indications will not decrease because, in fact, such an incentive does not exist today. For a variety of different reasons (the fast pace of research, the long approval timeframes for new

² January 28, 2002 letter from FDA to Daniel Popeo and Richard Samp of the Washington Legal Foundation (WLF), in response to WLF’s May 29, 2001 Citizen Petition. (Document available in the FDA Dockets, Docket No. 01P-0250.)

cancer indications, and the research and treatment paradigm in the cancer care community), the sponsors of cancer drugs have generally not pursued new indications for their approved products. Further, oncologists and other cancer health care professionals, such as oncology nurses, do not regard the labeling as providing comprehensive information on the use of drugs. These oncology professionals look to new clinical research, not a product's approved labeling, when choosing therapies for their patients. Since sponsors of cancer drugs are not currently applying for new indications for their approved products and oncology professionals look to sources other than labeling for treatment information, the agency's rationale for restricting manufacturers' ability to disseminate high-quality off-label information about new clinical research is greatly weakened.

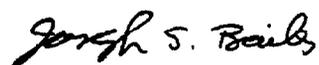
Constitutional Limits on Regulation of Commercial Speech

Under the principles established in the Supreme Court case that is often cited to explain the constitutionality of commercial speech regulations, *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557(1980), the government may regulate commercial speech that is neither inherently misleading nor related to an unlawful activity only upon showing that: (1) the government has a substantial interest that it seeks to achieve; (2) the regulation directly advances the asserted interest; and (3) the regulation serves that interest in a narrowly tailored manner. *Id.* at 566. Even assuming, for purposes of argument, that there exists a substantial governmental interest here (maintaining incentives for obtaining approval of new indications for approved drug products), it appears that restrictions on the dissemination of off-label information are not advancing this asserted interest, let alone doing so in a narrowly tailored manner.

Conclusion

ASCO supports FDA's efforts to examine its regulation of drug advertising and marketing in the light of recent court decisions demonstrating a new judicial emphasis on the need to eliminate unnecessary restrictions on commercial speech. As FDA engages in this examination, ASCO requests that the agency keep in mind the importance of off-label information in cancer care, the crucial role that drug sponsors can serve in disseminating this off-label information, and the fact that the main rationale offered by the agency to support restrictions on off-label information dissemination does not hold true in the cancer drug arena. ASCO encourages FDA to refrain from unnecessary restrictions on the dissemination and sharing of high-quality research and treatment information between the drug industry and the oncology community. Such an exchange can benefit cancer patients by helping to translate cutting-edge research into everyday therapies.

Sincerely,



Joseph S. Bailes, M.D.
Chair, Clinical Practice Committee

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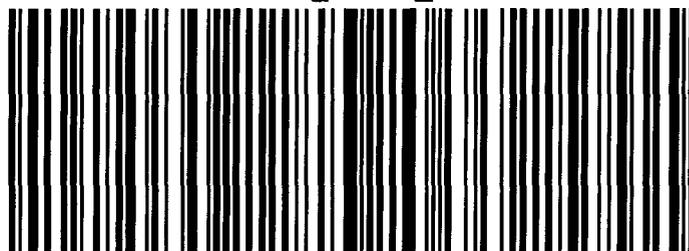
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