

COOK[®]

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VIA MESSENGER

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

Dear Sir or Madam:

The Cook Group, Incorporated ("Cook") is a family of several medical device manufacturers based in Bloomington, Indiana. We appreciate the opportunity to submit our comments in response to the FDA's Request for Comment on First Amendment Issues, published in the May 16, 2002 Federal Register. As you know, by notice in the July 10, 2002 Federal Register, the due date for comments was extended to September 13, 2002.

Consistent with the FDA's statutory mandate, it is Cook's goal to improve the quality of medical care in this country by improving access to new technologies in an expedient, yet safe and effective manner. The regulatory processes the FDA implements to carry out its obligation to ensure the safety and effectiveness of medical devices must be considered as the means to this end. Serving the best interests of the patient population is our shared number one priority. Improving the quality of patient care through improved access necessarily includes the ability to educate physicians and patients about our medical devices. Therefore, our comments address item 7 as set out in the May 16 Federal Register notice:

Would permitting speech by manufacturer, distributor, and marketer about off-label uses undermine the [Food, Drug and Cosmetic Act's requirement that new uses must be approved by the FDA? If so, how? If not, why not? What is the extent of FDA's ability to regulate speech concerning off-label uses?

67 Fed. Reg. 34,942, 34,944

02N-0209

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We recognize and value the FDA's role in regulating medical devices to ensure that they are safe and effective for their intended uses by patients. We also understand, however, that much innovation in medical care occurs when physicians, our learned intermediaries, develop "off-label" uses for our medical devices. As described more fully in a First Amendment context below, Cook believes that a balance can and should be achieved that would enable medical device manufacturers to educate physicians on new uses without compromising the FDA's statutory obligation to ensure that medical devices are safe and effective.

Our brief answer to the set of First Amendment-related questions restated above, which we will explain below in some detail, is as follows:

- The Act's requirement of FDA approval for new uses will not be significantly affected by permitting manufacturers to educate physicians about off-label uses to medical providers;

- Since there are ways of furthering that requirement which are less restrictive of speech than barring manufacturers' truthful communications with physicians, those approaches must be taken instead under applicable law. For example:

- The FDA may require that such speech be truthful and non-misleading;

- Full disclosure of the manufacturer's identity as the source of the advertising may be required; and

- Advertising off-label uses to the general public may be prohibited.

I. COOK'S INTEREST IN THESE ISSUES

Cook is an experienced manufacturer and marketer of a wide variety of medical devices, and is proud of the quality of its medical devices and of its adherence to all applicable FDA requirements. Cook's dedication to the welfare of the patients who use the company's medical devices, combined with the fact that some of those devices have successfully and beneficially been used for off-label purposes, leads Cook to the belief that its views on the issues quoted above may be of particular value to the FDA.

II. THE ACT'S REQUIREMENT THAT THE FDA APPROVE NEW USES FOR MEDICAL DEVICES SERVES A SUBSTANTIAL GOVERNMENTAL INTEREST

Cook believes strongly that the requirement of the Food, Drug, and Cosmetic Act mandating FDA approval of new uses for medical devices serves an important

public interest. The Government clearly has a strong interest in protecting the health and safety of its citizens. It is critical that members of the public be assured, when they use medical devices, either directly or indirectly through physicians, or take prescription or over-the-counter drugs, that the medical devices or drugs in question have gone through the FDA's approval process. More specifically, there is a strong governmental interest in seeing that all intended uses for a given medical device or drug are subjected to the FDA's evaluation process. This interest is reflected in, for example, the Food and Drug Administration Modernization Act of 1997 ("FDAMA"), Pub. L. No. 105-115, 111 Stat. 2296, *see* 21 U.S.C. § 360aaa *et seq.*

III. GOVERNING FIRST AMENDMENT LAW NEVERTHELESS BARS THE PROHIBITION OF TRUTHFUL, NON-MISLEADING SPEECH TO MEDICAL PRACTITIONERS REGARDING OFF-LABEL USES

The First Amendment to the Constitution protects commercial speech of the sort in question here as well as political and noncommercial speech. The standards governing the permissibility of legislative or regulatory restrictions on commercial speech are the familiar ones first articulated by the Supreme Court in *Central Hudson Gas & Electric Co. v. PSC of New York*, 447 U.S. 557, 566 (1980):

For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Under these standards, it is of course clear that commercial speech in some circumstances must be permitted even though its prohibition or regulation would directly further a legitimate and substantial governmental objective. This is true, for instance, whenever the speech in question concerns lawful activity, is non-misleading, and there is a sound way of vindicating that interest which is less restrictive of speech than the one at issue.

This point is illustrated by the recent decision in *Thompson v. Western States Medical Center*, 122 S. Ct. 1497 (2002), which prompted the FDA to seek comments on the First Amendment issues set out above. In *Thompson*, the Supreme Court addressed whether Congress and the FDA could limit the use of compounded drugs -- which in some targeted situations represent good alternatives for patients but whose mass production presents serious problems -- by barring providers of such drugs from soliciting orders for particular compounded drugs. The Court held that such a prohibition (which was embodied in FDAMA) was impermissible.

To begin with, the Court emphasized that “the party seeking to uphold a restriction on commercial speech” -- *i.e.*, the Government -- carries the burden of justifying it. *Id.* at 1507. The opinion also restated the governing *Central Hudson* test (quoting from that decision) as follows:

Under that test we ask as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, however, we next ask “whether the asserted governmental interest is substantial.” If it is, then we “determine whether the regulation directly advances the governmental interest asserted,” and finally, “whether it is not more extensive than is necessary to serve that interest.” Each of these latter three inquiries must be answered in the affirmative for the regulation to be found constitutional.

122 S. Ct. at 1504 (citations omitted).

In applying this test, the Court observed that there may be a substantial governmental interest in limiting advertising of compounded drugs, since it may be difficult to produce and market such drugs on a large scale without advertising. Thus, such a prohibition arguably helped to further the integrity of the FDA’s device approval process. Nonetheless, the Court held, the FDA’s restriction was “more extensive than is necessary to serve [that] interest . . .” *Id.* at 1506 (quoting *Central Hudson*). This was because there are several other ways of ensuring the integrity of the new-drug approval process -- while nonetheless permitting the compounding of drugs -- that do not restrict speech. For example, the Government could prohibit pharmacists from compounding drugs in anticipation of receiving prescriptions (rather than in response to prescriptions already received). “[I]f the Government could achieve its interests in a manner that does not restrict speech . . . or that restricts less speech,” the Court ruled, “the Government must do so.” *Id.*

Thompson supports and reflects the analysis adopted in *Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *vacated as moot*, 202 F.3d 331, 340 (D.C. Cir. 2000). *Washington Legal Foundation* (“WLF”) addressed the very questions posed in the FDA’s May 16 Request for Comments, with one exception: the speech in question in *WLF* involved only so-called “enduring materials” -- *i.e.*, “reprints of medical textbooks and peer-reviewed journal articles,” 13 F. Supp. 2d at 54 -- concerning off-label uses, rather than all commercial speech regarding off-label uses. Although it preceded the *Thompson* decision by more than three years, the District Court’s decision in the *WLF* case follows essentially the same analysis and approach as *Thompson* and provides highly persuasive guidance regarding the advertising of off-label uses for medical devices.

Applying the *Central Hudson* criteria, the *WLF* court held that although the Government had a substantial interest in having “adequate incentives” for “manufacturers to get new uses approved by the FDA,” the prohibition was “more extensive than necessary” *Id.* at 73. This was true, the court said, because “full disclosure” that the advertising materials in question came from the manufacturer -- a party with an obvious economic interest in the relevant scientific and medical issues -- would constitute an effective alternative, alerting physicians to weigh the materials carefully, while placing far less restriction on speech. The court also noted that (a) “the ability of the intended audience [physicians, not laypersons who might more easily be misled] to evaluate the claims made” is a guard against potential abuse; and (b) a concern that physicians will misuse truthful information is “unsupportable as a basis for prohibiting speech,” since a “paternalistic assumption that the [audience] will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it.” *Id.* at 67, 69-70.

In Cook’s view, this analysis strikes exactly the appropriate balance and hence both satisfies the *Central Hudson* test and promotes sound public policy with respect to all advertising of off-label uses to physicians:

As off-label uses are presently an accepted aspect of a physician’s prescribing regimen, the open dissemination of scientific and medical information regarding these treatments [and devices] is of great import. The FDA acknowledges that physicians need reliable and up-to-date information concerning off-label uses.

Id. at 56. Indeed, “in some . . . areas of medical practice, practitioners consider off-label use to constitute the standard of good medical care.” *Id.* Thus, following *WLF*, advertising of off-label uses to physicians should be permitted as long as (a) it is truthful and not misleading, and (b) it bears full disclosure as to its source (and

hence to the fact that that source is an economic actor with a monetary stake in the issue).

To be sure, the court's decision in *WLF* observed that its ruling barred only a "very narrow form of manufacturer communication" and that manufacturers would still be barred from promoting their products personally or via "internally-produced marketing materials." *Id.* at 73. And the court added: "Were manufacturers permitted to engage in all forms of marketing of off-label treatments, a different result might be compelled." *Id.* (emphasis omitted). However, the "full disclosure" approach, suggested by the court as a viable and less intrusive way of vindicating the Governmental interest in maximizing utilization of new-device approval for off-label uses, is equally effective regardless of whether the promotional speech involves "enduring materials" or other speech. The medical practitioners in

question will be aware, as a result of such disclosures, that they should exercise their critical faculties regarding the devices at issue.¹ Crucially, moreover, the marketing will not be addressed "to the general consumer public, who likely lack the knowledge or sophistication necessary to make informed choices on the efficacy of prescription drugs [or devices]." *Id.* at 70.

As this last point suggests, Cook believes the FDA can require that if a medical device manufacturer wishes to advertise off-label uses to the general public, it would have to first obtain approval of such uses.² This is because, as distinguished from the drug compounding situation addressed in *Thompson*, permitting advertising of off-label device uses to the general public would effectively eliminate any incentive for device manufacturers to seek FDA approval for off-label uses, thus precluding vindication of the substantial public interest in requiring or at least encouraging such approval. Unlike the situation in *Thompson*, in other words, there is no way in the off-label use context of advancing the relevant (and substantial) Governmental interests "in a manner that does not restrict speech . . . or that restricts less speech" than the approach suggested by Cook. 122 S. Ct. at 1504. Under that approach, which would permit manufacturer advertising of off-label uses to providers of medical care but not to the general public, the incentive to pursue and obtain such FDA approval will still exist, while valuable information concerning off-label uses may still be brought to the attention of physicians.

¹ It should not be overlooked that the possibility of medical malpractice claims provides an effective incentive for physicians to carefully scrutinize promotional materials regarding off-label medical device uses and to investigate the matter fully before using medical devices for unintended uses.

² We make this observation with the hope that the FDA will embrace our recommendation, made below, to limit the off-label use problem by permitting broader labeling claims for 510(k) devices.

On the basis of its nearly 40 years of experience with the FDA's regulatory process, Cook also urges the agency to reconsider its approach to approving "indications for use," especially with respect to section 510(k) clearances. Following the Medical Device Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 539, *see* 21 U.S.C. § 301 *et seq.*, as a matter of practice the FDA has been narrowing the labeling claims sought by medical device manufacturers. By doing so, the FDA has helped to create the off-label use problem for which it is now seeking comment. Broadening indications for use -- *i.e.*, returning to less restrictive but of course reasonable labeling claims (particularly with respect to 510(k)'s, which account for a very high percentage of the devices that the FDA reviews prior to marketing and sale) -- would constitute another way in which, without restricting speech, the FDA can address this problem. We believe the FDA can accomplish this without compromising its mission to further the best interests of our nation's patients.

IV. CONCLUSION

Cook believes that it is important to maintain incentives for manufacturers of medical devices to go through the approval process for off-label uses. At the same time, however, Cook also believes that employing its medical devices for off-label uses can significantly benefit patients and that manufacturers should be able to bring such beneficial and even potentially life-saving facts to the attention of medical care providers. First Amendment law, as outlined above, supports this position, with such advertising being permissible if but only if:

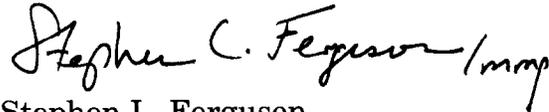
- It is truthful and not in any way misleading; and
- The advertiser fully and conspicuously discloses its identity and its role as the source of the relevant information.

On the other hand, Cook believes that advertising of off-label device uses to the general public may be restricted or prohibited by the FDA, since (a) there would appear to be no other way of maintaining a sufficient incentive for medical device manufacturers to seek approval of off-label uses, and (b) the Government has a substantial interest in maintaining such incentives. We recognize that in the new world created by the Internet, patients have access to a vast array of information, some of it good and some of it bad. Confronted with this reality, the FDA should encourage medical device manufacturers and physicians to share truthful information about off-label uses with the patient community. As the best sources of accurate information, the FDA, device manufacturers, and physicians together can serve as a filter to address the problem of information overload.

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Thank you again for this opportunity to provide our perspective on this very important public policy matter balancing our nation's health and right to free speech. We are available to discuss our comment or to answer any questions you may have at your convenience.

Sincerely,

A handwritten signature in black ink that reads "Stephen L. Ferguson" followed by a stylized flourish or initials.

Stephen L. Ferguson
Executive Vice President
Regulatory and Legislative Affairs
Cook Group Incorporated