FDA's Regulation of Internet Promotion and Advertising

Medical device manufacturers must closely monitor the content of their Web sites and related links to avoid being reprimanded by FDA for product adulteration or misbranding.

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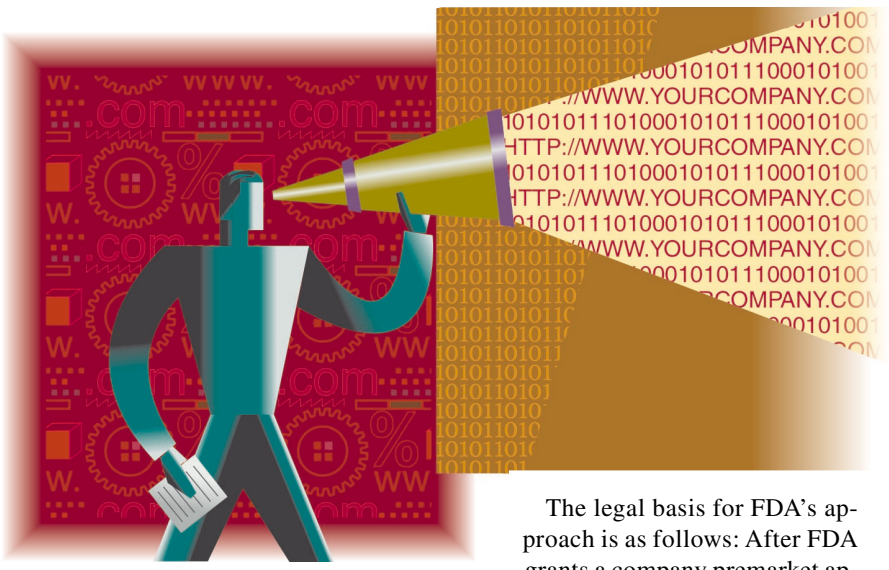
When Internet use accelerated in the late 1990s, some observers predicted that the new technology would add an impossible burden to FDA's regulation of promotion and advertising. The World Wide Web made possible nearly instantaneous global transmission of information about medical products. It appeared that FDA might be forced to rethink its entire approach to regulating advertising and promotion, especially promotion of off-label uses. Indeed, in October 1996, FDA held a public meeting to discuss how this revolutionary new medium should be regulated.

THE INTERNET AS ENFORCEMENT TOOL

Surprisingly, in the past year or so, the Internet has proven itself one of FDA's most effective enforcement tools. FDA watchdogs can simply access the Internet to quickly and easily gather and document evidence of promotional violations. Many companies are presenting FDA with written and often irrefutable evidence of violations of the Federal Food, Drug, and Cosmetic Act (FD&C Act) that appear as aggressive Web site postings. As a result of this increased access, FDA's output of untitled letters and warning letters for promotional violations is on the rise. At the same time, some, like the Washington Legal Foundation (WLF), believe FDA's reach has extended beyond its statutory mandate.

Still No General Guidance. In July 1999, nearly three years after its October 1996 meeting, FDA publicly stated its intent to draft an Internet guidance document. Since then, however, the agency has publicly confirmed that the guidance-drafting effort has been suspended indefinitely. While FDA has talked about plans to address Internet issues in future guidances related to promotion and advertising, no general guidance will be issued in the near future. This regulatory void is unfortunate. A clear, general guidance could have resolved or prevented many industry misunderstandings about what material is or is not acceptable to post on a company's Web site.

Enforcement on a Case-by-Case Basis. In the absence of a general Internet guidance document, FDA's regulatory expectations have been communicated in untitled letters and warning letters. The majority of these cite violations similar to those pursued in the off-line world. Most of the letters allege that statements on the companies' Web sites either promote a device for a new intended use requiring a separate premarket notification (or 510(k)) clearance or premarket approval (PMA) application, or that they unlawfully promote an investigational device. These alleged violations reflect CDRH's traditional legal theories, and no new statute has been proposed or regulation promulgated by FDA to prevent such allegedly violative activity.



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The legal basis for FDA's approach is as follows: After FDA grants a company premarket approval or 510(k) clearance of its device, that device may be labeled and promoted only for its approved or cleared intended use. According to FDA's regulations, the intended use of a device is determined from the circumstances surrounding distribution. The pertinent FDA regulation reads:

> The words *intended uses* . . . refer to the objective intent of the persons legally responsible for the labeling of devices. The intent is determined by such persons' expressions or may be shown by the circumstances surrounding the distribution of the article. This objective intent may, for example, be shown by labeling claims, advertising matter, or oral or written statements by such persons or their representatives. It may be shown by the circumstances that the article is, with the knowledge of such persons or their representatives, offered and used for a purpose for which it is neither labeled nor advertised. (*Code of Federal Regulations,* 21 CFR 801.4)

Thus, when a device is promoted for an unapproved new use on a firm's Web site, FDA may conclude that the device has a new intended use. The device is consequently considered adulterated or misbranded until FDA grants the manufacturer a new PMA or 510(k) clearance.

A recent example of intended-use infringement is CDRH's January 2001 warning letter to Voyager Medical Corp. (Portland, OR) alleging the company's therapeutic massager was cleared only for relief of minor muscle aches and pains, increase of local blood circulation, and local muscle relaxation. Voyager's Web site, however, reportedly made claims that the device treats a wide range of temporary and chronic conditions said by FDA to be beyond the scope of the 510(k) clearance. FDA's legal position is that the company created new intended uses for the device, which render it adulterated or misbranded until a separate PMA or 510(k) clearance is obtained.

In another recent example, FDA applied the intended-use regulatory approach to product testimonials posted on-line by patients and clinicians. The agency issued two warning letters last year (May 19, 2000, to Phazx Systems Inc., Colorado Springs, CO, and August 25, 2000, to Z'Strong International, El Monte, CA) citing violations based on testimonials appearing on the two companies' Web sites. In particular, Phazx Systems' product was cleared only for measurement of galvanic skin resistance for biofeedback information. Several statements posted on Phazx Systems' Web site, however, testified that the product successfully diagnosed medical conditions. FDA argued that these claims effectively created new intended uses for the product that required additional 510(k) clearances to avoid a charge of adulteration, misbranding, or both. The Z'Strong International case raised a similar issue.

Investigational Devices. FDA's regulations prohibit a sponsor from promoting or commercializing an investigational device or representing it as safe and effective for the intended use under investigation (*Code of Federal Regulations,* 21 CFR 812.7(a), (b), and (d)). When promotional information about an investigational device appears on a firm's Web site, FDA may conclude that the firm has violated that regulatory prohibition.

THE WLF PETITION

FDA has not taken a stance on whether the medical product information available on the Internet is labeling or advertising. The agency may need to confront the issue soon, however, in light of a citizen petition filed on April 13, 2001, by WLF. The group has requested that FDA formally draft a definitive rule, policy, or guidance stating that information on a company's Web site—including information displayed on third-party sites to which the site is linked—does not constitute labeling as defined by the FD&C Act and in light of relevant judicial precedents.

WLF further asks FDA to declare that information on, or accessible through, a Web site may, but does not necessarily, constitute advertising. WLF specifically cites a recent warning letter issued to Ocean Spray Cranberries Inc. (Lakeville-Middleboro, MA) in which FDA threatened to seize product because of the company's failure to conform to food labeling requirements. In the letter, FDA's New England district office found that the content of the company's Web site—including "health claims" related to its juices—constituted labeling and was therefore violative of food labeling regulations. The products were then subject to potential seizure.

WLF has previously engaged in litigation with FDA concerning what health information may be disseminated by industry. Therefore, if FDA ignores the WLF petition, or refuses to grant WLF's request, it is likely that WLF will take legal action against the agency.

WLF and Medical Device Manufacturers. If WLF prevails, and Web sites are deemed advertising and not labeling, the consequences could be significant for device manufacturers. In the case of medical devices, the jurisdiction for false or misleading statements would reside in the Federal Trade Commission (FTC), which has no product-seizure authority. Under the device authorities of the FD&C Act, FDA only has authority over advertising for restricted devices, which constitute a very small minority of devices regulated by the agency. However, CDRH could continue to issue warning letters alleging that a Web site has created a new intended use requiring separate 510(k) clearance or premarket approval. As stated in 21 CFR 801.4, the objective intended use of a device can be determined by all the circumstances surrounding distribution, including "advertising matter." Therefore, it is CDRH's position that information posted on a Web site can change the intended use of a device, taking that use outside the scope of the original clearance or approval. Similarly, CDRH could continue to issue warning letters alleging that a Web site has promoted or commercialized an investigational device. CDRH takes the position that this regulation extends to all promotional activities, including advertising.

Ultimately, it is unclear whether WLF's petition will result in litigation or a change in FDA policy. What *is* clear is that FDA has, for some time, taken an expansive view of what constitutes labeling. The device industry has traditionally been reluctant to challenge the agency's position. The WLF petition may prove to be the catalyst for either agency or judicial clarification as to FDA's reach concerning Web site content in particular and labeling in general.

FOREIGN AND U.S. APPROVAL STATUS

Another important Internet issue concerns the content international companies may legally post on their Web sites regarding products that have received approval outside the United States for uses that are unapproved or considered investigational by FDA. Before the advent of the Internet, segregating promotional materials for the U.S. market from those intended for the rest of the world was relatively simple. Because of the global nature of the Internet, however, information displayed on a company's Web site is accessible across

national boundaries. Companies are unclear on the legality of posting on their Web sites' product information that is lawful outside of but not in the United States.

FDA's position is that if a company's Web site is accessible from the United States, it must reflect the U.S. clearance or approval status of that company's products. A Web site should clearly state which intended uses and indications for a product have been cleared or approved by FDA, and which ones are unapproved or considered investigational in the United States. However, the use of disclaimers and caveats warning site visitors that a device is not cleared in the United States for a specific use generally will not pass enforcement scrutiny; in fact, a warning letter issued recently to Datascope Corp. (Montvale, NJ) urged the company to maintain a "separate Web site for those indications approved in the United States and one Web site for those indications approved overseas." Datascope's original Web site had included a list of product benefits; the indications for use approved only in Europe were marked with the disclaimer "Not applicable to the U.S. market." FDA, unsatisfied with the disclaimer, took the position that "it is inappropriate for a Web site essentially targeted to the American consumer to include indications for the device that may be approved in foreign markets but not in the United States."

Similarly, in an untitled letter to Visx Inc. (Santa Clara, CA) dated January 16, 2000, FDA reportedly argued that information on uses available internationally but considered investigational in the United States should only be accessible through a separate link identified for international customers.

In many cases, this task can be accomplished by way of a so-called "gateway" home page listing separate links for U.S. and international visitors. If no link exists between information on U.S.- and internationally cleared products, then FDA appears ready to agree that the Web site conforms to the rules regarding off-label promotion or promotion of investigational products. Additionally, one FDA official has reportedly said that U.S. firms with European subsidiaries are permitted to link the U.S. firm's home page to the home page of a European subsidiary, provided there is no direct link from any page containing U.S. product information to the European subsidiary's site. Again, however, without any written guidance from FDA on Internet use, predicting exactly how FDA may officially approach this issue in the future is difficult.

LINKS TO OTHER SITES AND DOCUMENTS

Hyperlink capability among Web sites poses the question, "May a company provide a link on its Web site to other sites, message boards, or chat rooms that may provide off-label information about the company's products?" FDA's current position is that a company is responsible for information posted on a linked site in the same way that it is responsible for the information that it presents on its own site or in its own promotional brochures. For instance, in a March 1, 2000, warning letter to Sands Hyperbaric Systems (Beverly Hills, CA), FDA cited the company in part because its Web site provided links to other Web sites—including two posted by clinics affiliated with the company—that were allegedly promoting the company's hyperbaric chamber for off-label uses.

In the event that a company's Web site offers a direct link to a journal article discussing off-label uses of its product, such a link will likely be considered violative. By extension, FDA would probably also deem it unacceptable for a firm to link to a chat room or message board it knows to be devoted to off-label discussion of its products. On the other hand, FDA appears ready to accept links to reputable trade association or general medical professional sites that may or may not contain a journal article discussing an off-label use for a device, so long as the manufacturer's Web site does not directly link to a specific off-label-use article.

According to the June 13, 2000, issue of *The Gray Sheet*, FDA officials have reportedly suggested in recent statements that they might be willing to accept links to journal articles about off-label use if the links were located in a password-restricted area of a company's Web site, with access permitted only to healthcare practitioners and other parties covered under the off-label-promotion safe-harbor provisions of Section 401 of the Food and Drug Administration Modernization Act of 1997. Such a suggestion may serve as a trial balloon offered as a compromise with industry that would permit links to these articles while making their general dissemination more difficult.

FDA claims that information posted on a Web site can change the intended use of a device.

FDA has also shared its view that direct links to journal articles containing information about off-label use compromise a company's ability to rely upon FDA's long-standing (but largely unwritten) policy of permitting manufacturers to provide off-label-use articles to healthcare professionals in response to unsolicited requests. In an April 18, 2000, warning letter to OmniCorder Technologies Inc. (Stony Brook, NY), FDA observed that the company's Web site posted direct links to articles with off-label-use information. FDA found that these links were inappropriate and stated that the links were the equivalent of "an open solicitation to the general public" that would "make it difficult" for the company to acceptably fill unsolicited requests for reprints in the future. In other words, FDA maintained that the company had tainted future requests for the reprints as *solicited* rather than *unsolicited*. An FDA official reportedly suggested recently that had these links been in a password-protected portion of the company's Web site, the links would not have been considered an open solicitation tainting future requests. A logical conclusion, then, is that FDA is attempting to steer companies toward the use of password-protected links. Whether this suggestion becomes official FDA policy remains to be seen.

FINANCIAL AND CORPORATE INFORMATION

The use of Web sites to communicate information about a company's activities raises issues about what is acceptable for different segments of the public audience. For example, FDA has recognized that companies need to communicate information about their activities and present and future products to

investors and other members of the financial community; yet, an on-line press release aimed at investors is equally available to potential customers. It appears that FDA will generally permit the on-line posting of press releases and announcements that include off-label information, e.g., foreign approval of a use not approved in the United States, if the information appears for only a reasonable time and is not directed at customers or potential customers. A preferred practice would be to place the information on a separately labeled "investor information" portion of the Web site. FDA may still object if the information remains for a prolonged time or a press release egregiously promotes unapproved products or off-label uses. Nevertheless, when the intent of on-line off-label discussions or references to unapproved products is to inform the investment community, FDA typically offers manufacturers some freedom.

CONCLUSION

Because FDA holds companies responsible for their Web site content in the same way it does other promotional material, companies should draft and maintain a policy that subjects all material to regulatory review prior to posting it on the Internet. If Web-based activities (e.g., a hosted forum or chat room) occur in real time, the nature of the planned activities should be scrutinized by the company, and guidelines should be established in advance. Information disseminated on the Internet should be subjected to the same compliance review as conventional promotional material; indeed, it would be appropriate for a company to draft detailed standard operating procedures covering Internet promotional activities.

When a manufacturer is uncertain about a specific promotional activity displayed on the Internet, the best course is for that company to seek the advice of regulatory experts to determine whether a valid legal and regulatory rationale exists for the proposed activity. If a company's Internet activity is questionable but not decidedly violative, prudence would dictate taking the conservative approach rather than subjecting oneself to a potential enforcement letter. The stock market has been known to react adversely to FDA allegations of unlawful promotional activities.

Some in industry have criticized FDA's failure to provide general guidance regarding product promotion on the Internet. Critics cite the potential for subjective and inconsistent decisions when enforcement policy is created on a case-by-case basis through warning letters. FDA, however, argues that most Internet cases can be resolved by applying existing policy. In addition, FDA has reportedly said that a team of agency officials meets weekly to discuss and triage Internet-posted promotional violations reported from all centers of the agency (drug, device, and biologic) in an effort to make its enforcement approach more consistent. What remains to be seen is whether such an informal procedure can substitute for a comprehensive, understandable, and detailed Internet policy. ■