Guidance for Industry

"Help-Seeking" and Other Disease Awareness Communications by or on Behalf of Drug and Device Firms

DRAFT GUIDANCE

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For questions regarding this draft document contact (CDER) Kristin Davis at 301-827-2828, (CBER) Glenn Byrd at 301-827-3028, or (CDRH) Deborah Wolf at 301-594-4595.

U.S. Department of Health and Human Services
Food and Drug Administration
Center for Drug Evaluation and Research (CDER)
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This draft guidance, when finalized, will represent the Food and Drug Administration's (FDA's) current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. You can use an alternative approach if the approach satisfies the requirements of the applicable statutes and regulations. If you want to discuss an alternative approach, contact the FDA staff responsible for implementing this guidance. If you cannot identify the appropriate FDA staff, call the appropriate number listed on the title page of this guidance.

I. INTRODUCTION

The purpose of this document is to provide guidance to industry regarding so-called "help-seeking" and other disease awareness communications, including a description of the specific characteristics of communications that fall into this category. Disease awareness communications are communications disseminated to consumers or health care practitioners that discuss a particular disease or health condition, but do not mention any specific drug or device or make any representation or suggestion concerning a particular drug or device. Help-seeking communications are disease awareness communications directed at consumers. FDA believes that disease awareness communications can provide important health information to consumers and health care practitioners, and can encourage consumers to seek, and health care practitioners to provide, appropriate treatment. This is particularly important for under-diagnosed, under-treated health conditions, such as depression, hyperlipidemia, hypertension, osteoporosis, and diabetes.

Unlike drug and device promotional labeling and prescription drug and restricted device advertising, disease awareness communications are not subject to the requirements of the Federal Food, Drug, and Cosmetic Act (the act) and FDA regulations. FDA recognizes the importance of distinguishing between communications that are under FDA jurisdiction and those that are not.

FDA's guidance documents, including this guidance, do not establish legally enforceable responsibilities. Instead, guidances describe the agency's current thinking on a topic and should be viewed only as recommendations, unless specific regulatory or statutory requirements are cited. The use of the word *should* in agency guidances means that something is suggested or recommended, but not required.

II. FDA AUTHORITY OVER DRUG/DEVICE LABELING AND ADVERTISING

FDA regulates the manufacture, sale, and distribution of drugs and devices in the United States under the authority of the act. This authority includes oversight of promotional labeling for all drugs and devices and advertising for prescription drugs and restricted devices. (21 U.S.C. 502(a), (n), (q), (r).)[1]

The act defines "label" to mean "a display of written, printed, or graphic matter upon the immediate container of any article . . . ." (21 U.S.C. 321(k).) "Labeling" means "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." (21 U.S.C. 321(m).) According to *Kordel v. United States*, 335 U.S. 345 (1948), the language "accompanying such article" in the "labeling" definition includes what supplements or explains an article, "in the manner that a committee report of the Congress accompanies a bill. No physical attachment one to the other is necessary. It is the textual relationship that is significant . . . ." FDA regulations thus define as "labeling" a wide variety of written, printed, or graphic matter that bears a textual relationship with a drug or device. (See 21 CFR 202.1(l)(2).)

FDA generally recognizes two types of labeling for drugs and devices: FDA-approved labeling and promotional labeling. FDA-approved labeling is prepared in the first instance by the sponsor and then reviewed by the agency as part of the new drug application (NDA), biologics license application (BLA) or premarket approval application (PMA) review. (21 CFR 314.50(c)(2), 601.2(a), and 814.20(b)(10).) For prescription products, the FDA-approved labeling must be included in or within the package from which the drug or device is to be dispensed, or else the product is deemed misbranded on the ground that it lacks adequate directions for use. (21 U.S.C. 352(f)(1); 21 CFR 201.100(c)(1) and 801.109(c).) Promotional labeling is generally any labeling other than the FDA-approved labeling. For a prescription drug or device to comply with the act's requirement of adequate directions for use (21 U.S.C. 352(f)(1)), its labeling must contain, among other information, information addressing product hazards and other risk information, as specified in FDA regulations. (21 CFR 201.100(d)(1) & (3) and 801.109(d).)

Advertising[2] for prescription drugs and restricted devices is also subject to requirements under the act for the disclosure of risk and other information. Advertisements for prescription drugs must include, among other things, "information in brief summary relating to side effects, contraindications, and effectiveness," as specified in FDA regulations. (21 U.S.C. 352(n); see also 21 CFR 202.1.) Advertisements for restricted devices must include "a brief statement of the intended uses of the device and relevant warnings, precautions, side effects, and

[1] FDA has authority over promotional labeling and advertising for prescription drugs intended for human use. (21 U.S.C. 352(a) and (n).) FDA also has authority over promotional labeling for all devices. (21 U.S.C. 352(a).) The agency's authority over device advertising only extends to restricted devices. (21 U.S.C. 352(q) and (r).) Other device advertising is regulated by the Federal Trade Commission (FTC). (15 U.S.C. 52.) See also 36 FR 18539; Sept. 16, 1971.

[2] The act does not specifically define "advertising" or "advertisement." According to FDA regulations (21 CFR 202.1(l)(1)), "Advertisements subject to section 502(n) of the act include advertisements in published journals, magazines, other periodicals, and newspapers, and advertisements broadcast through media such as radio, television, and telephone communication systems."

contraindications . . . .” (21 U.S.C. 352(r).) Both prescription drug and restricted device advertisements also must not be false or misleading. (21 U.S.C. 352(q)(1) & 321(n); 21 CFR 202.1(e)(5).)

In contrast to product advertisements and promotional labeling pieces, “reminder” promotion[3] is exempted by regulation from the requirements under the act for the disclosure of risk information. (21 CFR 200.200, 201.100(f), 202.1(e)(2)(i), 801.109(d).) Similarly, an FDA regulation restricting promotion of investigational new drugs provides that a manufacturer may “disseminat[e] . . . scientific findings in scientific or lay media” without engaging in promotional activity, but promotional claims of safety or effectiveness for a use for which the product is under investigation are subject to FDA regulation as advertising or labeling. (21 CFR 312.7(a).)

III. DISEASE AWARENESS COMMUNICATIONS BY OR ON BEHALF OF DRUG AND DEVICE FIRMS

A. Characteristics of Disease Awareness Communications

FDA will treat as a disease awareness communications any communications by or on behalf of a manufacturer, distributor, or retailer of a drug or device that:

- discuss a disease or health condition;
- if consumer-directed, advise the audience to “see your doctor” for possible diagnosis and/or treatment;
- if aimed at health care practitioners, encourage awareness of signs of the particular disease or health condition, or otherwise provide information to assist in the diagnosis of the particular disease or health condition;
- do not mention a particular drug or device; and
- do not include any representation or suggestion relating to a particular drug or device.

This kind of communication constitutes neither labeling nor advertising and is, therefore, not subject to the requirements for the disclosure of risk information and other requirements under the act. As discussed in greater detail below in section IV, however, there are circumstances in which FDA will treat as labeling or advertising a supposed disease awareness communication that is combined with reminder advertising or labeling. In this situation, or in other situations where a supposed disease awareness communication is determined to, by implication, identify a particular drug or device, the communication can be considered labeling or advertising and can therefore be subject to regulation by FDA.

[3] According to FDA regulations (21 CFR 200.200(a)(1) and 801.109(d)), reminder labeling is labeling that calls attention to the name of a drug or device but does not, among other things, include indications, dosage recommendations, or other representations or suggestions concerning safety of effectiveness. Similarly, “Reminder advertisements are those which call attention to the name of the drug product but do not include indications or dosage recommendations for use of the drug product.” (21 CFR 202.1(e)(2)(i).)

Where a company is the only manufacturer of a commercially available medical product for a particular disease or health condition or where a company only manufactures one product, that company is not automatically disqualified from disseminating communications that discuss a disease or health condition relating to that product. If, however, FDA determines that a supposed disease awareness communication impliedly identifies a particular drug or device, which may be the case when a communication relates to a drug or device that is the only drug or device in its diagnostic or therapeutic class or the only product manufactured by a company,[4] then the agency may treat the communication as labeling or advertising under the act.

B. Disease Awareness Communications Directed at Health Care Practitioners

As noted above in section III.A, disease awareness communications can be directed at either consumers or health care practitioners. In this section, FDA is providing examples of materials that drug and device firms might disseminate to health care practitioners as disease awareness communications to help clarify when those communications would not be considered advertising or labeling subject to the requirements of the act and of FDA regulations.

1. Recommendations for screening and treatment of a disease or health condition in primary care settings (e.g., National Institute of Mental Health screening and treatment recommendations for depression in men in primary care settings)

2. Counseling recommendations for health care practitioners with respect to a particular disease or health condition (e.g., Alliance for Cervical Cancer Prevention cervical cancer prevention "fact sheet")

Although the examples above involve materials prepared and disseminated by or on behalf of a government agency and an educational organization, respectively, FDA believes the same types of communications may be prepared and/or disseminated by or on behalf of drug and device firms.

If communications such as those described above as examples are not disseminated by or on behalf of a drug or device firm, they would be outside of FDA's labeling and advertising jurisdiction, whether or not they meet the criteria for disease awareness communications set forth in section III.A of this guidance document.

C. FDA Recommendations for the Content of Disease Awareness Communications

[4] In either of these situations, the mere appearance of the company's name in conjunction with a disease reference could trigger the act's advertising or labeling requirements, depending on the overall meaning and context of the communication. Similarly, depending on meaning and context, FDA might have jurisdiction over statements regarding the benefits of a product class to which a company's drug or device belonged, even if the communication in which the statements occurred did not mention any specific product. Where FDA does not have jurisdiction, the agency may nevertheless take appropriate action (e.g., issuing a public statement or referring the matter to the FTC) where we believe a communication is false or misleading, or includes an unbalanced presentation of the benefits and risks of a particular product class.

FDA encourages drug and device manufacturers to develop disease awareness communications, particularly for diseases and health conditions of particular public health importance. FDA particularly encourages the development of disease awareness communications for serious or life-threatening diseases or health conditions that are under-diagnosed or under-treated.

FDA believes that disease awareness communications should be designed with certain principles in mind.[5] In general, disease awareness communications should:

- be disease- or health condition-specific;
- enhance consumer or health care practitioner education;
- be clear and accurate;
- identify the population at risk or affected by the disease or health condition; and
- contain a responsible public health message (i.e., information on the prevention, diagnosis or treatment of a disease or condition).

In addition, disease awareness communications aimed at consumers should

- refer consumers to a qualified health care practitioner for more information; and
- avoid encouraging self-diagnosis and self-treatment.

IV. COMBINING DISEASE AWARENESS COMMUNICATIONS WITH REMINDER OR PRODUCT CLAIM PROMOTION

As discussed above, a supposed disease awareness communication disseminated by or on behalf of a drug or device manufacturer, packer, or distributor can be subject to regulation by FDA as promotional labeling or advertising if it mentions a specific drug or device or contains a representation or suggestion concerning a specific drug or device. This section focuses on one specific situation in which a supposed disease awareness communication may be treated by FDA as labeling or advertising: when the communication is presented in combination with reminder promotion or product claim promotion in a way that causes the audience to perceive the two pieces as one advertisement or promotional labeling piece.

For example, some drug firms have broadcast help-seeking advertisements in combination with perceptually similar reminder advertisements, separated only by a brief period containing unrelated intervening matter. When considered in isolation, the help-seeking advertisement conveys the message, "There is help for a particular medical condition; see your doctor." As discussed above, this advertisement would be neither labeling nor advertising and thus would not be subject to the requirements under the act for the disclosure of risk and other information. The perceptually similar reminder advertisement, by itself, conveys the message, "This specific product is available; see your doctor." As discussed above, this advertisement would be exempted by regulation from the requirements for disclosure of risk or other information.

[5] These principles are taken from the American Medical Association policy on Direct-to-Consumer Advertising (DTCA) of Prescription Drugs (H-105.988).

Together, however, these two advertisements communicate information about a treatable disease or health condition and the name of a product approved for treatment of a disease or health condition, and effectively constitute an advertisement that communicates a product's indication and efficacy for a certain medical condition without providing risk and other information. If a disease awareness or help-seeking piece and a reminder advertisement are presented in a manner that causes their messages to be linked together by the audience, the failure of the combined communication to include the risk and other information required under the act and FDA regulations would cause the advertised product to be misbranded.

Similarly, a supposed disease awareness communication could be properly treated as advertising or promotional labeling if presented in combination with a product claim advertisement or promotional labeling piece in a manner that causes the pieces' messages to be linked together by the audience. In such a case, the combined communication would also communicate a particular product's indication and efficacy for a certain medical condition. If the combined communication does not comply with the act and FDA's advertising or labeling regulations, the communication would cause the promoted product to be misbranded.

Psychology and marketing research suggests that the greater the perceptual similarity between disease awareness communications and reminder or product claim promotions (i.e., similarities in terms of their themes, such as story lines, or other presentation elements, such as colors, logos, tag lines, graphics, etc.), and the closer they are presented physically or in time to one another, the more likely it is that the separate messages contained in the two pieces will be remembered together in memory as one entity.[6] Perceptual similarity is an important factor because research indicates that pieces are most likely to be linked together in memory when they have prominent cues in common, such as distinctive visual elements, a common narrator or background music, or a common story line.[7]

Perceptually similar communications or promotional pieces that appear closely in time or in close physical proximity have a repetitive effect on each other. Repetition of information helps solidify and reinforce it in memory;[8] thus, disseminating pieces with similar presentation elements will increase the likelihood the messages from each piece will be remembered and that mental links between the pieces will be formed and strengthened. For example, a help-seeking communication preceding a perceptually similar reminder advertisement (or vice-versa) is likely to reinforce, through repetition, the images and message encoded in memory.[9] The practical

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[6] Fiske, S.T. and Neuberg, S.L. (1990). A continuum of impression formation, from category-based to individuating processes: Influences of information and motivation on attention and interpretation. In M.P. Zanna (Ed.), Advances in Experimental Social Psychology (Vol. 23), New York: Academic Press (hereinafter "Fiske & Neuberg"); Higgins, E.T. and Bargh, J.A. (1987). Social cognition and social perception. In M.R. Rosenweig & L.W. Porter (Eds.), Annual Review of Psychology, 38, 369-425. (hereinafter "Higgins & Bargh"); Baeyens, F., Crombez, G., and Eelen, P. (1988). Once in contact, always in contact: Evaluative conditioning is resistant to extinction. Advanced Behavioral Research and Therapy, 10, 179-199.

[7] Fiske & Neuberg; Higgins & Bargh.

[8] Fiske, S.T. and Taylor, S.E. (1991). Social Cognition. New York: McGraw Hill.

[9] Zhao, X. (1997). Clutter and serial order redefined and retested. Journal of Advertising Research, September/October, 57-73;

result of this process is that the audience will perceive these as components of one complete promotional piece. The more similar disease awareness communications and reminder promotional pieces or product claim promotional pieces are in terms of their presentation elements and the closer to one another they are presented physically or in time, the more likely it is that the key messages in the two pieces will be associated in memory.

In determining whether two communications together qualify as promotional labeling or advertising, and therefore must comply with the act and FDA regulations relating to advertising or labeling, FDA considers the following factors:

- Are the pieces perceptually distinct in use of graphic, visual, thematic, or other presentation elements?
- Are the pieces presented in close physical or temporal proximity?

Of these two factors, FDA considers the determinant issue to be whether the pieces are perceptually distinct. Thus, FDA recommends that manufacturers, packers, and distributors ensure that their disease awareness communications and reminder promotional pieces or product claim promotional pieces are sufficiently distinctive in terms of their thematic, graphic, visual and other presentation elements so that they will not be perceived as a single promotional piece that includes both a product name and a use, and is thus subject to the requirements for "labeling" or "advertising" mandated by the act and regulations. With regard to the second factor, FDA recognizes that "close physical or temporal proximity" is difficult to define precisely and is unaware of any data that help establish specific criteria. FDA requests comment on whether such data do exist or, in the absence of data, whether there would be utility in trying to develop specific criteria. For example, the agency could consider two communications that are not perceptually distinct to be in "close temporal proximity" in a broadcast advertisement if they were presented within the same 15 minutes of a one half hour program or the same half hour of a one hour program. Similarly, the agency requests comment on how "proximity" could be best considered for two communications that are not perceptually distinct if they were presented in the same publication (i.e., magazine, newspaper).