THE THORNY PROBLEM OF ADVERTISING

A Summary of FDA’s Draft Guidance for Industry: Presenting Risk Information in Prescription and Medical Device Promotion
“We’ve received a Notice of Violation.” Words no one wants to hear, yet often echoed along the halls of the industry, followed by, “What in the world was wrong with that advertisement?” The Draft Guidance for Industry published in May 2009 by the United States Department of Health and Human Services, Food and Drug Administration (FDA): Presenting Risk Information in Prescription Drug and Medical Device Promotion (“Draft Guidance”) provides some answers. In this Draft Guidance, the FDA sets out factors the agency considers when determining the adequacy of disclosure of risk information in promotional materials. Although the Draft Guidance has not been finalized, if history is an indication, the final Guidance will closely resemble this draft.

I. Introduction

The Draft Guidance is both broader and narrower than its title suggests. First, although from the title it appears directed only to the presentation of “risk information,” the document actually provides much information concerning the presentation of benefits. Second, despite the title’s reference to both drugs and medical devices, most of the information within the Draft Guidance is focused only on drugs. For instance, the Draft Guidance offers examples of appropriate and inappropriate promotional pieces, but out of those twenty examples, only one contains a single sentence specifically directed to “Device X” as opposed to “Drug X.”

Despite its length — twenty-four pages — the Draft Guidance can be summed up neatly with one familiar phrase: “The information presented in promotional materials should be fair and balanced.” But because one sentence does not a Guidance (or an article) make, the FDA set out in detail the kind of minutiae it considers when analyzing promotional pieces. Before delving into that level of detail, though, it may be helpful to look at the regulations and previous Guidelines under which the industry has labored.

II. Background

A. Regulations

Congress mandated that advertising for prescription drugs contain the drug’s name, ingredients, and a “true statement” of the “information in brief summary” relating to side effects, contraindications, and effectiveness […]. In industry parlance, this information has come to be known as the brief summary and essentially sets out each risk as contained in the drug’s approved labeling. The FDA expanded upon the legislation and enacted regulations governing prescription drug advertising, which are set out in 21 C.F.R. 202.1. Under 21 C.F.R. 202.1(e)(3) (iii), the “information relating to side effects and contraindications shall disclose each specific side effect and contraindication (which include side effects, warnings, precautions, and contraindications and include any such information under such headings as cautions, special considerations, important notes, etc. […] contained in required, approved, or permitted labeling for the advertised drug.”

The regulations provide that print advertisements essentially must include the brief summary. Broadcast media advertisements (television, radio, etc.) must provide information in the audio and/or visual segments disclosing the drug’s major risks. This information is sometimes called the major statement. In addition to the major statement, broadcast ads must also either set out the brief summary or may make “adequate provision […] for dissemination of the approved or permitted package labeling in connection with the broadcast presentation.” Over the last ten years, the FDA has issued documents addressing both print and broadcast media advertisements, including the adequate provision requirement for broadcast ads.

B. Guidances

In August 1999, the FDA presented its Guidance for Industry: Consumer-Directed Broadcast Advertisements. The purpose of this Guidance is to provide the industry with guideposts for determining whether a broadcast ad satisfies the adequate provision requirement. Before addressing the requirement, the FDA presumes that four goals already have been met:

1. The ad is not “false or misleading in any respect.” Meaning, according to the FDA, the ad communicates that the drug is available by prescription only and only a physician can decide whether it is appropriate for use in a particular patient.
2. The ad presents a “fair balance” between risk and benefit information.
3. The ad includes a thorough major statement.
4. The ad communicates in consumer-friendly language all relevant information concerning the drug’s indications.

The Guidance then sets out in sum that the industry may satisfy the adequate provision requirement by providing a “potentially diverse audience” with “reasonably convenient access to the advertised product’s approved labeling.” For example, a prescription drug or device manufacturer could include in the advertisement a toll-free telephone number that consumers could call to have the labeling either mailed to them or read to them over the phone. Industry also could share more product information in print ads that run in publications likely to reach the exposed broadcast audience, but the broadcast ads must inform audiences of the location of the additional information in the print ad. The related print ad must still include a toll-free telephone number for further access.
to complete package labeling. Further, if the broadcast ad is to be widely disseminated and relies on concomitant print ads for satisfaction of the adequate provision requirement, the print ad also must be widely disseminated. Alternative avenues available to the industry per the Guidance include providing brochures at public sites and disclosing in advertising an internet webpage that provides access to the package labeling.

Of interest in this Guidance — which was issued over ten years ago — the FDA acknowledges that the approved product labeling required to be disseminated with broadcast ads generally is “written in language directed to healthcare professionals.” The FDA thus “strongly encourages advertisers to consider the benefits of also providing consumers with non-promotional, consumer-friendly product information in the language of the broadcast ad (e.g., FDA-approved patient labeling or accurate consumer-friendly translations of product labeling information).”

In January 2004, the FDA addressed print ads when it presented its Draft Guidance for Industry: Brief Summary: Disclosing Risk Information in Consumer-Directed Print Advertisements. The Guidance provides recommendations concerning the disclosure of risk information for prescription drugs. As in the earlier 1999 Guidance, the FDA “strongly encourages the use of consumer-friendly language in all consumer-directed materials [...]” At the same time, however, the Agency acknowledges that prescription labeling, which is included in ads to meet the brief summary requirement, “is written for an audience of healthcare practitioners [and] uses highly technical medical terminology.” Further drawbacks to the use of professional labeling in ads, per the FDA, are:

1. The labeling has “often included all possible adverse events, including those that are unlikely to be drug related.”

2. The volume of material in labeling, coupled with its format of very small print and sophisticated terminology, “discourages its use and makes the information less comprehensible to consumers.”

3. The labeling includes “exhaustive lists of minor risks [that] distract from and make it difficult to comprehend and retain information on the more important risks.”

Despite these limitations, the FDA notes that including in print ads the risk information from FDA-approved professional labeling satisfies the brief summary requirement.

The Guidance set about to encourage the use of options other than professional labeling in print ads. For each option, however, the FDA continues to recommend the use of a toll-free telephone number or website address where the consumer can obtain more information.

One option to the use of professional labeling discussed in the 2004 Guidance is the use of FDA-approved patient labeling. “Patient labeling” includes the Information for Patient section of professional labeling, patient information, a medication guide, or a patient package insert. In general, patient labeling does not include each risk, but only the ones considered by the FDA to be the most important (i.e., the most serious or the most frequently occurring risks). More specifically, patient labeling includes Contraindications, Warnings, Precautions (including details describing serious adverse events or actions to take in order to avoid adverse events), and Adverse Reactions. In such circumstances, the FDA notes that it would not object to ads on the basis of the brief summary if the ads included patient labeling.

The FDA further notes, though, that there are instances when patient labeling would not suffice as the brief summary. For instance, some drugs include patient labeling that is directed only to proper usage (dose, directions for use through inhalation, etc.). Some patient labeling is narrowly focused on only a single risk. In these cases, the patient labeling is insufficient.

A second alternative to the use of professional labeling discussed in the 2004 Guidance is the use of FDA-approved patient labeling. As in a nutshell, under the proposed rule, professional labeling would acquire an additional introductory section called Highlights of Prescribing Information (“Highlights”). The Highlights would succinctly summarize “the information that is most important to safe and effective use, including information on the most common and the most serious risks associated with the product.” The FDA noted that it would not object to ads on the basis of the brief summary if the ads included the risk information from the Highlights section of professional labeling (or information that would have been in Highlights) — e.g., Boxed Warnings, Contraindications, Warnings/Precautions, Most Common Adverse Reactions. At the end of the day, though, the FDA again stresses that Highlights “ideally should be written in language fully understandable by a lay reader and should not contain technical, scientific terms or jargon.”

III. May 2009 Draft Guidance
A. Not Limited to Advertisements

Directed to Consumers

Among other differences from prior Guidelines concerning advertising, the 2009 Draft Guidance...
Guidance is not limited to advertising for prescription drugs directed at consumers. In other words, the factors the FDA considers relevant to promotional materials and the presentation of risk information apply to ads targeting both consumers and healthcare professionals. This difference is important because the FDA essentially adopts the Federal Trade Commission’s (FTC) standard of judging promotional materials from the standpoint of the “reasonable consumer.” That standard is a moving target, though, depending upon whether the intended audience is composed of lay persons or doctors. The standard is made even more amorphous by the FDA’s assertion that, although healthcare professionals may have a different level of expertise, such persons remain “subject to the same cognitive biases and processing limitations as non-experts.”

B. FDA’s Overall Policy

The Draft Guidance sets out a number of specific factors to be considered in the design of an advertising piece, but the over-arching consideration is the “net impression” of the ad. Even if an ad does not contain a single misleading statement, it still may draw the FDA’s ire if it presents a misleading picture of the benefits and risks of a product when considered as a whole. And whether the net impression is misleading is judged by the reasonable consumer standard:

[W]e examine the practice from the perspective of a consumer acting reasonably in the circumstances. If the representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group.19

Potentially troubling for the industry is the FDA’s acknowledgement that an ad may have more than one interpretation. Such an outcome could occur when the intended audience contains both lay persons and healthcare professionals, each group having differing levels of knowledge and experience. To avoid potential violations, each possible interpretation must be reasonable. While some may complain that this requires an unrealistic reading of the tea leaves, it may more realistically require more focus groups and expenditures for other sorts of copy testing. Perhaps recognizing the daunting nature of the task, the FDA then set about offering certain factors for the industry to consider.

C. General Considerations

1. Consistent use of language appropriate for target audience

The Draft Guidance sets out that the language used to provide information concerning benefits should be the same type of language used to convey information about risks. For instance, if the ad is directed to consumers and if easily-comprehensible language is utilized to discuss the drug’s indications and benefits, then the risk information should not be set in medical terms (e.g., using “syncope” as opposed to “fainting”).

2. Use of signals

“Signaling” is the method by which an author advises readers that the following information is important. Signals can include headlines and sub-headings. The use of signals must be consistent for both benefit and risk information. For example, bolded signals for benefits likely necessitate the use of bolded signals for risks. The FDA notes, though, that the “mere presence of similar signals for both benefit and risk information is not necessarily sufficient to make a piece accurate and non-misleading.”20 Because some readers may digest only the signal itself and not the text following it, signals must not be misleading and should be specific (e.g., “Important Risk Information” versus “Important Information”).

3. Framing risk information

Framing, which is “how a particular piece of information is stated or conveyed,” likewise can affect the impression made of risk information.21 For instance, the more specific the information concerning risks, the more significant that information may seem to the consumer. The Guidance sets out that “[r]isk information should be presented in the same terms or with the same degree of specificity as benefit information.”22 Under no circumstances should risk information be framed so as to minimize severity (e.g., “fever” versus “life threatening fever”).

4. Hierarchy of risk information

Finally, the FDA will consider the ordering of risk information in determining whether an ad is misleading. The most important risk information should be placed first in print ads and at the beginning and end of broadcast ads. Interestingly, the Guidance notes that “risk information should not just be presented in one location in a piece, but should, like benefit information, appear as an integral part of the piece.”23 Some may disagree that the notion of integrating risk information into an advertisement — rather than reserving a specific portion of the ad for all risk information — makes the advertisement more fair and balanced or helps the audience comprehend risks more easily. Nonetheless, the FDA appears to have concluded otherwise, so long as risks are ordered appropriately, and those

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in the industry must consider this view when developing product advertisements.

D. Content Considerations

1. Quantity

The “general considerations” are directed more toward the appearance and placement of risk information, but the FDA also addresses actual content and begins by noting that the “quantity of information presented can affect the net impression of the piece.” Not that an ad loaded down with risk information cannot be misleading. If risk information creates too much of a cognitive load — compared to short and easily understood benefit information — a Notice of Violation may still be delivered. But if comparable space or time is allotted to both benefit and risk information, along with the same level of language used, the possibility of a violation notice becomes more remote. On the other hand, pharmaceutical advertising is not a quota system, and the FDA specifically notes that “[p]romotional pieces do not have to convey an identical number of benefits and risks […]”. The important consideration is the net impression created by the piece.

2. Materiality and comprehensiveness

The Draft Guidance admonishes that an ad will be considered misleading — even if the quantity of risk and benefit information is comparable — if the risk information omits material facts, which “are those that would influence reasonable consumers (or healthcare professionals when they are the intended audience) about a product.” These facts can include information about the drug’s indications, whether the drug is appropriate for use in particular persons or patients, and risks. What is material differs among audiences.

Helpful to materiality considerations, the Draft Guidance notes that the FDA, with approved labeling, has already created a sort of hierarchy for disclosing risk information that may appropriately blend over into promotion. For instance, package inserts traditionally begin with Contraindications, followed by Warnings or Hazards, followed by Precautions and Adverse Reactions. Setting out appropriate risk information from these sections may satisfy the advertising materiality requirement. Further, if a drug has a boxed warning, it is hard to imagine that particular risk as anything other than material.

E. Format Considerations

The Draft Guidance sets out certain specific formatting factors such as size, shape, layout, organization, and themes that FDA will analyze in determining the net impression of an ad. The underlying premise is that for information to be considered, it must be noticed. Accordingly, both benefit and risk information should be “comparably noticeable or conspicuous.” The FDA advises that “risk information should be included in the main part of a piece […] as an integral part of the piece” and gives commonsense examples (i.e., not placing risk information on the very last page after the product’s logo and tagline). But the advisory language from the Draft Guidance, which seems to contemplate integration of risk information throughout the advertisement, raises the question alluded to earlier: Is risk information more noticeable and conspicuous to the audience when interspersed throughout the piece or segregated in one easily identifiable section? While there may be legitimate support for both views, in its current form, the FDA’s Draft Guidance favors integration, and those in the industry creating and approving product advertisements must consider this view.

IV. Conclusion

The Draft Guidance provides both general advice and specific examples to help the industry navigate the ever-churning waters that can sink an advertising piece. Reference to earlier Guidance, as well as to the regulations governing advertising and promotional labeling, is helpful. One shortfall noted by most commentators on the Draft Guidance is the dearth of information applicable to promotions on the internet. How the principles contained in this Draft Guidance will be implemented with respect to promotional materials on websites may indicate the need for guidance specific to that medium.

2 Id. at 8 (Example 5).
3 Id. at 11.
4 Id. at 4.
5 Id. at 2.
7 2004 Draft Guidance at 3.
8 Id. at 6.
9 The 2009 Draft Guidance applies to advertising and promotional labeling of any sort, whether used in “television ads, brochures, booklets, detailing pieces, internet websites, print ads, exhibits, and sound recordings or radio ads.” 2009 Draft Guidance at 3, n.9.
10 Id. at 6 & n.19.
11 Id. at 5 & n.17.
12 Id. at 8.
13 Id. at 8.
14 Id. at 11.
15 Id. at 10.
16 Id. at 10.
17 Id. at 11.
18 Id. at 11-12.
19 When addressing risks from the Adverse Events section, the FDA notes that they are “generally less serious or less well-documented than those” in Boxed Warnings, Contraindications, or Precautions. Id. at 13. Importantly, “FDA believes that exhaustive lists of minor risks distract from and make it difficult to comprehend and retain information on the more important risks.” Id. at 13 n.33 (referring the reader to the January 2004 Draft Guidance).
20 Id. at 15.
21 Id. at 15-16.