COMMITMENT | EXCELLENCE | INNOVATION

ARNOLD & PORTER LLP

Greg Levine

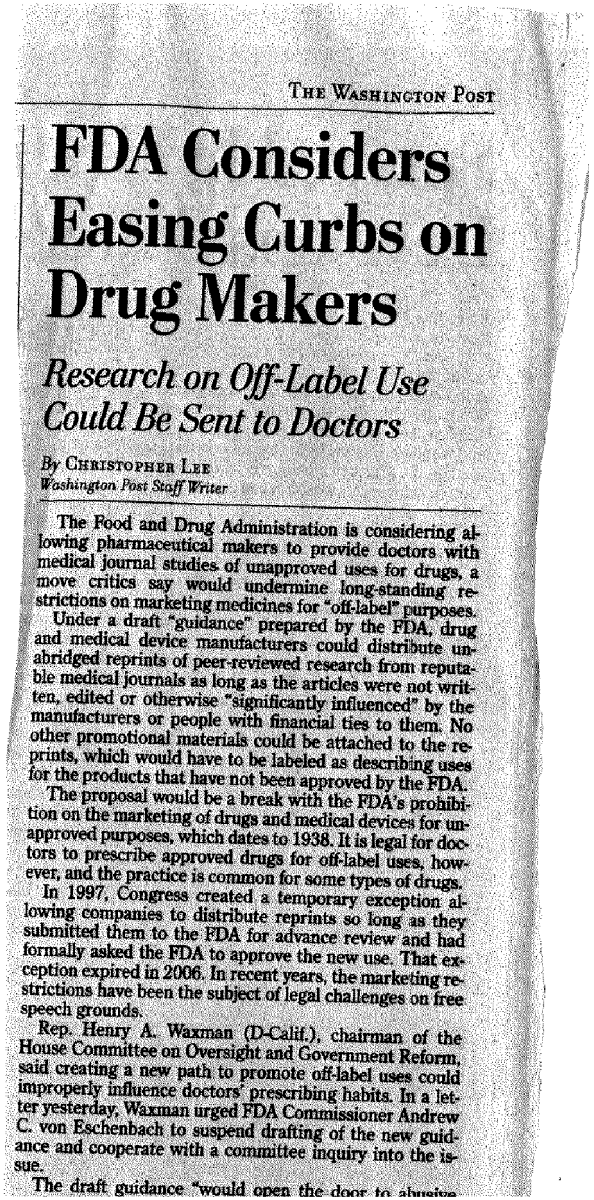
Enforcement Environment

- Accelerating progression of off-label promotion cases
  - Not just “Big Pharma”
  - No “oncology exception”
- Prosecutorial “Playbook”
  - Prosecutors know where to look company-wide
- More cases coming down the pipeline
  - Past whistleblower success is breeding more disclosures
- Prosecutorial cooperation is on the rise
  - Some state AGs participate in bimonthly conference calls
  - OIG collaborative trainings for state and federal prosecutors

What Happened to the First Amendment?

- Washington Legal Foundation litigation
  - Trial court initially enjoined FDA policies and FDAMA provisions as unconstitutional
  - Case dismissed as moot on appeal
  - FDA sought public comment on First Amendment issues, but never resolved them or issued new policies
  - FDA has not even addressed the status of 21 CFR Part 99

Where is the FDA?



THE WASHINGTON POST

FDA Considers Easing Curbs on Drug Makers

Research on Off-Label Use Could Be Sent to Doctors

By CHRISTOPHER LEE
Washington Post Staff Writer

The Food and Drug Administration is considering allowing pharmaceutical makers to provide doctors with medical journal studies of unapproved uses for drugs, a move critics say would undermine long-standing restrictions on marketing medicines for "off-label" purposes.

Under a draft "guidance" prepared by the FDA, drug and medical device manufacturers could distribute unabridged reprints of peer-reviewed research from reputable medical journals as long as the articles were not written, edited or otherwise "significantly influenced" by the manufacturers or people with financial ties to them. No other promotional materials could be attached to the reprints, which would have to be labeled as describing uses for the products that have not been approved by the FDA.

The proposal would be a break with the FDA's prohibition on the marketing of drugs and medical devices for unapproved purposes, which dates to 1938. It is legal for doctors to prescribe approved drugs for off-label uses, however, and the practice is common for some types of drugs.

In 1997, Congress created a temporary exception allowing companies to distribute reprints so long as they submitted them to the FDA for advance review and had formally asked the FDA to approve the new use. That exception expired in 2006. In recent years, the marketing restrictions have been the subject of legal challenges on free speech grounds.

Rep. Henry A. Waxman (D-Calif.), chairman of the House Committee on Oversight and Government Reform, said creating a new path to promote off-label uses could improperly influence doctors' prescribing habits. In a letter yesterday, Waxman urged FDA Commissioner Andrew C. von Eschenbach to suspend drafting of the new guidance and cooperate with a committee inquiry into the issue.

The draft guidance "would open the door to abusive

Waxman Leaked Draft Guidance on "Good Reprint Practices"

- Reprints should be peer-reviewed
- Published by organization with conflict disclosure policy
- Distributed reprints/texts should not be
  - Primarily distributed by the drug or device manufacturer
  - Written, edited, or excerpted by or for the manufacturer
  - Edited or significantly influenced by a manufacturer

What Does Congress Think?

November 30, 2007

The Honorable Andrew C. von Eschenbach, M.D.

The draft guidance that I have obtained would, in effect, allow drug and device companies to short-circuit FDA review and approval by sponsoring drug trials that are carefully constructed to deliver positive results and then using the results to influence prescribing patterns. This undercuts the prohibition on marketing of unapproved uses of drugs and devices and puts the public at risk for ineffective and dangerous uses of drugs.

drug or device for a therapeutic use without FDA approval. The draft guidance would carve a large loophole in the law and create a pathway by which drug and device manufacturers can promote unapproved (off-label) uses of their products without first obtaining FDA approval by passing out journal articles about the off-label use to physicians. Published reports of company-funded studies can be biased in favor of the company's product. Allowing drug and device companies to freely disseminate these articles can result in doctors using questionable study results to guide their prescribing habits. In addition, allowing marketing through journal articles can reduce the incentive for drug and device companies to conduct the rigorous studies needed to win full FDA review and approval, leaving physicians and patients without definitive data on the benefits and risks of medical products.

The draft guidance that I have obtained would, in effect, allow drug and device companies to short-circuit FDA review and approval by sponsoring drug trials that are carefully constructed to deliver positive results and then using the results to influence prescribing patterns. This undercuts the prohibition on marketing of unapproved uses of drugs and devices and puts the public at risk for ineffective and dangerous uses of drugs.

What Does Congress Think?

- Grassley investigation of "educational grants"
- Concern → use of grants to increase off-label use
- Senate Finance Committee conclusion = "manufacturers have implemented policies meant to rein in these activities"

Senate Finance Committee Report

- "ACCME's records reveal numerous instances over the past 3 years in which companies have had too much influence over the content of supposedly independent educational programs."
- "Lack of proactive or real time oversight for educational grant programs."
  - CME providers are not required to "run prepared text by the FDA, ACCME, or any regulatory authority."
  - FDA and ACCME do not routinely place monitors in audience.
  - ACCME rarely takes disciplinary action; de-accreditation takes up to 9 years.

What Does Congress Think?

- S. 2029, Physician Payments Sunshine Act
- Periodic "transparency reports" of all direct or indirect payments to physicians, including funding relating to
  - "participation in a medical conference, continuing medical education, or other educational or informational program or seminar"
  - "provision of materials related to such a conference or educational or informational program or seminar"
  - "remuneration for promoting or participating in such a conference or educational or informational program or seminar"
- Public access to reports via internet website