June 2018
DIA Regulatory Affairs Community
AdPromo Working Group

Selected Highlights from 2 Final Medical Product Communication FDA Guidance (HCEI, CFL)

and

“As Seen On TV: Reviewing DTC Advertising for Rx & OTC Drugs”

Web Meeting
June 20, 2018

Your WG Co-Chairs: Kimberly Belsky and Dolores Shank-Samiec

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DIA

Hold the Dates!

- The DIA AdPromo WG will generally meet on the 3rd Wednesday of each month at noon eastern
- **Next Meetings**

DATE	PRESENTER	TOPIC
July 25, 2018 @ 12:00 pm (eastern) Note: this is the 4th Wednesday of the month	**Michael A. Swit, Esq**. www.fdacounsel.com	**Scientific Exchange – New Interpretations?**
August 2018	no meeting	
September 19, 2018 @ 12:00 pm (eastern)	**John K. Wong**, Regulatory Drug Advertising & Promotion Therapeutic Products Inc.	**Canada: Regulation of Advertising and Promotion (PAAB)**

Covered Herein

- **Brief Update on the FDA "Payor" and "CFL" Communications FINAL Guidances**
  - Note, these guidances are posted as "Procedural" rather than "AdPromo"

- ***Guest Presenter!*** **"As Seen On TV: Reviewing DTC Advertising for Rx & OTC Drugs"**

Selected Updates to FINAL Guidance: Drug and Device Manufacturer Communications With Payors, Formulary Committees, and Similar Entities — Q & A

Issued June 12, 2018

DIA Communities

A View From Commissioner Gottlieb

Commissioner Gottlieb noted…

- **"It is important to clarify what FDA's role is – and isn't – in regulating this information."**
- The goal is to **advance public health benefits such as increased cost savings from informed and appropriate coverage and reimbursement decisions**….."
- "The extent that we can **facilitate a more seamless exchange of information between product manufacturers and payors will incentivize the development of different kinds of contracting arrangements** that could allow products to be priced more closely to value**,"**
- The objective at the agency is to "**go beyond the draft guidance to provide a framework" for sponsors' communication of such data to formularies and others**."

Audience: FDA clarified that the appropriate audience to receive HCEI includes both public and private sector payors, formulary committees, and related entities, **including "third party administrators" responsible for selection/coverage of drugs**.

- **FDA elaborated that the Guidance is not applicable to HCPs making individual patient prescribing decisions or patients (e.g., public websites)**
- **HCEI communications are permitted to HCPs "when they are carrying out their professional responsibilities for selection of drugs for coverage or reimbursement."**

Selected Updates – HCEI Final Guidance

Explicit inclusion of approved/cleared medical devices	While not covered under 502(a) *(formally referred to as FDAMA 114 but revised per 21CC)*, **the final guidance now permits communication of HCEI regarding approved/cleared medical devices** • NOTE: This was excluded from the draft since 502(a) only refers to drugs. Medical devices were included in the communication of unapproved products
Terminology: "Unapproved Products" and "Unapproved Uses of Approved/Cleared Products"	Final guidance no longer refers to "investigational" products; **now uses the terminology "unapproved products and unapproved uses of approved/cleared products"** • NOTE: Key update explicitly allows (via guidance) communication of HCEI to target audiences for unapproved uses of approved/cleared products FDA Law Blog provides a caution "*This is a significant change, as these discussions are tantamount to off-label discussions; these types of discussions with Medicare and Medicaid providers could raise False Claims Act questions*."
Considered "labeling"	**FDA further emphasizes that communications of HCEI to payors are "labeling"** (p. 3) • No change to FDA view that HCEI is promotional labeling (see footnote 11, p. 4)

Selected Updates – HCEI Final Guidance

Appropriate Audience for HCEI	• **Payors are a sophisticated audience** with a range of expertise in multiple disciplines, as well as established procedures for carefully considering evidence about medical products. • Generally, **payors possess financial resources and motivation** to closely scrutinize information about medical products as part of their decision-making process, including an evaluation of the limitations and reliability of that information. • Because section 502(a) provides for communication of HCEI **only to particular audiences, dissemination of HCEI to other audiences is not covered by the recommendations of this guidance** • **NEW reference 21**: "Congress believed that limiting the scope of the audience for HCEI is important because 'it will ensure that the information is presented **only to parties who have established procedures and skills to interpret the methods and limitations of economic studies**. [Section 502(a)] is not intended to permit manufacturers to provide such health care economic information to medical practitioners who are making individual prescribing decisions nor is it intended to permit the provision of such information in the context of medical education.' See page 65 of H.R. Rep. No. 105-310."

Selected Updates, Appropriate Audience for HCEI, cont'd

Appropriate Audience for HCEI, cont'd	• Acknowledges HCPs may fulfill several roles (III. A.A.2) – they may treat patients and serve on a formulary committee.
	  • Emphasizes that the **HCP should be carrying out their professional responsibilities in this decision making capacity when the information is provided**
	  • "*This is not meant to suggest that individuals who have multiple roles, such as a health care professional who serves on a formulary committee and also provides care for individual patients, would not fall within the scope of the appropriate audience for this guidance when they are carrying out their professional responsibilities for selection of drugs for coverage or reimbursement for a payor, formulary committee, or similar entity*."

Selected Updates – HCEI Final Guidance

Allows for dosing outside the FDA-approved labeling	**Explicitly acknowledges HCEI is based on real-world data where actual patient use falls outside the recommended dosage/use regimen** (p. 15) • **Provides a recommendation on how to address (e.g., by inclusion of a statement** such as "the dosing regimen used in this study varies from the dosing regimen in the FDA-approved labeling") • NOTE: the guidance states that this statement should be presented in conjunction with the HCEI presentation is a font size comparable to that used for the other information in the presentation • NOTE: The guidance allows flexibility in the presentation of this information and refers to "conspicuous and prominent."
Example of what's not considered "related to an approved indication"	Guidance includes new example: management of pain in cancer patients – and continues to note that discussion of disease course modification would not be appropriate (e.g., delaying the progression of cancer or prolonging patient survival) (see p. 10)
Formats for disclosure of HCEI	**Acknowledges other authoritative bodies that may have format recommendations**
Examples of HCEI	Employs the term, "real-world data" and creates a separate "compliance/adherence" entry (also see footnote 27)
Competent and reliable evidence	In the final, FDA provides a flexible approach to this standard, stating that evidence must be developed "using generally accepted scientific standards, appropriate for the information being conveyed, that yield accurate and reliable results." *Payor Communication Guidance at 10.*

Selected Updates to FINAL Guidance: Medical Product Communications That Are Consistent With the FDA-Required Labeling — Q & A

Issued June 12, 2018

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Selected Updates

Medical devices, Q.1/A.1	• **For devices cleared in 510(k)s and devices that are 510(k)-exempt, there is no need to separately analyze communications under the factors discussed in Q.2/A.2**. • Rather, for 510(k)-cleared devices, **firms should analyze communications about such devices (whether in labeling or otherwise) in accordance with 21 CFR 807.81(a)(3) and FDA's guidance Deciding When to Submit a 510(k) for a Change to an Existing Device13 (510(k) Modifications Guidance)** • FDA views communications that trigger the need for a 510(k) as inconsistent with FDA-required labeling • FDA notes that the factors and examples in the CFL Guidance may be helpful with respect to device information

Selected Updates

Intended Use-- p. 8, Q.3/A.3	• "**If a firm's product communication is consistent with the FDA-required labeling, FDA does not intend to rely on that communication to establish a new intended use**, different from the use(s) for which the product is legally marketed." • But keep reading-- • "**This is not to suggest that these communications must be excluded from consideration altogether**. For example, if there is other evidence of a new intended use for a product, product communications that are consistent with the FDA-required labeling may be part of the overall material that is evaluated in assessing the firm's conduct."

Selected Updates

Refinements to the 3-factor Test
 	
(additional detail)
	• **FDA notes there is potential for overlap among the 3 factors**
	• **From Factor 2**: If using a product in accordance with the representations/suggestions in a product communication increases the potential for harm to health relative to the information reflected in the FDA-required labeling, the communication is not CFL.
	  • e.g., if the representations or suggestions about use of the product would reasonably be expected to introduce new risks that are not included in the FDA-required labeling or to materially increase the rate of occurrence or severity of existing risks included in the FDA-required labeling, the communication would not be CFL
	• **From Factor 3**: Whether the directions for use in the FDA-required labeling enable the product to be safely and effectively used under the conditions represented/suggested in the product communication
	  • e.g., does the FDA-required labeling provide sufficient information about risks (i.e., about potential or expected risks) and effects of using the product as presented in the product communication? Any unique considerations associated with the use of the product as suggested by the communication? Does the FDA-required labeling furnish the appropriate context?

Selected Updates

SASS Standard Reinforced	• **Amount/type of evidence needed to support a particular CFL promotional communication depends in part on the topic addressed by the communication**. For example, different evidence would be needed to support a long-term efficacy presentation than would be needed to support a presentation about a product's mechanism of action. • To be considered truthful and non-misleading, product communications should not overstate the findings of or the conclusions that can be drawn from such studies or analyses, or fail to disclose their material limitations. • Where there is not robust statistical support for particular data, it would not be appropriate to make a claim based on the data, and instead the data may only be communicated in a limited manner with the limitations and contextual information made clear. • **For example, the firm could present the results from…analyses of the individual components of the composite endpoint descriptively without p-values and without claiming that the results on the individual components are demonstrated additional effects of the drug**. The firm should also include contextual information to describe the material limitations of the data (see Q.8/A.8) • e.g., **the firm could explain that because these analyses were not pre-specified and appropriate multiplicity adjustments were not applied, results of individual components need cautious interpretation and could represent chance findings**.

Additional Selected Points - Changes Draft to Final

For your review post meeting

- **FDA provided more specific information in the example involving effects of a product on patients under Question 4.**
- **"Patient-reported outcomes," a term used in this example in the Draft Guidance, is no longer mentioned in the final guidance**.
  - Although the example still includes information about compliance/adherence as consistent with the FDA-required labeling, it no longer includes this information within the context of a patient perception.
- **The Draft Guidance had included broad language suggesting that information related to patient perceptions of a product's effect on their "basic activities of daily living" would be consistent with FDA-required labeling.**
  - When originally published in January 2017, this example represented a more radical departure for FDA on its approach to "patient testimonials," which had often been the subject of enforcement action.
  - **The final guidance no longer includes this language; however, it includes a more limited example relating to a patient's perception of a** known adverse reaction related to the product.
- **Information about the tolerability of a product when used concomitantly with another product for a co-morbid condition was added as an example of a consistent communication in response to Question 4.**

http://www.fdalawblog.net/2018/06/like-ma-bell-ive-got-the-ill-communications-final-guidances-issued/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+FdaLawBlog+%28FDA+Law+Blog%29

“As Seen On TV: Reviewing DTC Advertising for Rx & OTC Drugs”

Guest Presenter
Michaelle Exhumé, Research Editor, NBC Universal Advertising Standards

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Purpose NBC Advertising Standards

To present viewers with advertisements that are truthful, tasteful, substantiated, and non-deceptive. The NBC Advertising Guidelines provide general guidance for advertisers and their representatives to make such ads.

About Me

MICHAELLE EXHUMÉ

RESEARCH EDITOR

Michaelle.Exhume@nbcuni.com

2011 — Chemical & Biomolecular Engineering — New York University

2013 — Product Analyst — Good Housekeeping Institute

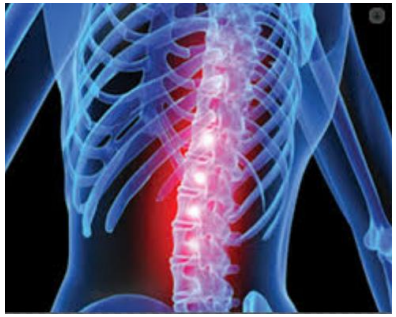
2013 — Application Engineer — Koehler Instrument Co.

2016 — Research Editor — NBCUniversal

Advertising Categories Covered

Rx & OTC Medications

Medical Devices



Medical Procedures

Dietary Supplements

Homeopathic Remedies

Dental Products

Hair Care & Hair Removal Products

Eye & Ear Products

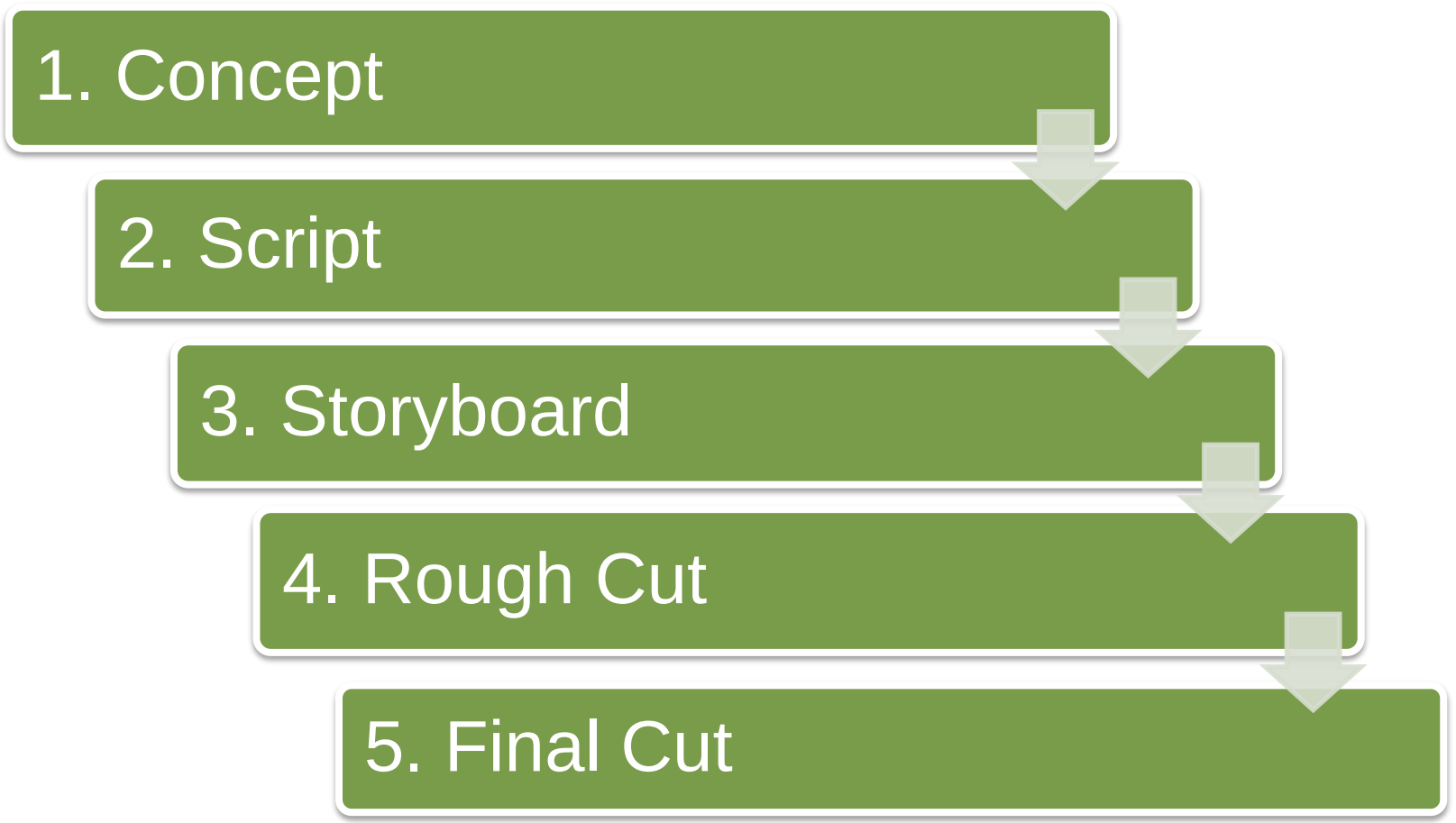
NBC Advertising Standards Guidelines

Based on internal guidelines, policies, industry standards, and on laws and governmental regulations, including the rules of the FCC, the FTC, and the FDA.

Federal Communications Commission

U.S. FOOD & DRUG ADMINISTRATION

Review Stages



What is the Takeaway?

- Implied Claims
- Sensory Claims
- Superiority Claims
- Comparative Claims

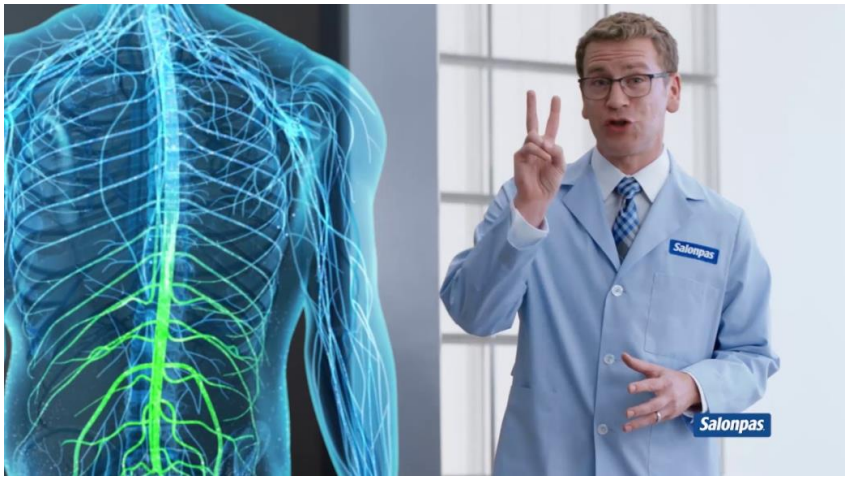
The Review Process: OTC Drug Products

- Consistent with the indications in their respective FDA Monograph or NDA, and the product labeling.
- Supported by clinical studies, consumer testing, or other scientific evidence.
- Studies should be statistically and clinically significant.
- Comparative claims based on in vitro data disclosure required.

The Review Process: OTC Drug Products

- Must feature a “use as directed” type super.
- Demos should be consistent with a product’s indications, directions, and warnings.
- Can only promote occasional use for treatment of minor conditions.
- General safety claims are not acceptable (e.g., Drug X is safe)
- Product ingestion is generally not OK.

Children & Doctors in OTC Drug Ads



- Health professionals — substantiation for implied endorsement.
- Children may only appear incidentally in ads for adult products.
- Children may appear in ads for children's medications but adult supervision must be portrayed.

The Review Process: Rx Drug Products

1. Product Claim Ads
   - ✓ Names the drug/treatment
   - ✓ The condition it treats
   - ✓ The benefits & risks

2. Reminder Ads
   - ✓ Only mentions the drug
     - On TV, these are typically billboards

3. Help-Seeking Ads
   - ✓ Describes a disease or conditioning without recommending a specific treatment.

The Review Process: Rx Drug Product Claim Ads

The Drug's Usage

- Usage being advertised must be consistent with the Prescribing Information
- Both the drug's generic name *and* brand name must be mentioned, *i.e. Viagra(Sildenafil)*

Overall Messaging

- Availability "by prescription only" must be clearly communicated
- Actors/patients should be of the appropriate age demographic
- Quality of life of patients portrayed should not be overstated

Access for More Info

- A website *and* a toll-free number must be included for additional information
- Language directing viewers to seek the advice of a doctor or healthcare professional must be included

Required Documents

- Complete prescribing information
- Counsel letter
- Print ad insertion order

General Caution: Product Claim Ads

- ✓ Fair balance
- ✗ Off-label promotion
- ✗ Exaggeration
- ✗ Potentially subject to scheduling restrictions

The Review Process: Reminder Ads

Typically billboards

i.e. *“brought to you by Y the makers of X drug.”*

✗ Not OK for drugs with a boxed warning

✓ Clear identification of sponsor required

The Review Process: Help-Seeking Ads

- ✓ All claims substantiated
- ✓ Advise viewers to “see your doctor”
- ✓ Clear Sponsor ID
- ✓ No direct mention or suggestion of a drug

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