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Client Alert

FDA & Life Sciences Practice Group

2011 Year in Review:
OPDP Warning Letters and Untitled Letters

In 2011, the Center for Drug Evaluation and Research's (CDER) Office of Prescription Drug Promotion (OPDP), formerly known as the Division of Drug Marketing, Advertising, and Communications (DDMAC), issued a total of 30 enforcement letters to pharmaceutical manufacturers, 22 less than in 2010. Of the 30 letters, 5 were Warning Letters and 25 were Untitled Letters. Roughly two-thirds (67%) of the promotional materials reviewed in the enforcement letters were directed at healthcare professionals, and one-third of OPDP's enforcement letters were issued regarding drugs with boxed warnings, including two Warning Letters. Five enforcement letters (17% of all enforcement letters issued) were the result of complaints received through the Bad Ad Program, two of which were Warning Letters.

Elevation of DDMAC to OPDP

On September 19, 2011, DDMAC was converted from a division to an office within CDER's Office of Medical Policy and became known as OPDP. With this change came a realignment of DDMAC's staff into two groups focused on reviewing different types of promotion: the Division of Professional Promotion and the Division of Direct-to-Consumer Promotion. As a result of the change, OPDP has increased its review staff and enforcement capacity.

Notable Trends in 2011:

The most frequent allegations cited by OPDP in 2011 were:

Allegation	2011	2010
Omission and Minimization of Risk Information	77%	85%
Overstatement of Efficacy	37%	63%
Unsubstantiated Claims	37%	25%
Broadening, Omission, or Misleading Indication	27%	40%
Unsubstantiated or Misleading Comparative or Superiority Claim	23%	46%

A number of trends emerged in 2011:

- FDA is relying on the Bad Ad Program to expand surveillance and used complaints received through the Bad Ad Program as a basis for five enforcement letters in 2011.

For more information, contact:

Nikki Reeves
+1 202 661 7850
nreeves@kslaw.com

Marian J. Lee
+1 202 661 7955
mlee@kslaw.com

Christina M. Markus
+1 202 626 2926
cmarkus@kslaw.com

Elaine Tseng
+1 415 318 1240
etseng@kslaw.com

Joanne H. Chan
+1 202 626 2914
jchan@kslaw.com

King & Spalding
Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737

www.kslaw.com

- FDA continues to monitor social media and issued one Untitled Letter for a YouTube video. In 2010, FDA issued an Untitled Letter regarding a Facebook widget.

- FDA is increasing its enforcement activity related to "live" or in-person promotion, as demonstrated by three Untitled Letters regarding oral statements made by sales representatives and one Untitled Letter relating to conditions surrounding an exhibit booth at a conference.

Observations and Lessons Learned from 2011 OPDP Letters:

- ***The Bad Ad Program is a source of surveillance that covers all types of media.*** In May 2010, FDA launched the Bad Ad program, which encourages healthcare practitioners to report suspected untruthful or misleading drug promotion to OPDP. FDA issued one Warning Letter in 2010 as a result of Bad Ad complaints and followed up with five more Bad Ad enforcement letters in 2011, including two Warning Letters. The five enforcement letters issued in 2011 each addressed a different method of promotion, including: a "STATgram" letter informing healthcare providers about drug labeling changes, oral statements by a sales representative, a YouTube video, a magnet, and an "Online Resources" webpage. The range of materials addressed in the Bad Ad enforcement letters demonstrates the breadth of FDA's new program and the far-reaching implications of FDA's decision to deputize the medical profession to act as its eyes and ears into the promotional practices of drug manufacturers. Letters issued as a result of Bad Ad complaints are likely to increase in the future, particularly in light of FDA's plans to educate early career healthcare professionals and students about the Bad Ad Program through continuing education programs and collaborative efforts with medical, pharmacy, and nursing schools.[1]

- ***FDA is continuing to take enforcement action against violative social media.*** As in 2010, FDA issued only one enforcement letter regarding social media in 2011. The Untitled Letter, which was issued as a result of a Bad Ad complaint, called out deficiencies in a YouTube video that had been posted by a pharmaceutical sales team member. According to FDA, the video made claims for the osteoporosis drug, Atelvia, but failed to communicate Atelvia's indication and any risks associated with its use. The video also omitted material facts about Atelvia's dosing schedule and "misleadingly implie[d] that patients have a choice to eat and drink" when taking the drug, but the PI states that Atelvia should be taken immediately after breakfast and not under fasting conditions. FDA's efforts to incorporate social media into its policies will likely continue in 2012 through methods other than the issuance of enforcement letters. According to Jean-Ah Kang, Special Assistant to OPDP Director Thomas Abrams, OPDP is focusing its efforts on issuing guidances on broad issue areas that span multiple forms of media instead of platform-specific guidances.[2] This approach can be seen in OPDP's two most recent guidance documents, *Responding to Unsolicited Requests for Off-Label Information on Prescription Drugs and Medical Devices* and *Product Name Placement, Size, and Prominence in Advertising and Promotional Labeling*, both of which address considerations relating to emerging electronic media, including YouTube, blogs, Twitter, websites, and public electronic forums such as chat rooms and discussion boards.[3]

- ***FDA is moving beyond submitted materials and online surveillance to focus on live promotion in its enforcement efforts.*** FDA's 2011 enforcement letters reveal an upward trend in the Agency's efforts to crackdown on misleading "live" or in-person product promotion. Since 2009, FDA has steadily increased

the number of letters relating to oral statements made by sales representatives from one Untitled Letter in 2009, to two in 2010, to three in 2011. FDA's focus on live promotion extends beyond examination of oral statements, as demonstrated by an Untitled Letter that was issued for the *de facto* omission of risk information from an exhibit booth due to the placement of bags, boxes, and other materials around the display panel in a way that obscured risk information.

- ***FDA is becoming more nuanced in its scrutiny of clinical studies cited in support of claims and statements.*** As in previous years, FDA's enforcement letters found promotional materials to be false or misleading based on the quality of studies cited in support of promotional claims. FDA continues to examine study designs and pre-specified endpoints in referenced studies, but the Agency's analysis is becoming increasingly nuanced. For example, in an Untitled Letter issued regarding a professional detail ad for the drug Focalin XR ("Focalin"), FDA objected to claims that Focalin was superior to the drug Concerta based on benefits demonstrated two hours post-dose because the supporting clinical study only focused on a specific time point (two hours post-dose) as a primary efficacy measure and failed to account for "the different pharmacokinetic profiles and subsequent efficacy profiles . . . over the entire treatment course." Examinations of clinical studies supporting promotional claims are becoming ubiquitous in FDA's letters.

- For your reference, we have prepared a chart that provides: (1) a list of 2011 OPDP Warning and Untitled Letters, and (2) highlights of promotional violations alleged in each letter. The chart is available online in a searchable PDF document at http://www.kslaw.com/library/publication/ca020612_Table.pdf.

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[1] U.S. Food and Drug Administration, Bad Ad Program: 2010–2011 Year End Report, http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/DrugMarketingAdvertisingandCommunications/ucm258719.htm.

[2] Jean-Ah Kang, FDA Address: An Update on Promotional Guidance, Oversight and Enforcement from The Office of Prescription Drug Promotion, CBI 9th Annual Pharmaceutical Compliance Conference (Jan. 24, 2012).

[3] U.S. Food and Drug Administration, Guidance for Industry: Product Name Placement, Size, and Prominence in Advertising and Promotional Labeling 5 (2012), http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm070076.pdf; U.S. Food and Drug Administration, Guidance for Industry: Responding to Unsolicited Requests for Off-Label Information on Prescription Drugs and Medical Devices - Draft Guidance 11 (2011); http://www.fda.gov/downloads/drugs/guidance complianceregulatoryinformation/guidances/ucm285145.pdf.