



May 14, 2012

Division of Dockets Management (HFA-305)
Food and Drug Administration
5630 Fishers Lane, Room 1061
Rockville, MD 20852

Re: Docket No. FDA-2012-D-0022; Comments on Draft Guidance for Industry on Direct-to-Consumer Television Advertisements -- the Food and Drug Administration Amendments Act of 2007 Direct-to-Consumer Television Ad Pre-Dissemination Review Program; Availability; 77 Fed. Reg. 14811 (March 13, 2012)

Dear Sir or Madam:

The Pharmaceutical Research and Manufacturers of America (“PhRMA”) is pleased to provide comments to the Food and Drug Administration (“FDA”) on its Draft Guidance for Industry entitled “Direct-to-Consumer Television Advertisements — FDAAA DTC Television Ad Pre-Dissemination Review Program” (“Draft Guidance”). PhRMA is a voluntary, non-profit trade association that represents the country’s leading pharmaceutical research and biotechnology companies, which are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives. PhRMA members invested approximately \$50 billion in 2011 in discovering and developing new medicines, representing the vast majority of private investment in new medicines in the United States.

PhRMA supports FDA’s efforts to help ensure that consumers receive appropriate information about the benefits and risks of prescription drugs. Consistent with this commitment, PhRMA also supports a voluntary pre-submission review program for certain prescription drug direct-to-consumer (“DTC”) television advertisements to facilitate FDA’s review of significant medical content. Indeed, PhRMA’s *Guiding Principles Direct to Consumer Advertisements About Prescription Medicines* (“DTC Guiding Principles”) have encouraged member companies to submit all new DTC television advertisements to FDA before broadcast since 2005, and FDA has reviewed an extensive amount of advertisements as a result of PhRMA’s guidelines.¹

Although PhRMA strongly supports FDA’s general policy goals, PhRMA is concerned that FDA’s proposal to implement a *mandatory* pre-dissemination review program for DTC television ads (via a guidance) under Section 503B of the Federal Food, Drug, and Cosmetic Act (“DTC Review Program”) is, in important respects, overbroad, unduly burdensome, and lacking in narrow, objective, and definitive standards. Because FDA is proposing to implement and enforce what is, in essence, a prior restraint on valuable constitutionally protected commercial speech, PhRMA urges the Agency to reconsider the scope of its proposal and proceed cautiously and in a manner that fully protects the free speech rights of advertisers and patients. PhRMA recommends that if FDA intends to pursue this effort, it should be implemented by means of

¹ PhRMA, *Guiding Principles Direct to Consumer Advertisements About Prescription Medicines* (2009), available at <http://www.phrma.org/about/principles-guidelines/direct-consumer-advertising> (“PhRMA Guiding Principles”).

notice and comment rulemaking in a tailored, risk-based approach that conforms with the Supreme Court's directive that "the First Amendment mandates that speech restrictions be narrowly drawn."²

PhRMA's comments are set forth below in four parts. The first part discusses the public health value of DTC communications for enhancing public health; the second part describes PhRMA's DTC Guiding Principles; the third part discusses the important boundaries that have been erected under the First Amendment to the United States Constitution to protect freedom of speech, including commercial speech; and the fourth part provides PhRMA's detailed comments to FDA's Draft Guidance. PhRMA provides additional data regarding the public health value of DTC advertising in the Appendix.

I. The Public Health Value of DTC Communications

DTC advertising plays an essential role in meeting the needs of an increasingly sophisticated, information-seeking health care consumer. An important benefit of DTC advertising is that it fosters an informed conversation about health, disease and treatments between patients and their healthcare practitioners. DTC advertising also serves a valuable role in educating patients about the limitations and risks associated with certain therapies. And because DTC advertising has the potential to reach millions of Americans about healthcare treatments, DTC communications can be of tremendous value in conveying useful health information to patients.

The benefits of DTC communications to the public health are manifold and have been documented in numerous studies. These benefits include:

- Providing patients with important and useful information on available treatments and their benefits and risks;
- Encouraging productive communications between patients and their doctors;
- Motivating people to seek additional health information from other sources;
- Motivating people to visit a physician; and
- Enhancing patient compliance with prescribed treatment regimens.

In fact, much of DTC advertising is for categories of medicine that are underused. In light of the documented pattern of under-treatment of serious conditions – such as asthma, depression, high cholesterol, diabetes and many others – outreach via DTC advertising can help patients obtain important information about potential treatments.

² *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 565 (1980) (quoting *In re Primus*, 436 U.S. 412, 438 (1978)).

Consumers value DTC advertisements as a resource for current information about treatment options. In FDA's 2002 survey, three-quarters of consumers reported that DTC ads increased their awareness of new treatment options, and 72% said that ads "educate people about the risks and benefits of prescription medicines." Consumers are not alone in perceiving the health benefits of DTC advertising. Physicians also recognize a positive effect. The Harvard/Harris study, for example, found that 72% of physicians agree that DTC advertisements help educate and inform patients about treatments available to them.³

Other research has produced data consistent with these positive results. For example, in one survey, 70 percent of doctors reported that advertisements help educate patients about available treatments, and 67 percent felt that the advertisements helped them have better discussions with their patients.⁴ During another study, 66 percent of African American physicians surveyed attested to the positive benefit that advertisements for prescription drugs have on patients. The survey revealed several clear trends: "African American physicians see DTC advertising as providing substantial educational benefits; physicians believe that DTC advertising helps rather than hurts the doctor-patient relationship; and African American physicians see the benefits of DTC advertising outweighing its drawbacks."⁵

Results from a recent patient survey demonstrate that DTC advertising provides patients with information about the benefits and risks of medicines. Specifically, 86 percent of patients who saw medicines advertised on television were aware of the risk information presented. Seventy-five percent said that they pay some or "a lot of attention" to the risk information, while 72 percent said that the risk information was somewhat or very useful. About 72 percent were aware of the benefits of the drug.⁶ Clearly, DTC advertising has substantial public health value as demonstrated by these patient and practitioner survey results. FDA restriction on this valuable commercial speech could have a perverse effect on public health.

II. PhRMA Supports a Voluntary Program for the Pre-Dissemination Review of DTC Television Advertisements

On July 29, 2005, PhRMA's Board of Directors unanimously approved our *Guiding Principles on Direct-to-Consumer Advertisements About Prescription Medicines*, which were

³ Joel S. Weissman, Ph.D., et al., Consumer and Physician Reports on the Health Effects of DCTA, (Harvard/Harris Study (2003)), <http://www.fda.gov/cder/ddmac/P1weissman/index.htm>,

⁴ Weissman, J.S. et al., "Physicians Report on Patient Encounters Involving Direct-to-Consumer Advertising," *Health Affairs Web Exclusive*, <http://content.healthaffairs.org/cgi/reprint/hlthaff.w4.219v1> (2004).

⁵ Morris A., et. al., "For the Good of the Patient: Survey of the Physicians of the National Medical Association Regarding Perceptions of DTC Advertising, Part II, 2006," *Journal of the National Medicine Association* 99(3) (2007), available at <http://www.nmanet.org/images/uploads/Publications/OC0287.pdf>.

⁶ Prevention Magazine. 14th Annual Survey of Consumer Reactions to DTC Advertising of Prescription Medicines, Emmaus, PA: Rodale, Inc., 2011.

updated and revised in 2008. These principles help ensure that DTC advertising remains an important and powerful tool to educate patients while at the same time addressing many of the concerns expressed about DTC advertising over the past few years.

The Guiding Principles are intended to help ensure that DTC advertising continues to provide accurate, accessible, and useful health information that encourages the appropriate use of pharmaceuticals. To that end, the DTC Guiding Principles reiterate signatory companies' longstanding commitment to developing DTC communications in accordance with all FDA requirements.

The DTC Guiding Principles recognize that FDA regulations already set an extremely high standard for DTC advertisements for pharmaceutical products – higher than the standards applicable to the advertising of virtually any other product. According to FDA's regulations, all DTC information must be accurate and not misleading, can make product claims only when supported by substantial evidence; must reflect a balance between risks and benefits; and must be consistent with the FDA approved labeling. PhRMA companies are committed to meeting these existing high standards, and the Guiding Principles reiterate that commitment.

But the provisions of the DTC Guiding Principles go beyond existing regulatory requirements in order to promote an educated dialogue between physicians and patients. PhRMA's principles recognize that at the heart of our companies' DTC communication efforts is patient education. This means that DTC communications designed to market a medicine should responsibly educate patients about a medicine, including the conditions for which it may be prescribed.⁷ DTC advertising should also foster responsible communications between patients and health care professionals to help the patient achieve better health and a better appreciation of a medicine's known benefits and risks.⁸

For example, the Guiding Principles state that signatory companies should spend appropriate time educating health care professionals about a new medicine before it is advertised to patients.⁹ This will help ensure that physicians know about a medicine first so that they are prepared to discuss the appropriateness of a given medication with a patient.

Of particular significance to the Draft Guidance, companies that sign onto the Guiding Principles agree to submit all new DTC television ads to the FDA before releasing them for broadcast.¹⁰ This commitment also goes beyond existing regulatory requirements, which merely require companies to submit their DTC television advertisements to FDA at the time they are first aired. This additional lead time provides the Agency an opportunity to review new TV ads before they are aired, consistent with its priorities and resources. It also provides FDA and

⁷ DTC Guiding Principles at 5.

⁸ *Id.*

⁹ *Id.* at 6.

¹⁰ *Id.*

sponsors a better opportunity to communicate expectations and identify and address issues before a DTC advertisement is viewed by the public.

PhRMA believes that the DTC Guiding Principles are a responsible step toward improving DTC communications and have had a positive impact on compliance with FDA requirements. Patients today are seeking more information about medical problems and potential treatments. Our Guiding Principles help ensure that DTC promotion facilitates thoughtful and informed conversations between patients and their healthcare providers.

III. FDA's Implementation of Section 503B Must Be Consistent With the First Amendment's Protection of Free Speech

Any proposed revisions to the current regulatory system for DTC communications must be consistent with the free speech protections of the First Amendment to the United States Constitution. The Supreme Court recently affirmed that “[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment.”¹¹ Thus, when the FDA restricts the speech of pharmaceutical manufacturers and other regulated entities, the restrictions are subject to scrutiny under the First Amendment.¹²

DTC promotion – like other forms of advertising and promotion – is commercial speech that is protected by the First Amendment. Any restriction on DTC promotion must therefore satisfy the Supreme Court’s well-known *Central Hudson* test in order to be constitutional.¹³ Under *Central Hudson*, the initial inquiry is whether the speech at issue proposes a lawful transaction and is not inherently misleading.¹⁴ Regulations that unduly burden truthful, non-misleading commercial speech about a lawful product “hinder consumer choice [and] impede debate over central issues of public policy” and, therefore, “rarely survive constitutional scrutiny.”¹⁵

It is firmly established that “FDA may not restrict speech based [simply] on its perception that the speech could, may, or might mislead.”¹⁶ Rather, FDA must put forth concrete proof that the restricted speech is actually or inherently misleading.¹⁷ If speech concerns a lawful activity,

¹¹ *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

¹² *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010) (“The Court has recognized First Amendment protection extends to corporations.”).

¹³ *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

¹⁴ *Central Hudson*, 447 U.S. at 563.

¹⁵ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503, 504 (1996).

¹⁶ *Washington Legal Foundation v. Henney*, 56 F. Supp. 2d 81, 81 (D.D.C. 1999).

¹⁷ *Ibanez v. Florida Dept. of Business and Prof'l Regulation*, 512 U.S. 136, 146 (1994) (government’s burden is not satisfied by “rote invocation of the words ‘potentially misleading’”); *see also Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (the government’s “burden is not satisfied by mere speculation or conjecture”).

and the Agency cannot make a record establishing that the speech is in fact misleading, then the Agency must satisfy the three remaining prongs of the *Central Hudson* inquiry in order to justify a restriction on the speech. Specifically, the restriction must: (1) promote a substantial governmental interest; (2) directly advance that interest; and (3) be no more extensive than necessary to achieve the asserted government interest.¹⁸ Because the government generally has an strong interest in protecting the health and safety of its citizens, the constitutionality of FDA-imposed limitations on non-misleading speech typically turns, first, on whether the action directly advances the asserted government interest, and, second, on whether the government's legitimate interests could be served in a less restrictive way.

To demonstrate that a limitation on speech directly advances a government interest, the government "bears the burden of showing not merely that its [action] will advance its interest, but also that it will do so to a material degree."¹⁹ The government must prove that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree."²⁰

To satisfy the final element of *Central Hudson*, agency action that burdens speech must not be more extensive than necessary to serve the government's legitimate interests.²¹ A restriction is not appropriately tailored if "there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech."²² "[I]f the government can achieve its interests in a manner that does not restrict speech or that restricts less speech, the Government must do so."²³

A governmental restriction that operates as a "prior restraint" on expressive activity is one of the least tolerable infringements on First Amendment rights, and there is a "heavy presumption" against its constitutionality.²⁴ As the Supreme Court has explained:

The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few

¹⁸ *Central Hudson*, 447 U.S. at 566.

¹⁹ *44 Liquormart*, 517 U.S. at 505 (internal quotation and citation omitted).

²⁰ *Edenfield*, 507 U.S. at 770-71.

²¹ *Thompson v. Western States Medical Center*, 535 U.S. 357, 371 (2002).

²² *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n. 13 (1993).

²³ *Western States*, 535 U.S. at 371.

²⁴ See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); see also *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975).

who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.²⁵

In order to be consistent with the First Amendment, therefore, a prior restraint must not only include clearly defined standards that cabin the reviewing official's "unbridled discretion,"²⁶ but also must include adequate procedural safeguards to reduce the danger of suppressing constitutionally protected speech.²⁷ The FDA has recognized that the presumption against prior restraints applies equally to commercial speech.²⁸ As discussed below, PhRMA is concerned that FDA's proposed pre-dissemination review of DTC television advertisements raises significant First Amendment concerns.

IV. FDA Should Implement Section 503B Through Notice-and-Comment Rulemaking, Not Through Informal Guidance

In light of the serious First Amendment concerns presented by FDA's proposed review program, particularly FDA's imposition of a prior restraint on commercial speech, FDA should implement Section 503B through notice-and-comment rulemaking rather than through issuance of an informal guidance document. As discussed above, FDA's implementation of Section 503B could be susceptible to constitutional challenge if it does not include clear objective standards that cabin FDA's "unbridled discretion," particularly with respect to the particular TV ads subject to pre-review requirements and standards FDA will use in making recommendations regarding "consumer good and well-being." To be effective, however, such standards must be enforceable not only against proposed advertisements and advertisers, but also against the Agency. As the Supreme Court has explained, the limits upon an Agency's discretion must be made explicit in statutory text, "binding judicial or administrative construction, or well-established practice."²⁹ Because the Draft Guidance, once finalized, "does not operate to bind FDA or the public,"³⁰ it cannot provide the binding standards necessary to cabin FDA's authority. In this case, only binding regulations promulgated through notice-and-comment rulemaking can accomplish this requirement.

In addition, regulations are the most appropriate pathway for implementing Section 503B under the Administrative Procedures Act ("APA"). Under the APA, an agency must engage in notice-and-comment rulemaking in order to substantively change its regulatory regime.³¹ As

²⁵ *Southeastern Promotions*, 420 U.S. at 558-59.

²⁶ *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769-70 (1988).

²⁷ *Southeastern Promotions*, 420 U.S. at 559.

²⁸ Compliance Policy Guide 140.100, *Seizure of Books that Constitute Misleading Labeling* (8/31/1989) ("the courts have established that speech, including commercial speech, should not be subject to a prior restraint").

²⁹ *City of Lakewood*, 486 U.S. at 770.

³⁰ Draft Guidance at 1.

noted above, the proposed DTC Review Program would implement *sweeping* changes to FDA's existing regulatory scheme governing DTC television advertisements and thus should be the subject of notice-and-comment rulemaking. Furthermore, FDA is establishing binding requirements in the draft guidance, which are more appropriately issued as a regulation than as a guidance document.³² FDA specifically states that it intends to require submission of a pre-dissemination review package for all advertisements falling under the categories listed above.³³ The binding nature of FDA's "recommendations" is underscored by the fact that the Draft Guidance addresses questions on enforcement. Additionally, although FDA states that the list of materials that should be included in a pre-dissemination review package is a recommendation, the guidance also provides that a pre-dissemination review package that is missing any of the listed materials will be deemed incomplete and that the 45-day review time frame will not begin until a complete pre-dissemination review package is received.³⁴ In this way, the list of materials is in fact a requirement for pre-dissemination review packages and not merely a recommendation.

Accordingly, PhRMA requests that FDA withdraw the Draft Guidance and promulgate regulations to implement the DTC Review Program under Section 503B.

V. Specific Comments on the Draft Guidance Document

Although PhRMA strongly supports the policy goals underlying FDA's issuance of the Draft Guidance, PhRMA is concerned that the Draft Guidance, if finalized, would implement Section 503B in a manner that is overly broad, unduly burdensome and lacking in narrow, definite, and objective standards to cabin FDA's discretion. Because these issues raise serious First Amendment concerns, PhRMA strongly urges FDA to implement it, if at all, through binding regulations rather than a non-binding Guidance Document as described above. If FDA nonetheless chooses to proceed forward to finalize the Draft Guidance, PhRMA requests that

³¹ See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (setting aside a guidance document which establishes a new regulatory regime that broadens the scope of an existing rule without notice-and-comment rulemaking, stating that "[a]n agency may not escape...notice and comment requirements...by labeling a major substantive legal addition to a rule a mere interpretation."). The Supreme Court has also noted, "We can agree that APA rulemaking would still be required if [a new rule] adopted a new position inconsistent with any of the Secretary's existing regulations," *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (finding that the new rule under consideration was consistent with the existing regulations and thus did not effect a substantive change in the regulations).

³² See, e.g., 65 FR 56477 at 56473 ("(Comment 33) One comment noted that we should not use guidance documents as a replacement for notice-and-comment rulemaking. We agree with this comment and believe that in certain circumstances regulations should be issued, while in other circumstances issuance of a guidance document is more appropriate. We carefully consider whether a document that contains binding requirements should be issued. This decision ultimately determines whether it is more appropriate for us to issue regulations or guidance on a given subject.")

³³ See, e.g., Draft Guidance at p. 5, "The Agency **intends to require** sponsors to submit TV ads for pre-dissemination review in the following categories . . ." (Emphasis added).

³⁴ Draft Guidance at p.6-7.

FDA revise and restructure it as described further below. In sum, FDA should implement the DTC Review Program in a manner that maintains an appropriate balance between protecting the public health and allowing the free flow of important health-related information, consistent with the First Amendment.

A. The Proposed Scope of the DTC Review Program is Overly Broad and Not Well-Supported By Empirical Evidence

As proposed, the DTC Review Program would apply to an extremely broad category of DTC television advertisements. According to the Draft Guidance, FDA intends to require sponsors to submit six categories of television advertisements for FDA pre-review:

- Category 1: The initial TV ad for any prescription drug or the initial TV advertisement for a new or expanded approved indication for any prescription drug;
- Category 2: All TV ads for prescription drugs subject to a Risk Evaluation and Mitigation Strategy (REMS) with elements to assure safe use;
- Category 3: All TV ads for Schedule II controlled substances;
- Category 4: The first TV advertisement for a prescription drug following a safety labeling update that affects the Boxed Warning, Contraindications, or Warnings & Precautions section of its labeling;
- Category 5: The first TV advertisement for a prescription drug following the receipt by the sponsor of an enforcement letter (i.e., a Warning letter or untitled letter) for that product that either cites a TV advertisement or causes a TV advertisement to be discontinued because the TV advertisement contained violations similar to the ones cited in the enforcement letter;
- Category 6: Any TV advertisement that is otherwise identified by FDA as subject to the pre-dissemination review provision.³⁵

These six categories appear to cover a broad swath of all DTC television advertisements for prescription drugs subject to FDA jurisdiction. For example, in 2007, pharmaceutical manufacturers indicated to FDA that they intended to voluntarily submit 151 DTC television advertisements to FDA for advisory comments in fiscal year 2008 under the proposed DTC User Fee Program, a good estimate of the relevant new DTC advertisements introduced on an annual basis.³⁶ Under the proposed plan to implement Section 503B, however, FDA estimates that it

³⁵ Draft Guidance for Industry, *Direct-to-Consumer Television Advertisements—FDAAA DTC Television Ad Pre-Dissemination Review Program 2* (March 2012).

³⁶ 72 Fed. Reg. 70334 (Dec. 11, 2007).

will receive approximately 82 ads per year for pre-dissemination review.³⁷ This appears to represent *more than half* of the new advertisements that would be introduced in any given year.

PhRMA is not aware of any justification for imposing the prior restraint provisions of Section 503B to such a broad category of DTC television advertisements. Although FDA contends that it is seeking to impose pre-review requirements only on “high risk and high impact TV ads” to ensure that they “accurately and effectively communicate key information about advertised products, including their major risks and indications,”³⁸ FDA does not provide any empirical evidence to support the need for a prior restraint on the particular DTC television advertisements listed above to achieve its regulatory objectives. Nor can FDA identify any category of advertisement that would be *excluded* from this pre-approval process. Examples of ads that do not have to be submitted would be helpful guidance here. As noted above, “FDA may not restrict speech based [simply] on its perception that the speech could, may, or might mislead.”³⁹ On the contrary, FDA must prove that “the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”⁴⁰ PhRMA believes that FDA should heed the Supreme Court’s directive to place limitations on speech in the least restrictive manner: “[I]f the government can achieve its interests in a manner that does not restrict speech or that restricts less speech, the Government must do so.”⁴¹

In this case, PhRMA is not aware of any special concerns regarding the communication of benefit and risk information in DTC television advertisements generally or the specific categories of DTC advertisements identified in the Draft Guidance. On the contrary, since 2008, it appears that FDA has issued only *four* warning or untitled letters alleging regulatory violations with respect to DTC television advertisements, despite the fact that hundreds (perhaps thousands) of such ads have been disseminated during that time period. This relatively low incidence of alleged regulatory violations may stem from the broad acceptance and implementation of PhRMA’s DTC Guiding Principles by biopharmaceutical companies, including the suggestion to seek pre-review by FDA for any new DTC advertisements. Regardless of the reason, there appears to be scant justification based on FDA’s enforcement record for imposing a new pre-review requirement on the broad category of advertisements identified in the Draft Guidance.

Moreover, in seeking to impose special pre-review requirements with respect to DTC advertisements for prescription drugs, the Agency seems to ignore the fact that, in practice, patients who are exposed to a DTC television advertisement must necessarily consult with, and

³⁷ 77 Fed. Reg. 14811, 14812 (March 13, 2012). We note that this estimate may be low, considering that the average of 150 ads every year FDA received between 2000 to 2006 was just for ads that were submitted to FDA for voluntary review.

³⁸ Draft Guidance at 2.

³⁹ *Washington Legal Foundation v. Henney*, 56 F. Supp. 2d 81 (D.D.C. 1999).

⁴⁰ *Edenfield*, 507 U.S. at 770-71.

⁴¹ *Western States*, 535 U.S. at 371.

obtain a prescription from, a healthcare practitioner prior to purchasing and using the advertised drug. Indeed, it is the physician, not the patient, who ultimately must decide whether the benefits of the advertised drug outweigh its risks for any particular patient. Consequently, the need for a pre-dissemination review to protect the public health is suspect in this context because any potential misperceptions communicated by a DTC television advertisement, of necessity, will be quickly corrected *prior to use* through an intervening consultation with the patient's treating physician. Moreover, this concern is mitigated even further for drugs subject to a Risk Evaluation and Mitigation Strategy ("REMS") with elements to assure safe use – a category specifically identified by FDA as needing pre-review – because these drugs typically are subject to tight restrictions regarding when, where, how and to whom they may be prescribed and/or dispensed.

Although FDA might be able to justify imposing pre-review requirements under Section 503B on advertisements in Category 5 above, the Agency has not sought to limit the program to this category or provided any empirical data demonstrating that the harms it seeks to prevent are real with respect to this or any other category of DTC television advertisements. Nor has the Agency explained why less burdensome alternatives would not work to mitigate any identified harms. Such alternatives could include the issuance of clear and explicit guidance explaining how advertisers should communicate important risks in DTC television advertisements, ordering violators to disseminate corrective advertising, and/or imposing civil money penalties for violative advertisements. Indeed, FDA already has implemented the first two alternatives and, as discussed above, those regulatory approaches appear to have been effective. PhRMA thus believes it will be difficult for FDA to demonstrate, as required, that imposition of a prior restraint regime will alleviate any identified harms "to a material degree."⁴²

In addition, PhRMA is concerned that the broad scope of FDA's proposal could place an undue strain on FDA's resources that may result in extended review times that could chill the dissemination of new television advertisements. In 2007, FDA indicated that it could provide advisory comments within 45 days for only 75 DTC television advertisements – and only if it hired an additional 27 employees dedicated to the review of such advertisements.⁴³ FDA now estimates that it will receive approximately 82 ads per year for pre-dissemination review.⁴⁴ FDA has not stated how it will be able to manage this additional workload.

If FDA is not able to meet the 45-day review timeline, sponsors will be placed in the uncomfortable position of having to choose either to run their advertisements without receiving FDA's comments or to delay their advertising campaign until FDA has completed its review. FDA itself has recognized this burden: "The lack of timely, predictable FDA review times for DTC television advertisements is detrimental to companies' ability to accurately set timeframes for their marketing campaigns and discourages companies from submitting these materials for advisory review."⁴⁵ These potential burdens and uncertainty may lead sponsors to forego

⁴² *Edenfield*, 507 U.S. at 770-71.

⁴³ 72 Fed. Reg. at 60680.

⁴⁴ 77 Fed. Reg. 14811, 14812.

disseminating new DTC television advertisements for some prescription drugs, resulting in a decrease not only in advertising activity but also in the dissemination of important health information to interested patients. As discussed in section I above, such a result would not further the public health, and such burdens unduly interfere with companies' protected commercial speech.

In order to address these concerns in a manner consistent with the Supreme Court's First Amendment jurisprudence, PhRMA recommends that FDA reconsider the proposed broad scope of the DTC Review Program and narrowly target those advertisements where it can provide justification supported by empirical evidence to support a legitimate need for a pre-dissemination review and delay of commercial speech and the absence of other less restrictive alternatives.

B. The Proposed DTC Review Program Is Unduly Burdensome

PhRMA also is concerned that FDA's proposal to implement Section 503B would place undue burdens on expressive activity protected by the First Amendment. In addition to the burdens associated with its broad scope (as discussed above), FDA's proposal imposes unnecessary costs on the regulated industry by requiring the submission of a final recorded version of the proposed television advertisement as part of a "complete pre-dissemination review package." PhRMA thus respectfully requests that FDA revise its proposal to clarify that a pre-dissemination review package will be considered "complete" if it contains an annotated storyboard of the proposed TV advertisement, rather than a final recorded version.

The requirement to submit a final recorded version of a TV advertisement will place a substantial financial burden on submitting companies. In particular, FDA's proposal creates significant financial risks in undertaking full production of a proposed DTC TV advertisement. Even if a storyboard or similar document is previously cleared, if FDA provides additional comments after reviewing the final recorded advertisement, the company could be forced to re-work material that has already been fully produced at significant cost, which may include re-shooting a commercial after FDA has made comments. This will impose significant, unnecessary costs on the development of DTC television advertisements for prescription drug products, when presenting FDA with a script and/or story board could meet FDA's interests.

FDA's requirement for extensive pre-dissemination review will add an additional review burden to both FDA and the companies, because it is very likely that Companies will still elect to pre-clear storyboards and/or animation for FDA comment prior to embarking on a final production of the television advertisement. The extra time for review plus the additional review will cause companies to incur additional cost and the time to bring the advertisement to market will be greatly extended, not only because of the additional review, but also because companies will be less likely to purchase "media buys" until the final FDA review is conducted. Waiting for the final approval could delay media placement by upwards of six months and will delay the benefits conferred by the DTC advertisement, including patient compliance and education. We believe this would be an unwanted, unintended consequence for both FDA and the biopharmaceutical industry.

⁴⁵ 72 Fed. Reg. 1743, 1752.

PhRMA respectfully suggests that these added financial and creative burdens are unnecessary and unjustified under Section 503B. Under that provision, FDA is empowered to “require inclusion” of a “specific disclosure about a serious risk listed in the labeling of the drug involved.” FDA also may make recommendations for changes that are: (1) “necessary to protect the consumer good and well-being,” (2) “consistent with prescribing information,” and (3) related to efficacy in specific subpopulations (e.g., elderly). In PhRMA’s view, FDA does not need to review a final recorded version of an advertisement in order to exercise its authority under these provisions but rather can do so in a more narrowly tailored manner based upon an annotated storyboard (potentially including, but not limited to, animatics and music clips). Indeed, an annotated storyboard, which describes a proposed advertisement on a screen-by-screen basis, should provide all the information necessary to fully inform the Agency whether or not a serious risk will be disclosed in a proposed advertisement and/or whether FDA should make any of the other recommendations authorized under section 503B(b). Accordingly, FDA’s review of a final recorded version of the advertisement is not necessary.

In the Draft Guidance, the Agency nevertheless states that “FDA cannot provide final comments *on the acceptability of a TV ad* without viewing a final recorded version in its entirety.”⁴⁶ PhRMA respectfully suggests that this description misconstrues the scope of Section 503B. Section 503B does not authorize FDA to rule on the *acceptability* of TV advertisements in general. On the contrary, as described above, Section 503B grants FDA limited authority to ensure that all relevant serious risks have been disclosed (and to make other non-binding recommendations). PhRMA respectfully suggests that FDA easily could exercise this limited authority without recourse to a final recorded version of the TV advertisement.⁴⁷

Although the Draft Guidance provides that sponsors may request comments from FDA on a storyboard before producing a final recorded version of an advertisement, the Draft Guidance does not specify any time frame within which FDA agrees to provide such comments. Moreover, the Draft Guidance states that the 45-day review period under Section 503B will not begin until the pre-dissemination package is complete, which requires submission of the final recorded version of the advertisement. PhRMA is concerned that this will foster delays and create uncertainty regarding FDA review times, which will make it difficult for companies to plan and execute their television communication strategies within predictable timelines. To address this concern, PhRMA requests that FDA amend the DTC Review Program to specify that the 45-day review period will commence upon submission of an annotated storyboard.

To avoid confusion, PhRMA also requests that FDA clarify that minor changes to an advertisement following FDA review of a storyboard do not require re-submission and re-review of the storyboard or final recorded version of the advertisement under the DTC Review Program or result in a new 45-day review period.

⁴⁶ Draft Guidance at 6 (emphasis added).

⁴⁷ Although PhRMA concedes that Section 503B specifically authorizes FDA to require the submission of a “completed video production,” 21 U.S.C. § 353b(a), FDA nevertheless must implement this provision in a manner consistent with the First Amendment.

C. The Standards FDA Will Use to Require Pre-Review and to Review Required Submissions Are Unconstitutionally Vague

PhRMA is concerned that FDA is planning to implement several aspects of Section 503B without narrow, objective and definitive standards to cabin the Agency's discretion. For example, there are no standards explaining when FDA will require pre-dissemination review under Category 6 or how FDA will objectively determine whether changes to an advertisement are necessary to protect "the consumer good and wellbeing." Given the fact that Section 503B represents a prior restraint under First Amendment jurisprudence, PhRMA believes it is necessary for FDA to implement that provision in a careful manner and with clear and explicit objective standards to guide Agency decision-making.

In the Draft Guidance, FDA states that it may require pre-dissemination review of any TV advertisement if "deemed necessary from a public health perspective."⁴⁸ FDA explains that this decision will be made "on a case-by-case basis after considering the risks associated with particular products."⁴⁹ The Agency, however, does not provide any criteria or standards for making this determination. Although PhRMA understands FDA's desire to retain as much discretion as possible, in the context of a prior restraint like the proposed DTC Review Program, this type of broad discretion does not appear to be consistent with the First Amendment.

It is well-established that a prior restraint is unconstitutional if it places "unbridled discretion in the hands of a governmental official or agency"⁵⁰ As the Supreme Court has explained, "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their speech, even if the discretion and power are never actually abused."⁵¹ Consequently, the Court has held that, in order to be constitutional, a prior restraint must have specific standards to guide the decision-maker. "Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech."⁵²

Here, FDA's ability to determine who will be subjected to the Section 503B prior restraint regime without any objective, clearly defined standards for making that determination raises significant First Amendment concerns. To ensure that FDA's implementation of Section 503B is consistent with the First Amendment, PhRMA respectfully requests that FDA remove Category 6 or provide clear, explicit objective guidelines defining when a TV advertisement would fall within that category.

In addition, FDA should provide clear standards explaining how it will determine whether changes to a submitted advertisement are necessary to protect "the consumer good and

⁴⁸ Guidance Document, at 4.

⁴⁹ *Id.*

⁵⁰ *FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 225-26 (1990).

⁵¹ *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1998).

⁵² *City of Lakewood*, 486 U.S. at 758.

wellbeing.” Although the Draft Guidance does not indicate whether FDA intends to implement this specific provision, all advertisements that are subject to Section 503B’s pre-dissemination review likewise are subject to the provision allowing FDA to make recommendations regarding “consumer good and wellbeing.” Consequently, if FDA begins to implement Section 503B by requiring pre-dissemination review of certain DTC TV ads, it also should explain how it defines “consumer good and wellbeing.”

Conclusion

PhRMA is extremely concerned that FDA’s proposed program for mandatory pre-dissemination review of a vast amount of television advertising runs counter to the First Amendment’s protection of commercial free speech. PhRMA appreciates the opportunity to provide comments on the draft guidance regarding the proposed DTC Review Program, and we would welcome the opportunity to discuss these comments further.

Respectfully submitted,



Jeffrey K. Francer
Assistant General Counsel

Appendix

The Public Health Value of DTC Advertising

Numerous studies, including FDA's own surveys, demonstrate the public health value of DTC advertising. In this Appendix, PhRMA summarizes some of the pertinent study results that demonstrate the value of DTC advertising, which include, enhanced communication with healthcare professionals and improved compliance with prescribed treatment regimens.

A. DTC Communications Encourage Productive Communications Between Patients and Their Physicians

Survey data indicate that discussions between patients and their physicians triggered by a DTC advertisement are thoughtful and productive. In the FDA survey, patients almost universally (93%) reported that their doctor "welcomed their questions." Similarly, 41% of physicians participating in FDA's survey reported that DTC advertising benefited their interaction with patients. Reported benefits included improved discussions with patients, greater patient awareness of treatments, and more informed/educated patients.

Most physicians (73%) also agreed that their patients asked thoughtful questions because of a DTC advertisement. According to surveyed physicians, DTC advertising also causes patients: (a) to be more concerned about their health and involved in their healthcare, (b) to become aware of problems earlier, and (c) to seek treatment for potentially serious conditions.⁵³

The Harvard/Harris National physician survey produced similar results: 73% of physicians agree that DTC advertising helps educate patients, and 67% agree that DTC advertising helps physicians have better discussions with patients.⁵⁴

As FDA itself has acknowledged, research indicates that greater patient involvement in healthcare may lead to better health outcomes.⁵⁵ By prompting more productive doctor/patient dialogue and furthering consumers' interest in their own healthcare, DTC advertising enables consumers to more effectively partner with their healthcare providers to determine appropriate treatments. Similar results were obtained by the FDA in their survey of physicians. In this study, 72% of physicians agreed that DTC increases awareness of treatments in general.

⁵³ K. Akin et al., Patient and Physician Attitudes and Behaviors Associated with DTC Promotion of Prescription Drugs - Summary of FDA Survey Research Results, Final Report (Nov. 19, 2004).

⁵⁴ J. S. Weissman, et al., Physicians Report on Patient Encounters Involving Direct-To-Consumer Advertising, Health Affairs, W4-219-W4-233 (April 28, 2004).

⁵⁵ K. Akin et al., Patient and Physician Attitudes and Behaviors Associated with DTC Promotion of Prescription Drugs - Summary of FDA Survey Research Results, Final Report (Nov. 19, 2004).

B. DTC Communications Motivate People to Seek Additional Health Information

By definition,⁵⁶ DTC advertisements for prescription medicines are not expected to provide all of the information necessary to inform prescribing decisions – this is the role of the physician-patient interaction, which is required by law.⁵⁷ However, such advertisements motivate consumers to consult with their physicians to learn more about the benefits and risks of treatment options.⁵⁸ In the 2002 FDA patient survey, 43 percent of respondents reported that a DTC advertisement caused them to look for more information about the medicine or their health. Among respondents who said a DTC advertisement motivated them to search for additional information, the most commonly mentioned sources were healthcare providers, reference books, and friends, relatives, or neighbors. The Internet is also becoming an increasingly important source of health information.

C. DTC Communications Motivate Patients to Visit A Physician, Often Resulting In New Diagnoses

FDA's 2002 patient survey confirms that consumers exposed to DTC advertising seek additional information either about advertised drugs or their health, and that the vast majority (89%) seek this follow-up information from their doctors. Almost a third of physicians participating in FDA's survey reported that DTC advertising encourages hard-to-reach patients to visit their doctors.⁵⁹ Similarly, a multi-year tracking study conducted by Prevention and Men's Health magazines found that in each of the years 1997 through 2002, approximately one-third of survey respondents -- a total of 64.7 million consumers -- had talked with a physician as a result of seeing a DTC advertisement.⁶⁰ A third survey, the Harvard/Harris National patient survey, found that 35% of consumers had been prompted by a DTC advertisement to talk to a doctor about an advertised drug or other health issue or concern.⁶¹ Studies suggest that product

⁵⁶ See 21 U.S.C. 353(b) (requiring for prescription drugs the "supervision of a practitioner licensed by law to administer such drug").

⁵⁷ See 21 U.S.C. 353(b) (requiring for prescription drugs the "supervision of a practitioner licensed by law to administer such drug").

⁵⁸ In annual studies conducted by Prevention Magazine, 85% of patients surveyed agreed that DTC advertisements encourage people to find out more about the advertised drug, while 83% agreed the advertisements encourage people to find out more about the condition the drug treats. Edwin Slaughter, Consumer Reaction to DTC Advertising of Prescription Medicines 1997 to 2002, (Prevention Annual Survey (2002)), available at <http://www.fda.gov/cder/ddmac/P1Slaughter/index.htm>

⁵⁹ K. Akin et al., Patient and Physician Attitudes and Behaviors Associated with DTC Promotion of Prescription Drugs - Summary of FDA Survey Research Results, Final Report (Nov. 19, 2004).

⁶⁰ E. Slaughter, Consumer Reaction to DTC Advertising of Prescription Medicines 1997 to 2002, A Six-Year Tracking Study from Prevention and Men's Health Magazines, presentation available at <http://www.fda.gov/cder/ddmac/P1Slaughter/index.htm>

⁶¹ J. S. Weissman, et al., Consumers' Report on the Health Effects of Direct-To-Consumer Advertising, Health Affairs, W3-82-W3-95 (Feb. 26, 2003).

specific advertisements may be more effective at motivating patients to consult a physician than general “disease-awareness” ads because product specific ads offer a potential solution whereas disease-awareness ads do not.⁶² Based on these surveys and research, it is clear that DTC promotion motivates consumers to discuss health concerns with their healthcare providers.

Multiple surveys show that exposure to DTC advertisements prompts consumers to ask physicians about problems that had not been discussed previously. The *Prevention* and *Men’s Health* tracking study found that 29.4 million Americans spoke with their doctor about a medical condition for the first time as a result of seeing a DTC advertisement between 1997 and 2002.⁶³ Similarly, nearly one in five patients participating in FDA’s survey reported speaking to a physician about a condition for the first time because of a DTC advertisement.⁶⁴ Data from the Harvard/Harris National patient survey confirms these findings and also shows that these DTC-prompted discussions lead to important new diagnoses. In that survey, almost 22% of consumers who initiated a discussion with their doctor as a result of a DTC advertisement discussed a new health concern, and almost 25% (representing approximately 16 million consumers) were diagnosed with a new condition during the doctor visit. Notably, approximately 43% of the new diagnoses were “high priority” conditions, such as high cholesterol, high blood pressure, diabetes and depression, which often are under-diagnosed or under-treated.⁶⁵

These new diagnoses allow earlier intervention and treatment, helping patients avoid more costly treatments, such as surgery and/or hospitalization, and unnecessary suffering.

D. DTC Communications Enhance Patient Compliance

Another benefit of DTC advertising is its positive impact on patient compliance with physician-prescribed treatment regimens. Physicians participating in the FDA survey reported that DTC advertising enhanced patient compliance: one third thought that DTC advertising increased the likelihood of proper medication usage and close to one third believed that it helps patients adhere to their treatment regimen.⁶⁶ Similarly, 46% of physicians surveyed in the Harvard/Harris National survey agreed that DTC advertising increases patient compliance.⁶⁷

⁶² Testimony of Patrick Kelly, President, US Pharmaceuticals, Pfizer, before the Food and Drug Administration, Public Hearing on Direct-to-Consumer Promotion of Medical Products, November 1, 2005.

⁶³ E. Slaughter, Consumer Reaction to DTC Advertising of Prescription Medicines 1997 to 2002, A Six-Year Tracking Study from *Prevention* and *Men’s Health* Magazines, presentation available at <http://www.fda.gov/cder/ddmac/P1Slaughter/index.htm>

⁶⁴ K. Akin et al., Patient and Physician Attitudes and Behaviors Associated with DTC Promotion of Prescription Drugs - Summary of FDA Survey Research Results, Final Report (Nov. 19, 2004).

⁶⁵ J. S. Weissman, et al., Consumers’ Report on the Health Effects of Direct-To-Consumer Advertising, *Health Affairs*, W3-82-W3-95 (Feb. 26, 2003).

⁶⁶ K. Akin et al., Patient and Physician Attitudes and Behaviors Associated with DTC Promotion of Prescription Drugs - Summary of FDA Survey Research Results, Final Report (Nov. 19, 2004).

⁶⁷ J. S. Weissman, et al., Physicians Report on Patient Encounters Involving Direct-To-Consumer Advertising, *Health Affairs*, W4-224 (April 28, 2004).

Data submitted at a 2005 public hearing also indicate that DTC advertisements remind consumers to take their medication.⁶⁸ The high costs and poor patient outcomes associated with non-compliance underscore the significant public health benefit of tools that encourage compliance, including DTC advertising.⁶⁹ Moreover, there is scant evidence to support claims that DTC advertising leads to inappropriate prescribing or drug use or inappropriate pressure to prescribe an advertised drug product.⁷⁰

E. DTC Communications Do Not Lead To Inappropriate Prescribing Decisions

Claims that DTC advertising causes consumers to exert inappropriate pressure on physicians for advertised drugs they do not need lacks empirical foundation. According to FDA's studies, in 88% of cases in which patients asked about a drug, physicians determined that the person had the condition that the drug treated.⁷¹ Physicians in the same study reported that 91% of the time patients did not seek to influence their care in a way that would be harmful.⁷² Other studies report similar findings.⁷³

The vast majority of physicians do not feel that DTC advertising has pressured them to prescribe inappropriate medications—or, indeed, that it has pressured them to prescribe anything at all.⁷⁴ Most consumers who consult their physicians about an advertised drug are not even seeking a prescription for a specific advertised drug. Multiple studies indicate that patients want information about an underlying condition and available treatment, and are far more likely to ask about therapy than for a specific drug.⁷⁵

⁶⁸ 19 C. Winnicki, *Recent Sufferers: Exploring Patient Behavior from Discovery to Diagnosis* (Nov. 1, 2005), presentation available at: <http://www.fda.gov/cder/ddmac/dtc2005/Winnicki.PPT>

⁶⁹ See, e.g., S.D. Sullivan, et al., *Noncompliance with medication regimens and subsequent hospitalizations: a literature analysis and cost of hospitalization estimate*, *J. Res Pharm Econ.* 1990: 2(2); 19-33 (estimating that 5.5% of hospitalizations result from drug noncompliance); P. A. Tabor, et al., *Comply with Us: Improving Medication Adherence*, *J. Phar Pract.* 2004: 17;3:167-180.

⁷⁰ E. A. McGlynn et al., "The Quality of Health Care Delivered to Adults in the United States," *New England Journal of Medicine* 348, no. 26 (23 June 2003): 2635–2645.

⁷¹ FDA Physician Survey (2002).

⁷² FDA Physician Survey (2002).

⁷³ Market Measures/Cozint (in inquiries for drugs treating high cholesterol and mood/anxiety disorders, physicians reported that, in over 80% of cases, patients asked about medicines that were appropriate to them) <http://www.fda.gov/cder/ddmac/p6thumma/index.htm>.

⁷⁴ FDA Physician Survey (2002). 82% of physicians said that DTC ads did not create any problems for their interaction with patients; 91% said the patient did not try to influence the course of treatment in a way that would have been harmful; 48% of GPs and 58% of specialists felt "not at all" pressured to prescribe a specific brand name drug when asked about it; NMA/COSPAR Physician Survey. 61% did not feel additional pressure to justify their prescriptions based on patient requests; 89% said they had not changed their prescribing habits as a result of DTC ads.

⁷⁵ FDA Physician Survey (2002). 23% of those surveyed asked their physicians about treatment for a condition, while only 7% asked about a specific brand); Henry N. Young, Ph.D., et al., *Does Direct-to-Consumer Advertising*

Moreover, asking a physician about a drug does not guarantee a prescription. According to a General Accounting Office report, of the 61.1 million people (33 percent of adults) who had discussions with their physician as a result of a DTC advertisement in 2001, only about 8.5 million (5 percent of adults) actually received a prescription for the product, a small percentage of the total volume of prescriptions dispensed.⁷⁶

(DCTA) Promote Shared Decision Making? A Preliminary Study, (Sept. 22, 2003) (93.5% of respondents were more likely to seek additional information about advertised drugs than a prescription); NCL Patient Survey (half of patients who visited a physician after seeing an advertisement said they wanted to find out if the medication was right for them, 33% said they wanted to find the best way to treat their condition, and only 10% said they wanted the advertised drug); COSHAR Patient Survey (21% of patients wanted to discuss a specific drug with their physician after seeing a DTC advertisement, but only 11% planned to ask for a specific prescription).

⁷⁶ General Accounting Office, FDA Oversight of Direct-to-Consumer Advertising Has Limitations (Washington, DC: GAO, October 2002).