

American Academy of Orthopaedic Surgeons' 2010 Annual Meeting

Off-Label Device Use: When Clinical
Need Outpaces Regulatory Approval
The Legal Parameters of Off-Label Use

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**Off-Label Device Use: When Clinical Need
Outpaces Regulatory Approval
The Legal Parameters of Off-Label Use**

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**My disclosure is in the Final Program
Book and in the AAOS database.**

**I have no potential conflicts
with this presentation.**

Food and Drug Administration (FDA)

- The FDA regulates the marketing approval or clearance of all drugs, devices and biologics in the United States.
- Products may only be labeled, promoted and advertised by the product manufacturer for the uses that the FDA has approved or cleared.
- Product manufacturers may manufacture and sell legally approved or cleared products but may not promote such products for off-label use.

Food and Drug Administration (FDA)

- Off-label use is any use that is not specified in the labeling approved by the FDA.
- For cleared medical devices, off-label is any use that is not included in the cleared “indications of use”.
- Labeling is any written material from the manufacturer that accompanies, supplements or explains the product.

Food and Drug Administration (FDA)

- Off-label promotion involves conduct by a manufacturer or company to pro-actively sell or support commercial product sales for off-label use.
- FDA views promotion as including written labeling and sales materials, interactions with company sales representatives, company websites, distribution of journal articles, trade show presentations, physician education and training, and reimbursement advice.
- Certain medical education activities may be viewed as promotion where designed to induce commercial product sales.

Food and Drug Administration (FDA)

- Where such promotion is directed at unapproved or uncleared product use, a violation of FDA law may occur.
- Under current regulations and government enforcement theories, products that are promoted for off-label use are viewed as misbranded because the labeling (written materials) is false or misleading for its intended use approved by the FDA. 21 USC 502(a).

Food and Drug Administration (FDA)

- A product's use may be shown by the circumstances in which the manufacturer or company offer the product for a purpose for which it not labeled or advertised. 21 CFR 801.4.
- There are criminal and civil sanctions for knowing and intentional violations of the FDA labeling regulations through off-label promotion and liability may extend to companies, their employees and agents, hospitals and physicians.

Lawful Exchange of Scientific and Clinical Information.

- FDA regulations prohibit off-label promotion by a company to induce commercial sales of its products.
- The FDA regulations do not prohibit the exchange or dissemination of scientific information regarding a product's unapproved uses in specific circumstances.

Lawful Exchange of Scientific and Clinical Information.

- FDA regulations allow a manufacturer or company to respond to an unsolicited request for clinical and scientific data from a physician; provide information as part of medical education programs (CME); and, provide information contained in peer-reviewed scientific and medical journals(e.g. reprints).

Practice of Medicine

- The practice of medicine is regulated under individual state laws.
- FDA regulations and other applicable law recognize that physicians may prescribe or administer any legally marketed product for an off-label use within the practice of medicine laws of licensed jurisdiction according to a physician's medical judgment for the best interest of the patient.

Practice of Medicine

- If a physician determines to use a product for an indication not in the FDA approved or clear labeling, the physician must be well informed about the product and base the medical decision on credible scientific and clinical rationale.
- Physicians may make inquiry regarding clinical and scientific data to drug and device companies and their peers.

AAOS Position Statement. Issued 2009.

- The American Academy of Orthopaedic Surgeons (AAOS) believes that surgeons may prescribe or administer any legally marketed product for an off-label use within the authorized practice of medicine in the exercise of appropriate medical judgment for the best interest of the patient.
- If surgeons use a product for an indication not in the approved or cleared labeling, they have the responsibility to be well informed about the product, to its use on firm scientific and rationale and sound medical evidence, and to maintain awareness of the product's use and effects.

AAOS Position Statement.

Issued July, 2009.

- Surgeons should appropriately counsel patients about the benefits and risks of the proposed treatment, and alternative treatments that might be available. In the case of an adverse event with an off-label use, surgeons can submit a report to the manufacturer and/or the FDA.
- Orthopaedic surgeons should disclose all conflicts of interest to patients, institutions and medical associations and adhere to all state and federal laws and regulations.” www.aaos.org

Industry Marketing Practices, Conflicts of Interest and Anti-Kickback Issues.

- Certain company sales and marketing practices may undermine the free and credible exchange of scientific information on new products and technologies and negatively impact practice of medicine standards.
- Some of the practices may include inappropriate product comparisons, particularly between FDA approved and unapproved products, misleading claims regarding product safety and efficacy, the dissemination of biased clinical data, and the omission of adverse clinical data.

Industry Marketing Practices, Conflicts of Interest and Anti-Kickback Issues.

- Certain interactions between industry and physicians may create actual or potential conflicts of interest related to the promotion of off-label products, particularly where physicians may have compensated industry relationships.
- Some states mandate disclosure of financial conflict of interest to patients as part of the physician's informed consent obligations.

Industry Marketing Practices, Conflicts of Interest and Anti-Kickback Issues.

- The federal anti-kickback statute applies broadly to prohibit anything of value to induce the use or recommend use of products reimbursed by federal health care programs.
- The federal anti-kickback statute applies to compensated or funded interactions and activities between companies and surgeons and surgeons must take precautions to insure their compensated relationships are both ethical and legal.

Hospital Quality Assurance and Liability Interests.

- Hospitals have growing concerns regarding potential liability for unapproved product use and will likely seek to update policies on surgeon use of new technology and products, conflicts of interest, and company representatives in the operating room.
- Medtronic-Kyphoplasty Hospital investigation.

DOJ Prosecutions.

- DOJ has pursued device and drug companies for off-label promotion and increasingly is asserting liability against individuals such as company officers and attorneys, physicians who engage in off-label promotion activities and hospitals that submit claims for unapproved procedures to federal health care programs.

DOJ Prosecutions.

- Many investigations originate from False Claims Act *qui tam* whistleblower suits filed by company employees, competitors, physicians and other health care professionals and have resulted in criminal and civil fraud liability and exclusion from federal health care programs.
- Most cases to date have involved drug companies but device companies are now on the radar for off-label promotion.
- Lilly, \$1.4 billion, Pfizer, \$2.3 billion, Cephalon, \$400 million, Biovail, \$29 million.

DOJ Prosecutions.

- Stryker Medical Group and several sales manager employees have been indicted for alleged off-label promotion.
- Synthes has been indicted for alleged off-label promotion and several Synthes executives have entered guilty pleas related to off-label promotion.
- DOJ reports there are over 200 off-label promotion investigations ongoing that involve the device and drug industry.

Suggested Best Practices

- Be aware of current FDA product labeling information for products used in procedures.
- Identify new product and technology uses to appropriate hospital functions.
- Confirm reimbursement status for any off-label product or procedures from payor sources.
- Seek up-to-date clinical and scientific information for any off-label use that is not standard of care from reliable and credible sources, including from the company that manufactures the product.

Suggested Best Practices

- Follow state law practice of medicine standards and other applicable regulations regarding patient informed consent and disclosure of any actual and potential conflict of interest.
- Report adverse event information to the product manufacturer or FDA.
- Disclose compensated or funded industry relationships and collaborations when participating in medical education activities, clinical research activities, public health panels and advisory committees, and other appropriate forums.

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