

# “It’s Time to Make a Good Agency Better”:<sup>†</sup> The Food and Drug Administration Modernization Act of 1997 and the First Amendment

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## I. INTRODUCTION

Well concealed among the numerous changes brought by the Food and Drug Administration Modernization Act of 1997 (FDAMA)<sup>1</sup> to the Federal Food, Drug, and Cosmetics Act (FDCA)<sup>2</sup> is perhaps its most intriguing provision, a four-part mission statement that lists *promotion* of the public health before *protection* of the public health.<sup>3</sup> If heeded by the agency, this rendition of its mission can be the catalyst for real reform and modernization that will benefit all sides of the equation, the public, the industry, and the Food and Drug Administration (FDA), alike. The ultimate goal of this new mission for the twenty-first century should be to complete the transformation of FDA from paternalistic gatekeeper, as it has sometimes been viewed in the past, to facilitator of the public health and well-being. A number of provisions of FDAMA reflect this new image of the agency as a facilitator and promoter of public health.<sup>4</sup>

Indeed, one of the most controversial provisions of FDAMA — “Section 401, Dissemination of Information on New Uses”<sup>5</sup> — is consistent with this new image of the agency. This section of FDAMA compels FDA to open, at least partially, the gates

<sup>†</sup> 141 CONG. REC. E1157-04 (June 6, 1995), Introduction of H.R. 1742, The Food and Drug Administration Modernization Act of 1995 (statement of Rep. Ron Wyden (D-OR)).

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<sup>1</sup> The Food and Drug Administration Modernization Act of 1997 (FDAMA), Pub. L. No. 105-115, 111 Stat. 2296 (1997).

<sup>2</sup> Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified at 21 U.S.C. §§ 301 et seq. (1994)).

<sup>3</sup> (b) MISSION — The Administration shall —

(1) promote the public health by promptly and efficiently reviewing clinical research and taking appropriate action on the marketing of regulated products in a timely manner;

(2) with respect to such products, protect the public health by ensuring that —

(A) foods are safe, wholesome, sanitary, and properly labeled;

(B) human and veterinary drugs are safe and effective;

(C) there is reasonable assurance of the safety and effectiveness of devices intended for human use;

(D) cosmetics are safe and properly labeled; and

(E) public health and safety are protected from electronic product radiation;

(3) participate through appropriate processes with representatives of other countries to reduce the burden of regulation, harmonize regulatory requirements, and achieve appropriate reciprocal arrangements; and

(4) as determined to be appropriate by the Secretary, carry out paragraphs (1) through (3) in consultation with experts in science, medicine, and public health, and in cooperation with consumers, users, manufacturers, importers, packers, distributors, and retailers of regulated products.

FDAMA § 406 (FDCA § 903(b)). This statement was brought to the author’s attention by her colleague at Cephalon, Inc., attorney Scott Melville, in a memorandum dated Nov. 20, 1997.

<sup>4</sup> For example, the following FDAMA provisions require the agency to take positive steps to promote the public health, not just prevent harm: identify drugs that would benefit children, and reward manufacturers for conducting pediatric studies by extending market exclusivity for an additional six months (section 111); establish a data bank of information on clinical trials of drugs for serious or life-threatening diseases (section 113).

<sup>5</sup> FDAMA § 401(FDCA §§ 551-557).

that previously blocked manufacturers from disseminating information regarding off-label uses to medical professionals and consumers.<sup>6</sup> Those FDA information dissemination policies, which many manufacturers argue severely restrict them from disseminating truthful information about their products, ultimately led to a lawsuit on First Amendment grounds.

In 1994, the Washington Legal Foundation (WLF)<sup>7</sup> sued then-FDA Commissioner David A. Kessler in his official capacity, claiming that the agency's policy of prohibiting manufacturers from disseminating information about off-label uses violated the First Amendment rights of WLF members who wanted to receive and/or disseminate such information.<sup>8</sup> FDA failed various attempts to have the case dismissed on procedural grounds.<sup>9</sup> FDA also failed to convince the court to issue a protective order that would prevent WLF from deposing Kessler.<sup>10</sup> The WLF won every procedural argument, and recently enjoyed a sweeping victory on the merits as well.<sup>11</sup>

Using the First Amendment battle between WLF and FDA as a springboard, this article addresses the provisions of FDAMA that pertain to the dissemination of information on off-label uses. Part II of the article provides a review of the documents that were the basis for WLF's lawsuit, including FDA's 1992 draft policy statement and WLF's Citizen Petition in opposition to that policy. Part III provides a review of the procedural history of the lawsuit. Part IV examines how the new statutory provisions regarding the dissemination of enduring materials (scientific peer-reviewed journal articles and medical reference texts) would fare under a future First Amendment challenge. Part IV concludes that the new statutory provisions should be deemed restrictions of pure speech as opposed to commercial speech, but that the restrictions may survive strict scrutiny.

Part V argues that while FDAMA may survive a future First Amendment challenge, its implementation may remain tentative because Congress has delegated authority to FDA that is outside its area of expertise; under FDAMA, FDA has authority to decide whether or not manufacturers may skip the most onerous prerequisite to the dissemination of enduring materials that discuss off-label uses. FDAMA gives FDA the authority to deem that it is *economically* prohibitive for a manufacturer to conduct the additional clinical trials that otherwise would be necessary to compile a supplemental new drug application (SNDA) for the new use.

## II. FDA'S POLICY AND WLF'S PLEA

WLF objects to FDA policies, which it claims curtail pharmaceutical industry manufacturers' ability to disseminate truthful information about approved products.

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<sup>6</sup> The term "off-label use" refers to any use (including the disease indication, appropriate dose, regimen, or route of administration) of the product that does not appear in the product labeling and is, therefore, not approved by the agency. When FDA clears a product for marketing, it agrees that the product is safe and effective for its intended use based on the information and data provided to the agency in the sponsor's new drug application (NDA). Included in the application is the product labeling. Hence, when FDA approves the application it approves only the specific uses or indications that are described in the approved product labeling. *See* Citizen Petition Regarding the FDA's Policy on Promotion of Unapproved Uses of Approved Drugs and Devices; Request for Comments, 59 Fed. Reg. 59,820 (Nov. 18, 1994).

<sup>7</sup> The Washington Legal Foundation (WLF) is a nonprofit public interest law center that focuses on government regulations that affect business. *See* Washington Legal Found. v. Friedman, No. 94-1306, Compl. at 2 (as amended July 25, 1994).

<sup>8</sup> Washington Legal Found. v. Friedman, No. 94-1306, Compl. at 2-3 (as amended July 25, 1994).

<sup>9</sup> Washington Legal Found. v. Kessler, 880 F. Supp. 26, 48 (D.D.C. 1995).

<sup>10</sup> *In re* David A. Kessler, M.D., 100 F.3d 1015 (D.C. Cir. 1996).

<sup>11</sup> Washington Legal Found. v. Friedman, 13 F. Supp.2d 51 (D.D.C. 1998).

The policies to which WLF objects aim to curtail two main types of activities by manufacturers: first, the support (financial or otherwise) of scientific and educational activities that may involve discussions or demonstrations of off-label uses; and second, the dissemination of medical textbooks and medical journals that discuss off-label uses.<sup>12</sup>

### A. *Manufacturer-Supported Scientific and Educational Activities*

In 1992, FDA published a “Draft Policy Statement on Industry-Supported Scientific and Educational Activities.”<sup>13</sup> The notice explains that FDA has traditionally viewed scientific and educational activities sponsored by the companies that market the products involved as labeling, but the draft guideline clarifies that FDA does not wish to regulate these activities if they are truly independent from manufacturer influence and are non-promotional.<sup>14</sup>

FDA’s policy on industry support of scientific and educational activities resurfaced in final form just a few weeks before FDA filed its motion for summary judgment in the *WLF* case.<sup>15</sup> The policy was set forth in FDA’s Guidance for Industry: Industry-Supported Scientific and Educational Activities.<sup>16</sup> FDA received 152 comments on the draft version of this guidance document that originally was published in 1992, and sixty comments on the WLF Citizen Petition.<sup>17</sup> Despite the feedback, the core FDA policy remains the same. FDA aims to distinguish, and not subject to regulation, those industry-supported scientific and educational activities that are truly independent (i.e., not influenced by the sponsoring company).<sup>18</sup> In addressing the comments received, FDA firmly restated its conviction that a very broad definition of “labeling” brings industry-supported scientific and educational activities that involve the sponsoring company’s product well within FDA jurisdiction.<sup>19</sup>

FDA addressed and rejected comments that claimed that the FDA policy violated the First Amendment. FDA’s argument was basically two-fold: first, FDA claimed to be regulating drugs and devices, not speech; second, if deemed to be regulating speech, the agency suggested it was commercial speech that is entitled only to limited protection. FDA believed that the protection afforded commercial speech is not abridged by this regulatory policy.<sup>20</sup> FDA also rejected comments that suggest that medical devices should be exempt from the policy, and concluded that training sessions that are

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<sup>12</sup> See *Washington Legal Found. v. Friedman*, No. 94-1306, Compl. at 3 (as amended July 25, 1994).

<sup>13</sup> 57 Fed. Reg. 56,412 (Nov. 27, 1992).

<sup>14</sup> See *id.* at 56,413.

<sup>15</sup> WLF filed its motion for summary judgment on November 24, 1997. FDA followed with its motion for summary judgment on December 24, 1997. Finally, WLF filed a brief on January 26, 1998, in response to FDA’s motion for summary judgment. See *Washington Legal Foundation*, Press Release (Jan. 27, 1998). See also *Washington Legal Foundation*, *WLF Press Releases* (Jan. 27, 1998) (visited Sept. 25, 1998) <<http://www.wlf.org/pressrel.html>>.

<sup>16</sup> 62 Fed. Reg. 64,074 (Dec. 3, 1997).

<sup>17</sup> A description of WLF’s Citizen Petition was published in the *Federal Register*. See 59 Fed. Reg. at 59,820. See also 62 Fed. Reg. at 64,074.

<sup>18</sup> 62 Fed. Reg. at 64,075.

<sup>19</sup> *Id.* The notice previews many of the arguments made in FDA’s motion for summary judgment. FDA maintains that statements made or materials presented at industry-supported scientific or educational activities may indicate an intended use of the product. If that intended use is not described in the FDA-approved labeling, the product is misbranded. *Id.* For support of this broad definition of labeling, FDA cites the FDCA’s definition of labeling: “‘written, printed, or graphic’ material ‘accompanying’ a regulated product.” *Id.* at 64,076. For support of its broad interpretation of “accompanying” the product, FDA relies on *Kordel v. United States*, 335 U.S. 345 (1948). *Id.*

<sup>20</sup> *Id.* at 64,076.

provided or supported by the manufacturer are in violation of the law if they demonstrate or otherwise address unapproved uses.<sup>21</sup>

The main purpose of the final guidance document is to identify the line between those scientific or educational activities supported by industry that are truly independent (i.e., not subject to regulation as advertising or labeling) and those activities that are subject to influence by the sponsoring manufacturer (i.e., those activities that will be subject to FDA jurisdiction). In drawing that line, FDA recognized the significance of restricting participants' ability to express their ideas and data. To facilitate the distinction, FDA set forth twelve factors that would be considered in determining whether the activity is independent from influence of the manufacturer. FDA would consider the following twelve factors to determine whether the scientific or educational activity is independent:

- (1) Control: the agency will consider to what degree the provider (i.e., the entity that actually conducts the symposium), as opposed to the manufacturer, maintained control over program planning, content, and selection of speakers and moderators;
- (2) Disclosures: the agency will consider whether there was appropriate disclosure of the amount of company involvement in the program (e.g., funding or any fiduciary relationship between the company and the provider) and disclosure of the fact that off-label uses of products would be discussed;
- (3) Focus: the agency will consider the intent of the company (i.e., whether the program is focused on education and is free from commercial influence or bias), and the agency will consider whether the title of the program accurately reflects its contents;
- (4) Relationship between the provider and the supporting company: the agency will consider to what degree the relationship is likely to allow the company to exert influence over the program. The agency is not likely to look favorably on a situation where the provider is either owned by, or dependent on, the financial support of the sponsoring company;
- (5) Provider involvement in sales or marketing;
- (6) The program provider's history or track record: whether it has a propensity for conducting programs that are not independent, balanced, or objective;
- (7) Multiple presentations: presumably, multiple presentations would be viewed less favorably by FDA. In a footnote in the final policy, however, the agency recognizes that "repeat programs can serve public health interests"<sup>22</sup> and that such interests "sometimes actively encourage multiple presentations on selected urgent topics;"<sup>23</sup>
- (8) Audience selection: the agency seems to frown on mailing lists that are generated with an eye toward sales and marketing objectives;
- (9) Opportunities for discussion: the agency expects there to be ample opportunity for discussion and questions from the audience;
- (10) Dissemination: further dissemination of information about the company's product (other than in response to unsolicited requests) will not be viewed favorably by the agency;
- (11) Ancillary promotional activities: promotional exhibits or presentations should not take place "in the meeting room;"

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<sup>21</sup> *Id.* at 64,082. Indeed, FDA will not exempt even veterinary educational activities from this policy. *Id.*

<sup>22</sup> *Id.* at 64,098 n.5.

<sup>23</sup> *Id.*

(12) Complaints: the agency will, of course, consider any complaints noting attempts by the company to influence the program.<sup>24</sup>

### B. *Dissemination of Enduring Materials*

At the time it filed its complaint, WLF seemed to object to both the substance and the form of FDA policy regarding the dissemination of enduring materials (i.e., medical textbooks and journals) that discuss off-label uses. According to WLF, it was FDA policy that such distribution amounted to misbranding<sup>25</sup> of the product, therefore rendering the product subject to seizure.<sup>26</sup> Furthermore, WLF complained that this policy had never been stated formally by the agency; rather, the policy had been elucidated by FDA through warning letters and phone calls to manufacturers.<sup>27</sup> The WLF complaint cited a series of 1992 FDA letters and phone calls to a major pharmaceutical company.<sup>28</sup> These letters and phone calls indicate FDA's objections to the company distributing updated chapters of an oncology textbook and another oncology textbook in its entirety. Both of the textbooks discussed off-label uses of one of the company's products. In those letters, FDA indicated that future distribution of textbooks by the pharmaceutical company was prohibited if the textbooks discussed off-label uses of the company's products.<sup>29</sup>

Since WLF filed its suit, FDA has published additional guidance documents related to the dissemination of enduring materials that contain information about off-label uses. On October 8, 1996, FDA published two guidance documents: Guidance to Industry on Dissemination of Reprints of Certain Published, Original Data and Guidance for Industry-Funded Dissemination of Reference Texts.<sup>30</sup> These guidance documents, to the extent that they set forth FDA policy, severely restrict the dissemination by manufacturers of reprints or texts that contain information that may be inconsistent with FDA-approved labeling. Despite receiving "over fifty-seven comments" — including suggestions that manufacturers should be free to distribute any article about their product, or that a broad scope of materials (e.g., all peer-reviewed journal articles) should be deemed totally appropriate for distribution — FDA published the final guidance documents in essentially the same form as the draft versions.<sup>31</sup>

The Guidance on Dissemination of Reprints does not even address articles that discuss off-label uses. In fact, it essentially limits manufacturers to dissemination of peer-reviewed journal articles that discuss those adequate and well-controlled clinical trials that were relied upon by FDA in approving the product for the intended use.<sup>32</sup>

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<sup>24</sup> *Id.* at 64,097-99.

<sup>25</sup> The FDCA gives FDA the power to take enforcement action against products that are misbranded. Products are deemed misbranded if the labeling of the product does not "contain adequate directions for use." 21 U.S.C. § 352(f) (FDCA § 502(f)). The agency-approved product labeling (package insert) accompanies the product when it is distributed, but FDA's control over labeling does not stop there. Rather the agency abides by a long-standing regulatory scheme in which a product's labeling consists of all product information that is disseminated by the manufacturer. *See* Citizen Petition, *supra* note 6, 59 Fed. Reg. at 59,820. Hence, medical texts or journals that are distributed by the product manufacturer may be deemed "labeling" by FDA. *See id.* at 59,821. Accordingly, if those medical texts or journal articles describe off-label uses, FDA may deem them to be labeling that lacks adequate directions for use, rendering the product misbranded. *Id.*

<sup>26</sup> *See* Washington Legal Found. v. Friedman, No. 94-1306, Compl. at 11 (as amended July 25, 1994).

<sup>27</sup> *Id.* at 10-14.

<sup>28</sup> *Id.* at 11.

<sup>29</sup> *Id.*

<sup>30</sup> 61 Fed. Reg. 52,800 (Oct. 8, 1996).

<sup>31</sup> 60 Fed. Reg. 63,384 (Dec. 8, 1995).

<sup>32</sup> 61 Fed. Reg. at 52,801.

Furthermore, if the article contains any data, information, or analyses that are not consistent with the approved product labeling, the manufacturer is supposed to “prominently state the difference(s), with specificity, on the face of the reprint.”<sup>33</sup>

The Guidance for Industry-Funded Dissemination of Reference Texts does address manufacturer discussion of off-label uses. In this guidance document, FDA announces that it will, under certain circumstances, permit manufacturers to disseminate medical texts that discuss off-label uses. Essentially, for the manufacturer to distribute it permissibly, the text must have been prepared independently of the interests of the manufacturer.<sup>34</sup> The guidance document states that the text should not focus primarily on any particular product, nor should the primary focus of the text be an off-label use. In addition, the text must not have been written, edited, or significantly influenced by the product manufacturer. Moreover, to be appropriate for dissemination by the manufacturer, the text:

- should be generally available (i.e., available in book stores);
- should not be accompanied by any product information other than the FDA approved package insert; and
- a manufacturing company representative may not “refer to, or otherwise promote, in any manner or at any time, information in the reference text that is not consistent with the approved labeling for a product.”<sup>35</sup>

### C. WLF's Citizen Petition

FDA's policies, whether formal or informal, final or draft, prompted WLF to submit a Citizen's Petition to FDA. The petition objected to FDA policy on the dissemination of information that pertained to off-label uses on two main grounds: 1) that FDA had exceeded its authority to regulate labeling, and 2) that FDA policy violated the First Amendment rights of WLF's physician-members who wished to disseminate or receive the information.<sup>36</sup> In its Citizen's Petition, WLF requested that FDA withdraw its Draft Policy Statement on Industry-Supported Scientific and Educational Activities.<sup>37</sup> Furthermore, WLF asked FDA to acknowledge positively that companies were free to conduct such activities and to disseminate textbooks and journal articles that discuss off-label uses.<sup>38</sup>

FDA finally responded<sup>39</sup> to WLF's Citizen Petition by describing the petition and requesting comments from the public in a November 18, 1994 *Federal Register* no-

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<sup>33</sup> *Id.* To achieve the appropriate prominence of the statement of differences, the agency suggests permanently affixing a “sticker” that states the differences to the front of the reprint. *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* The addition of this clarification that company representatives may not “use reprints or reference texts as [tools] to promote unapproved uses of their products” represents the only comment-period suggestion to be followed by the agency. *Id.* This criterion appears only in the medical text guidance document; it is not needed in the peer-reviewed journal article reprint guidance document because of the restrictive nature of that document (i.e., articles may discuss only clinical trials that FDA relied on to approve the product). *Id.*

<sup>36</sup> See *Washington Legal Found. v. Friedman*, No. 94-1306, Compl. at 2-3 (as amended July 25, 1994).

<sup>37</sup> 57 Fed. Reg. 56,412 (Nov. 27, 1992).

<sup>38</sup> See *Food & Drug Admin., Dkts. Mgmt. Branch (HFA-305)*, WLF Citizen Petition, Dkt. No. 92N-0434 (Oct. 22, 1993).

<sup>39</sup> Apparently, the Citizen's Petition “fell through the cracks” at the agency. WLF cites 21 C.F.R. § 10.30 (1997), which provides that the Commissioner shall either approve, deny, or provide a tentative response to a Citizen Petition within 180 days. Because FDA had not responded to the WLF Citizen Petition, and more than 180 days had elapsed, WLF asked the court to deem the petition to have been denied. See *infra* notes 45, 62, and accompanying text.

tice.<sup>40</sup> In this notice, FDA explained that it was not trying to prohibit unapproved uses of drugs or discussions thereof, rather, that it has long recognized the importance of off-label use of approved products, and has allowed manufacturers several avenues for dissemination of information regarding off-label uses.<sup>41</sup> FDA pleaded its case for broad authority to restrict the flow of off-label use information, however, by underscoring the serious risks to the public health that can result from “unfettered promotion” of off-label uses.<sup>42</sup>

By the time the lawsuit was filed, WLF wanted no interference from FDA on dissemination of truthful information by manufacturers about their products.<sup>43</sup> To support its position, the WLF focused on the harm that may come to patients, especially in the fields of orthopedics and oncology (where off-label uses are often the standard of care), if the information does not reach the health care provider.<sup>44</sup> FDA, on the other hand, focused on the harm that may come to patients if off-label uses become prevalent before adequate and well-controlled clinical trials are conducted by manufacturers and assessed by FDA.<sup>45</sup>

FDA’s current policies struggle to strike a balance between these competing positions. Unsolicited information on unapproved uses of approved products can be disseminated by manufacturers only under very limited circumstances: through scientific or educational activities that are explicitly free from influence by the manufacturer; through dissemination of medical reference texts that are prepared independently without influence from the manufacturer; and, at least in the near future, through the distribution of reprints of peer-reviewed journal articles, provided that the numerous criteria set forth in section 401 of FDAMA are met.

### III. PROCEDURAL HISTORY OF WLF’S CASE AGAINST FDA

Since WLF filed its complaint on June 13, 1994, and amended it on July 25, 1994, FDA has fought unsuccessfully to have the case dismissed on various grounds, including: lack of standing; failure to reach finality, ripeness, or exhaustion; and lack of jurisdiction.<sup>46</sup> FDA also was unsuccessful in its attempt to get a protective order that would prevent WLF from deposing defendant Kessler.<sup>47</sup>

#### A. *The Complaint*

The Washington Legal Foundation followed up on its October 22, 1993 Citizen’s

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<sup>40</sup> 59 Fed. Reg. 59,820 (Nov. 18, 1994).

<sup>41</sup> See *id.* at 59,820. For example, FDA has long allowed manufacturers to disseminate information on off-label uses by supporting *independent*, nonpromotional educational symposia and by providing scientific information in response to *unsolicited* requests from health care professionals. *Id.*

<sup>42</sup> See *id.* at 59,824-25. For example, FDA reviewed the recent disastrous results of the postinfarction use of anti-arrhythmic agents. Although increased survival was completely unsubstantiated, it became common practice for physicians to treat post-myocardial-infarction (heart attack) patients with anti-arrhythmic agents that reduced the number of premature ventricular contractions (PVCs) of the heart. A high rate of PVCs is associated with sudden death during the year after the heart attack. The link, however, between fewer PVCs and increased survival was never made through adequate and well-controlled clinical trials. In fact, once an extensive controlled study of survival was undertaken, the results were just the opposite. The study showed a 2.5-fold increase in mortality for patients taking the anti-arrhythmic agents as compared to patients taking a placebo. *Id.*

<sup>43</sup> See *Washington Legal Found. v. Friedman*, No. 94-1306, Compl. at 1-2 (as amended July 25, 1994).

<sup>44</sup> See *id.* at 6.

<sup>45</sup> See 59 Fed. Reg. at 59,824-25.

<sup>46</sup> See *Washington Legal Found.*, 880 F. Supp. at 27.

<sup>47</sup> See, e.g., *Washington Legal Found. v. Friedman*, No. 94-1306 (July 23, 1996) (order denying motion for a protective order); *In re Kessler*, 100 F.3d at 1015.

Petition<sup>48</sup> to FDA by filing a complaint in the U.S. District Court for the District of Columbia on June 13, 1994.<sup>49</sup> The complaint alleged that FDA policy regarding the dissemination by manufacturers of information regarding off-label uses of their products is in violation of the First Amendment. In addition, the complaint asked the court to enjoin FDA from enforcing such a policy and to require the agency to adopt a new policy to "dissipate the chilling effect" of that existing policy.<sup>50</sup> The complaint laid a foundation for a successful defense against FDA's argument that the case should be dismissed because the plaintiffs lack standing.<sup>51</sup> In the complaint, WLF buttressed its theory by focusing on the alleged harm that FDA policy has caused in two areas of medicine: oncology<sup>52</sup> and orthopedics.<sup>53</sup> Then WLF pointed out that oncologists and orthopedic surgeons are represented among its members.<sup>54</sup> Furthermore, WLF cited regulations that require FDA to approve, deny, or provide a tentative response to a Citizen Petition within 180 days.<sup>55</sup> Because FDA had not responded to the WLF Citizen Petition, and more than 180 days had elapsed, WLF asked the court to deem the petition to have been denied.<sup>56</sup> Indeed, WLF contended that FDA did not respond until July 14, 1994, when it notified WLF that the agency intended to seek public comment on the petition. That response was "some 270 days after WLF filed its petition, and several weeks after WLF filed [the] lawsuit."<sup>57</sup> Finally, the complaint noted that WLF had proposed a remedy in its Citizen Petition. WLF proposed that FDA should adopt a new policy that would recognize the importance of off-label uses of approved drugs, and should state that the agency would not oppose manufacturers'

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<sup>48</sup> Citizen Petition, *supra* note 38. The Citizen's Petition asked FDA to "(1) withdraw its policies that inhibited manufacturer distribution of enduring materials and manufacturer support of scientific and educational activities; (2) formally withdraw its 'Draft Policy Statement on Industry-Supported Scientific and Educational Activities' dated November 19, 1992; and (3) adopt a policy that recognizes the important role played by off-label uses of approved drugs and medical devices in the proper administration of health care in this country." Washington Legal Found. v. Friedman, No. 94-1306, Compl. at 19 (as amended July 25, 1994).

<sup>49</sup> WLF alleges that FDA effectively denied the Citizen's Petition because the agency failed to respond. *Id.* at 20.

<sup>50</sup> *Id.* at 1.

<sup>51</sup> The complaint sets forth the following: that WLF physician-members have been injured because the FDA policy infringes on their ability to give and/or receive truthful information about off-label uses of drugs and devices; that their injury is traceable to FDA policy because the number of scientific and educational activities where they could exchange such information and the distribution of medical texts and journal articles by manufacturers have decreased since FDA adopted its policy; and that the injury is likely to be redressed by the relief sought because if FDA changes its policy it is likely that manufacturers will resume the practices of providing medical texts and journal articles to the physicians and resume supporting scientific and educational activities in which the physician-members will participate. *See id.* at 2, 6, 20-22.

<sup>52</sup> According to WLF, off-label use of approved drugs in the field of oncology is wide-spread, and oncologists believe that the dissemination of information about such uses is necessary in order for them to provide patients with the best possible care. As evidence of the negative impact of FDA policy on the oncologists, WLF points to two examples of warning letters issued by the agency. The warning letters inform a major pharmaceutical company that they are not to distribute chapters of one oncology textbook and that they are not to distribute another standard oncology textbook. *See id.* at 6, 7, 10-15.

<sup>53</sup> According to WLF, orthopedic surgeons are another group that are particularly interested in obtaining information about off-label uses of medical devices. As evidence of the negative impact of FDA policy on orthopedic surgeons, WLF focuses on pedicle fixation, a surgical technique that uses a medical device approved by FDA for some uses, but not for pedicle fixation. Manufacturers had provided support for training activities in this area. Again, WLF points to a series of FDA Warning Letters from August 1993. In the letters, FDA reprimanded manufacturers for providing samples of their devices, providing information about their product, and for allowing doctors, who were affiliated with the manufacturer, to participate in demonstrations of the devices at the pedicle fixation training sessions. *See id.* at 7, 8, 15-17.

<sup>54</sup> *See id.* at 6.

<sup>55</sup> 21 C.F.R. § 10.30.

<sup>56</sup> *See* Washington Legal Found. v. Friedman, No. 94-1306, Compl. at 20 (as amended July 25, 1994).

<sup>57</sup> *Washington Legal Found.*, 880 F. Supp. at 30.

dissemination of information about off-label uses of their products.<sup>58</sup> WLF concluded that FDA's denial of the Citizen Petition and accompanying "proposed remedial policy" rendered FDA in violation of the Administrative Procedures Act (APA),<sup>59</sup> thus, the court had jurisdiction to hold that the FDA policy is unlawful because it is unconstitutional.<sup>60</sup>

### B. *FDA's Motion to Dismiss Is Denied*

A brief review of Judge Lamberth's denial of the FDA motion to dismiss provides some insight into his approach to the case. FDA argued that the case should be dismissed because:

- the plaintiffs, physician-WLF members, lacked standing in that they were not directly harmed by FDA policy;
- the claim was not ripe; and
- the court lacked the jurisdiction to provide relief to the plaintiffs.

Each argument failed, and the motion to dismiss was denied accordingly.<sup>61</sup>

FDA's first argument was that WLF lacked standing. FDA claimed that its policy was directed toward manufacturers; thus, the harm that may have been suffered by WLF's physician-members is not "traceable" to FDA action.<sup>62</sup> The court bluntly rejected this argument,<sup>63</sup> and relied on the three-part *Hunt* test to demonstrate that the plaintiffs easily could show that they had representational standing to bring the lawsuit.<sup>64</sup>

The court next rejected FDA arguments that centered around the assertion that the case was premature. The agency argued that the case was premature because:

- FDA had not yet responded to WLF's Citizen Petition;
- it was not ripe for judicial review because the agency had not yet adopted a *final* policy regarding dissemination of information about off-label use; and
- intervention by the court at that stage would amount to judge-made policy.<sup>65</sup>

The court partially discredited the argument that FDA had not yet responded to WLF's

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<sup>58</sup> See *Washington Legal Found. v. Friedman*, No. 94-1306, Compl. at 23 (as amended July 25, 1994).

<sup>59</sup> Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551 et seq. (1994)). The APA provides for judicial review of agency action. The court may "hold unlawful and set aside agency action, findings, and conclusions found to be . . . (B) contrary to constitutional right, power, privilege, or immunity . . ." 5 U.S.C. § 706(2).

<sup>60</sup> See *Washington Legal Found. v. Friedman*, No. 94-1306, Compl. at 23 (as amended July 25, 1994).

<sup>61</sup> See *Washington Legal Found.*, 880 F. Supp. at 27.

<sup>62</sup> *Id.* at 31.

<sup>63</sup> The court characterizes FDA's lack of standing argument as "insubstantial," and remarks that it should not "detain the court long." *Id.*

<sup>64</sup> See *id.* The three-part *Hunt* test invoked by the court requires plaintiffs to satisfy the following criteria: members of the plaintiff-organization must themselves have standing to sue; the interests at stake must be "germane to the organization's purpose"; and "neither the claim nor the relief requested [may require] the participation of individual members in the law suit." The court found the second and third parts of the test obviously satisfied. The court stated that the first part of the test also was satisfied easily because the constitutional right to receive information is as valid as the right to give the information. See *id.* at 31-32 (*citing* *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) and *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976)).

<sup>65</sup> See *Washington Legal Found.*, 880 F. Supp. at 32.

Citizen Petition by pointing out that FDA was clearly at fault for the delay.<sup>66</sup> In general, the court described the FDA arguments as “attempts to invoke” the doctrine of exhaustion,<sup>67</sup> then quickly found that that doctrine did not help the agency’s case. Based on examination of the four primary purposes of exhaustion set forth in *Public Citizen Health Research Group v. Commissioner, Food & Drug Administration*,<sup>68</sup> the court concluded that the *WLF* case would not be dismissed on the basis of exhaustion.<sup>69</sup>

The court recognized that FDA’s strongest argument was that the case was not ripe for judicial review. The court balanced the “prudential concerns” of interference by the court against the potential harm resulting from alleged violations of the constitutional rights of the plaintiffs, and concluded that it was appropriate to review the case.<sup>70</sup> The final FDA argument—that the court lacked jurisdiction to prevent the agency from enforcing the law—was labeled “curious” by the court and summarily rejected.<sup>71</sup>

<sup>66</sup> See *id.* The court purported to accept FDA’s assertion at oral argument that the Citizen Petition just “slipped through the cracks” and that the failure to respond was inadvertent, but the court noted that in failing to respond to the Citizen’s Petition within 180 days — indeed, failing to respond until after the filing of the law suit — FDA violated its own regulations. Even though the court agreed with the agency that this innocent failure to respond to the Citizen’s Petition should not, by itself, constitute a denial of the petition “for the purposes of determining whether there has been final agency action,” the court expressed its disapproval of “less vigilant concern for the doctors’ First Amendment rights than this court would hope to see.” *Id.*

<sup>67</sup> See *id.* Even though FDA did not invoke explicitly the doctrine of exhaustion, which requires that a “party challenging the action of an administrative agency exhaust its remedies through the administrative process before turning to the courts,” the court indicates that FDA’s “filings and the cases [cited] make it clear that this is the thrust of [the] argument.” *Id.*

<sup>68</sup> 740 F.2d 21 (D.C. Cir. 1984).

<sup>69</sup> See *Washington Legal Found.*, 880 F. Supp. at 33. The following are the four purposes of the doctrine of exhaustion:

- (1) “It ensures that persons do not flout legally established administrative processes.” The court relied on FDA’s estimate that it would take over two years to address concerns outlined in *WLF*’s Citizen Petition to justify judicial review.
- (2) “It protects agency decisionmaking.” The court indicated that the autonomy of agency decisionmaking was not at issue because *WLF* alleged that the FDA policy already had been adopted.
- (3) “It aids judicial review by permitting factual development of issues relevant to the dispute.” The court found that the benefit of any additional information that may be gained was far outweighed by the seriousness of *WLF*’s allegations.
- (4) “It serves judicial economy by avoiding repetitious administrative and judicial fact-finding and by resolving some claims without judicial intervention.”

The court found it doubtful that *WLF* would be able to get relief in an administrative proceeding, given that, at least according to *WLF*, the agency already was enforcing its policy. *Id.*

<sup>70</sup> *Id.* Ripeness is a doctrine that determines when review by a court is appropriate. It distinguishes cases where plaintiff’s injury is speculative and may never occur from cases where plaintiff’s injury has occurred. The latter cases are ripe; therefore, review by the court is appropriate. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES, § 2.6.1, 93 (4th ed. 1997) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). The court relied on the three “ripeness factors” set forth in *Ciba-Geigy Corp. v. U.S. Environmental Protection Agency*, 801 F.2d 430, 434 (D.C. Cir. 1986). These factors are: 1) “whether the issue presented is purely legal”: the court indicated that the issues to be decided — “whether the FDA adopted a de facto policy concerning off-label usage” and “whether that policy is unconstitutional” — are primarily legal issues; 2) “whether consideration of that issue would benefit from a more concrete setting”: the court was not persuaded that any significant benefit would result from waiting for FDA to formalize its policy, and determined that any benefit from waiting would be outweighed by the seriousness of *WLF*’s allegations of First Amendment violations; and 3) “whether the agency’s action is ‘sufficiently final’”: the court focused on the effect of FDA action rather than the agency’s own characterization of it, and concluded that the policy is sufficiently final because the complaint at least raises the question that the agency “has been enforcing a de facto policy concerning manufacturer-supported distribution of off-label usage information.” The court indicated that if the agency’s characterization always prevailed, an agency could preclude judicial review of any of its actions by simply failing to declare them to be final, and then enforce them by threatening companies with enforcement actions. *Washington Legal Found.*, 880 F. Supp. at 33.

<sup>71</sup> *Id.* at 36. The court cites *Abbott*, 387 U.S. at 140-41 (1967) to state the rule that courts have the power to review final agency action and to provide relief if that action is “unlawful.” *Id.*

C. *In Re David A. Kessler, M.D.*<sup>72</sup>

Another important battle in the procedural history of this case was fought over the right to depose defendant David Kessler, M.D., then FDA Commissioner. Although ultimately unsuccessful in persuading the court with its legal arguments, FDA did delay the deposition until it essentially was moot (Dr. Kessler resigned on March 1, 1997).<sup>73</sup> WLF believes that the details of current FDA practices regarding the dissemination of information on off-label uses mostly are attributable to Dr. Kessler.<sup>74</sup> Accordingly, WLF sought to depose Kessler, but FDA refused.<sup>75</sup> FDA instead produced other high-level employees<sup>76</sup> and moved for a protective order that would prevent WLF from deposing Kessler. Relying primarily on *Simplex Time Recorder Company v. Secretary of Labor*,<sup>77</sup> FDA argued that a high-level government official should not be required to be deposed absent “extraordinary circumstances.”<sup>78</sup> Unpersuaded, the court ruled in WLF’s favor and denied the motion for a protective order.<sup>79</sup> FDA then filed a motion requesting that the court reconsider; when that request was denied, FDA petitioned the U.S. Court of Appeals for the D.C. Circuit to intervene with an emergency writ of *mandamus* ordering the District Court to vacate its order authorizing the deposition and to enter the protective order.<sup>80</sup>

FDA argued to the court that immediate relief was required, otherwise Kessler would be subject to a contempt order, which would be “constitutionally unseemly.”<sup>81</sup> The D.C. Circuit declined to follow the Eleventh, Fifth, and Second Circuits in this reasoning, noting that the cases<sup>82</sup> where courts had adopted this reasoning had relied on *United States v. Nixon*,<sup>83</sup> which held that then-President Nixon was entitled to appeal a discovery order, rather than violate it and potentially be held in contempt.<sup>84</sup> The D.C. Circuit noted that the decisions of the other circuits had failed to consider sufficiently the difference between the president and other officers in the executive

<sup>72</sup> 100 F.3d 1015 (D.C. Cir. 1997).

<sup>73</sup> *Washington Legal Found. v. Friedman*, No. 94-1306 (notice of Dr. Kessler’s departure from office; Michael A. Friedman, M.D., Acting Commissioner, substituted (Mar. 3, 1997)).

<sup>74</sup> See Richard A. Samp, *FDA Faces Court-Ordered Limits to Its Power*, MED. MKT. & MEDIA, Sept. 1, 1997, at 50, available in WESTLAW, 1997 WL 9909883 (noting that the FDA “crackdown” on dissemination of information on off-label uses began around the time that Kessler was appointed commissioner, and that Kessler played a role in formulating the current policies).

<sup>75</sup> See *id.*

<sup>76</sup> WLF did depose at least the following four FDA employees: William K. Hubbard, Associate Commissioner for Policy Coordination; Janet Lucille Rose, Former Director, Division of Drug Marketing and Advertising, Center for Drug Evaluation and Research (CDER); Byron L. Tart, Director, Promotion and Advertising Policy Staff, Office of Compliance, Center for Devices and Radiological Health (CDRH); and Robert Temple, M.D., Associate Director for Medical Policy, CDER. See *Washington Legal Found. v. Friedman*, No. 94-1306, Reply Memo. in Support of Defendants’ Motion for a Protective Order, at 6-7 (May 13, 1996).

<sup>77</sup> 766 F.2d 575, 586 (D.C. Cir. 1985) (holding that “high-level government officials” should not be called as witnesses absent “extraordinary circumstances”).

<sup>78</sup> *Washington Legal Found. v. Friedman*, No. 94-1306, Reply Memo. in Support of Defendants’ Motion for a Protective Order, at 1 (May 13, 1996).

<sup>79</sup> See *Washington Legal Found. v. Friedman*, No. 94-1306, Order Denying Motion for a Protective Order (July 23, 1996).

<sup>80</sup> *In re Kessler*, 100 F.3d at 1016.

<sup>81</sup> *Id.* at 1016.

<sup>82</sup> The court cites, for example, *In re United States*, 985 F.2d 510 (11th Cir.) (per curiam), cert. denied, 510 U.S. 989 (1993); *United States v. Winner*, 641 F.2d 285 (10th Cir. 1981); *In re F.D.I.C.*, 58 F.3d 1055 (5th Cir. 1995); *In re Attorney General of the United States*, 596 F.2d 58 (2d Cir.), cert. denied, 444 U.S. 903 (1979); *In re Kessler*, 100 F.3d at 1017.

<sup>83</sup> 418 U.S. 683 (1974).

<sup>84</sup> *In re Kessler*, 100 F.3d at 1017 (citing *Nixon*, 418 U.S. at 691-92).

branch, and therefore, the court refused to intervene.<sup>85</sup>

Ultimately, on July 30, 1998 Judge Royce C. Lamberth handed down a decision in this case that was wholly in favor of the WLF.<sup>86</sup> Judge Lamberth's decision held that the promotional activity in question (i.e., the manufacturers' dissemination of information on off-label uses through the distribution of scientific journal article reprints and medical reference texts, and through the sponsoring of educational seminars) is speech, not conduct;<sup>87</sup> does not lose all First Amendment protection because of FDA's broad statutory authority to regulate the pharmaceutical industry;<sup>88</sup> and is commercial — not pure — speech.<sup>89</sup> Furthermore, Judge Lamberth held that the FDA policies restricting the dissemination of information of off-label uses (i.e., the Final Guidance on Industry-Supported Scientific and Educational Activities,<sup>90</sup> the Guidance to Industry on Dissemination of Reprints of Certain Published, Original Data,<sup>91</sup> and the Guidance for Industry-Funded Dissemination of Reference Texts<sup>92</sup>) violate the First Amendment.<sup>93</sup> Accordingly, the court granted WLF's request and enjoined FDA from enforcing the guidance documents at issue.<sup>94</sup>

#### IV. FDAMA AND THE FIRST AMENDMENT

"All ideas having even the slightest redeeming social importance . . . have the full protection of the guarantees [of the First Amendment]."<sup>95</sup> With this admonition as a backdrop, the remainder of this article focuses on FDAMA. Specifically, it focuses on section 401, Dissemination of Information on New Uses,<sup>96</sup> which does allow a manufacturer to disseminate information regarding off-label uses. This dissemination, however, is subject to strict limitations regarding what material can be distributed to whom.<sup>97</sup> FDAMA also requires that the manufacturer have an application for the drug (i.e., a new drug application (NDA)) or device "in effect" at FDA.<sup>98</sup> FDAMA further re-

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<sup>85</sup> See *id.* at 1017. The court determined that Kessler's "rank" as FDA Commissioner was Level IV — the "journeyman of those appointed by the President and confirmed by the Senate." *Id.* Furthermore, the court said that there were at least 350 Level IV employees in the Administration. Apparently, at oral argument FDA could not come up with any persuasive criteria as to where to "draw the line" regarding who was entitled to the protection sought; counsel said that wherever the line was, Kessler, as head of a powerful agency, was definitely on the "important side" of it. *Id.* at 1017, 1018. Accordingly, the court denied the petition. See *id.* at 1017.

<sup>86</sup> See *Washington Legal Found.*, 13 F. Supp.2d at 51, 54.

<sup>87</sup> *Id.* at 59.

<sup>88</sup> *Id.* at 62.

<sup>89</sup> *Id.* at 65.

<sup>90</sup> 62 Fed. Reg. 64,704 (Dec. 3, 1997).

<sup>91</sup> 61 Fed. Reg. 52,800 (Oct. 8, 1996).

<sup>92</sup> 61 Fed. Reg. 52,800 (Oct. 8, 1996).

<sup>93</sup> See *Washington Legal Found.*, 13 F. Supp.2d at 72-74 (applying *Central Hudson* test and finding that the policies fail the test because they are "more extensive than necessary"). See *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564-65 (1980).

<sup>94</sup> See *Washington Legal Found.*, 13 F. Supp.2d at 74-75.

<sup>95</sup> *Glickman v. Wileman Bros.*, 117 S. Ct. 2130, 2143 (Souter, J., dissenting) (1997) (*citing* *Roth v. United States*, 354 U.S. 476, 484 (1957)).

<sup>96</sup> FDAMA § 401 (becoming FDCA §§ 551-57).

<sup>97</sup> *Id.* A reprint of a peer-reviewed journal article about a scientifically sound clinical investigation, or an independent reference publication about a scientifically sound clinical investigation may be distributed. FDAMA § 401 (FDCA § 552(a)(1)). The specific criteria of independence that a reference publication must meet are also set forth in FDAMA and are similar to the criteria set forth in the October 1996 Guidance Document. FDAMA § 401 (FDCA § 552(b)). See also *supra* notes 34, 35, and accompanying text. These materials may be distributed to a health care practitioner, a pharmacy benefit manager, a health insurance issuer, a group health plan, or a government agency. FDAMA § 401 (FDCA § 551(a)).

<sup>98</sup> FDAMA § 401 (FDCA § 551(b)(1)(A)).

stricts dissemination by imposing several additional conditions that the manufacturer must meet. The additional conditions are designed to ensure full disclosure,<sup>99</sup> fair balance,<sup>100</sup> and some degree of motivation for the manufacturer to pursue FDA approval of the new use of the product.<sup>101</sup>

Despite all of these restrictions, the new statutory provisions represent a significant change from the policy set forth in the previously published guidance documents.<sup>102</sup> With regard to dissemination of peer-reviewed journal articles, the new rules will be less restrictive; manufacturers will be allowed (at least under certain limited circumstances) to disseminate articles that discuss off-label uses. Under the guidance document, such articles could discuss only the adequate and well-controlled clinical trials that FDA relied on to approve the drug in the first place.<sup>103</sup> With regard to reference texts, the indicia of independence, which allow for dissemination by the manufacturer, remain essentially the same as they were under the guidance document.<sup>104</sup>

This new approach is at once less restrictive and more restrictive than it was under the guidance documents. The new statutory provisions include two additional conditions that further restrict a manufacturer's ability to disseminate information on off-label uses. First, in order to disseminate any information on off-label uses (whether in the form of peer-reviewed journal articles or reference texts) the manufacturer must first have submitted, or have submitted a plan to submit, a supplemental new drug application (SNDA)<sup>105</sup> for FDA approval of the new indication.<sup>106</sup> Second, under the

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<sup>99</sup> For example, the manufacturer must prominently display a statement with information, including that the drug or device has not been approved by FDA for the new use; if applicable, that the information is being disseminated at the expense of the manufacturer; and any other involvement by the manufacturer in the dissemination, such as the name of any author of the information who is also an employee or consultant of the manufacturer. FDAMA § 401 (FDCA § 551(b)(6)(A)).

<sup>100</sup> For example, the manufacturer must include with the disseminated information a copy of the official labeling of the drug or device, and must identify other products that already have been approved by FDA for the new use. FDAMA § 401 (FDCA § 551(b)(6)(A)(iv)). Furthermore, the manufacturer must submit the information to FDA sixty days in advance of dissemination. If FDA determines that the information is not balanced, it may require the manufacturer to disseminate additional information pertaining to the safety and effectiveness of the new use. FDCA § 551(c). Alternatively, FDA may require that the manufacturer include an FDA-prepared statement regarding the safety and effectiveness of the new use. FDCA § 551(c)(2).

<sup>101</sup> Before disseminating enduring materials that discuss off-label uses, the manufacturer must satisfy the following provision: Requirement Regarding Submission of Supplemental Application (SNDA); Exemption from Requirement. FDAMA § 401 (FDCA § 554). This provision of FDAMA requires the manufacturer to submit an SNDA for the new use (section 554(a)), submit a certification that it plans to submit an SNDA within six months if clinical studies are underway, or within thirty-six months if clinical studies are planned (section 554(b) and (c)), or obtain an exemption from the SNDA requirement (section 554(d)). *Id.*

<sup>102</sup> Guidance to Industry on Dissemination of Reprints of Certain Published, Original Data and Guidance for Industry-Funded Dissemination of Reference Texts, 61 Fed. Reg. at 52,800.

<sup>103</sup> *See id.* at 52,801.

<sup>104</sup> *See id.* The criteria that allow a manufacturer to disseminate a reference text that discusses an off-label use remain essentially the same as were under the guidance document:

- it must not have been written, edited, excerpted, or published specifically for or at the request of the manufacturer;
- it must not have been edited or significantly influenced by the manufacturer;
- it must be generally available in book stores;
- it must not focus on any particular drug or device of the manufacturer or have as its primary focus an off-label use;
- it must not be false or misleading.

FDCA § 552(b).

<sup>105</sup> For a company to describe an additional use or indication in its official product labeling, it must conduct adequate and well-controlled clinical trials that demonstrate the safety and effectiveness of the product for that indication. The results must be compiled in a supplemental new drug application (SNDA) and must be submitted to and approved by the agency. *See* 21 C.F.R. § 314.70. *See also supra* note 101 and accompanying text.

<sup>106</sup> Thus, while manufacturers have been granted the right to disseminate peer-reviewed journal articles

new law, sixty days before disseminating any information on a new use, a manufacturer is required to submit to the agency the information that will be disseminated, along with any clinical trial information that the manufacturer has regarding the safety and effectiveness of the product in the new indication.<sup>107</sup>

It is easy to envision the sixty-day presubmission requirement and the SNDA requirement prompting a future First Amendment challenge. As was the case in *Washington Legal Foundation*, to resolve a future First Amendment challenge, a court must first decide whether the provisions regulate conduct or speech. If the court concludes that the provisions regulate speech, it must then decide if the speech (enduring materials) is entitled to full protection under the First Amendment, or the somewhat less comprehensive protection afforded to “commercial speech.” Judge Lamberth’s conclusion in *Washington Legal Foundation*<sup>108</sup> notwithstanding, this section argues that the provisions of FDAMA should be deemed restrictions of pure speech, but that FDA, nevertheless, may prevail under the strict constitutional scrutiny applied to government restrictions of pure speech.

### A. *Do the New Statutory Provisions Permissibly Regulate Conduct, or Restrict Speech?*

Under the FDCA,<sup>109</sup> FDA has broad authority to regulate many aspects of the distribution of drugs and devices in interstate commerce. At least in the WLF case, FDA’s core argument — that FDA authority includes the authority to regulate the dissemination of enduring materials that discuss information on off-label uses — is that it is protecting the public against the misbranding of a drug or device. A drug or device is misbranded if its “labeling” does not include “adequate directions for use,”<sup>110</sup> and a misbranded drug that is introduced into interstate commerce is subject to seizure by FDA.<sup>111</sup> Thus, any manufacturer who wants to market a drug or device must first obtain clearance from FDA. To do so, the manufacturer must demonstrate that the drug or device is safe and effective for its intended uses, or — in the case of a device — that it is “substantially equivalent” to another device for which a demonstration of safety and effectiveness has been deemed not to be required.<sup>112</sup> The product labeling, or package insert, also must be approved by FDA, and must describe the uses for which the manufacturer obtained approval from FDA (i.e., those uses for which the manufacturer already has proved to FDA that the product is safe and effective).<sup>113</sup> According to FDA, the actual intended use of a drug or device has to be gleaned by careful attention to the “circumstances surrounding the distribution of the article” including labeling claims, advertisements, or oral or written statements made by the

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that discuss off-label uses, under the new statutory provisions, the restrictions on manufacturers’ ability to disseminate *reference texts* that discuss off-label use actually have been tightened. The SNDA and 60-day preclearance requirements apply to both. Alternatively, the new statutory provisions indicate that, if appropriate, the manufacturer may submit an application for an exemption from the requirement of submitting an SNDA or a plan to submit an SNDA. Such an exemption may be granted if it would be economically prohibitive or unethical to conduct the studies necessary for the SNDA. FDAMA § 401 (FDCA § 554 (d)). *See also* Dissemination of Information on Unapproved/New Uses for Marketed Drugs, Biologics, and Devices, Proposed Rule, 63 Fed. Reg. 31,143, 31,148 (1998).

<sup>107</sup> *Id.* (FDCA § 551(b)(4)). *See also* Proposed Rule, 63 Fed. Reg. at 31,148.

<sup>108</sup> 13 F. Supp. 2d at 51. *See also supra* notes 86 through 94 and accompanying text

<sup>109</sup> 21 U.S.C. § 331 (FDCA § 301).

<sup>110</sup> *Id.* § 352(f)(1) (FDCA § 502(f)(1)).

<sup>111</sup> *Id.* § 334(a)(1) (FDCA § 304(a)(1)).

<sup>112</sup> *See* 62 Fed. Reg. at 64,075 (citing 21 U.S.C. §§ 355(a); 360(c), (f), (i), (k); 360b(a); 360e(a)).

<sup>113</sup> *Id.*

manufacturer or made by other persons on behalf of the manufacturer.<sup>114</sup>

With this broad regulatory authority foundation laid to defend against a First Amendment challenge, FDA is likely to argue first, as it did unsuccessfully in *Washington Legal Foundation*,<sup>115</sup> that it is regulating conduct with only a permissible and incidental effect on speech.<sup>116</sup> At the other end of the spectrum, the prospective plaintiff is likely to argue, as WLF did, that FDA is restricting fully protected scientific speech.<sup>117</sup> In the *WLF* case, in a failed attempt to avoid First Amendment entanglements, FDA relied primarily on *Ohralik v. Ohio State Bar Association*<sup>118</sup> and *SEC v. Wall Street Publishing Institute*,<sup>119</sup> and maintained that it was regulating conduct appropriately with only an incidental and permissible impact on speech.<sup>120</sup> FDA asserted that the “[FDA’s] strong interest in regulating certain kinds of activity justify restrictions and policies that may have an incidental effect on speech.”<sup>121</sup>

In *Ohralik*, the Supreme Court held that the First Amendment did not prohibit the state (or the bar association acting on behalf of the state) from disciplining a lawyer for in-person client solicitation for “pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.”<sup>122</sup> In *Wall Street*, the U.S. Court of Appeals for the D.C. Circuit reversed the District Court’s denial of an injunction that would require a magazine to disclose payment that it received in exchange for publishing favorable articles that describe a particular company’s securities.<sup>123</sup> In doing so, the court recognized that in certain industries, the federal government’s broad authority to regulate activity is bound to impact on speech.<sup>124</sup> Furthermore, the court stated that the Constitution does not require the courts to intervene every time those broad regulatory schemes happen to “impinge upon communications.”<sup>125</sup>

At first glance, both of the cases seem to lend support to FDA’s argument that restrictions on the dissemination of off-label use information do not necessarily implicate analysis under the protections of the First Amendment.<sup>126</sup> On closer inspection, however, the cases are readily distinguishable, such that FDA’s reliance on *Ohralik* and *Wall Street* is awkward at best. Restrictions on the dissemination of scientifically sound information when it includes discussions of off-label uses of approved products is more like regulation of speech with an incidental effect on conduct, rather than the alternative. In *Ohralik*, the Court carefully points out that the Ohio Code of Professional Responsibility Disciplinary Rule at issue does not prohibit a lawyer from com-

<sup>114</sup> See *id.*

<sup>115</sup> 13 F. Supp.2d at 51, 59 (holding that dissemination of information regarding off-label uses in the form of reprints of scientific journal articles or reference texts is speech, not conduct).

<sup>116</sup> *Washington Legal Found. v. Friedman*, No. 94-1306, Mem. in Opp. to Plaintiff’s Motion for Summary Judgment and in Supp. of Defendant’s Cross-Motion for Summary Judgment, at 18 (Dec. 24, 1997).

<sup>117</sup> *Washington Legal Found. v. Friedman*, No. 94-1306, Mem. in Supp. of Plaintiff’s Motion for Summary Judgment, at 22 (Nov. 24, 1997) (*citing* *Keyesian v. Board of Regents*, 385 U.S. 476, 484 (1957)).

<sup>118</sup> 436 U.S. 447, *reh’g denied*, 439 U.S. 883 (1978).

<sup>119</sup> 851 F.2d 365 (D.C. Cir. 1988), *cert denied*, 489 U.S. 1066 (1989).

<sup>120</sup> See *Washington Legal Found. v. Friedman*, No. 94-1306, Mem. in Opp. to Plaintiff’s Motion for Summary Judgment and in Supp. of Defendant’s Cross-Motion for Summary Judgment, at 18-21 (Dec. 24, 1997).

<sup>121</sup> *Washington Legal Found. v. Friedman*, No. 94-1306, Mem. in Opp. to Plaintiff’s Motion for Summary Judgment and in Supp. of Defendant’s Cross-Motion for Summary Judgment, at 18 (Dec. 24, 1997) (*citing* *Wall Street*, 851 F.2d at 373).

<sup>122</sup> 436 U.S. 447, 449 (1978).

<sup>123</sup> 851 F.2d at 366.

<sup>124</sup> *Id.* at 373.

<sup>125</sup> *Id.*

<sup>126</sup> *Washington Legal Found. v. Friedman*, No. 94-1306, Mem. in Opp. to Plaintiff’s Motion for Summary Judgment and in Supp. of Defendant’s Cross-Motion for Summary Judgment, at 18 (Dec. 24, 1997) (*citing* *Home Box Office v. FCC*, 567 F.2d 9, 46 (D.C. Cir. 1977), *cert. denied*, 489 U.S. 1066 (1989)).

municating legal advice (or anything else); it merely prohibits the lawyer from accepting employment (i.e., “pecuniary gain”) in exchange for that advice.<sup>127</sup> The situation is just the opposite for the pharmaceutical industry manufacturer under the provisions of FDAMA. Under FDAMA, absent compliance with onerous prerequisites, the manufacturer is prohibited from communicating the off-label use information, but they are not prohibited from pecuniary gain when a physician prescribes the drug for the off-label use. Thus, in *Ohralik*, it is the conduct not the speech that is actually prohibited, but in the FDA regulatory regime it is *the speech, but not the conduct* that is prohibited.<sup>128</sup>

*Wall Street* is also distinguishable. In *Wall Street*, the Securities and Exchange Commission simply asked for disclosure of any consideration that the publisher received from the company for running stories that invariably reported favorably on the company’s finances. Conversely, under the new statutory provisions of FDAMA, disclosure<sup>129</sup> of the fact that the distributed enduring materials discuss unapproved uses is only the first (and arguably the least burdensome) requirement.<sup>130</sup>

Thus, a future challenge to the new statutory provisions is likely to be analyzed as a government restriction on protected speech. The more interesting question then will be to determine if it is fully protected pure speech, somewhat less protected commercial speech, or something in between.

### B. *Are Enduring Materials “Pure Speech” or “Commercial Speech”?*

In the context of a First Amendment challenge to the new statutory provisions, the court will have to determine whether enduring materials (i.e., peer-reviewed journal articles and medical texts) that discuss off-label uses<sup>131</sup> constitute pure speech or commercial speech. Whether the restrictions at issue are deemed to impinge on “speech” or “commercial speech” will determine the level of scrutiny applied by a court in a First Amendment challenge. The Court will subject content-based<sup>132</sup> restrictions on speech to strict scrutiny.<sup>133</sup> To decide if the provisions of FDAMA are content-based restrictions, the court will have to determine if the speech is being regulated because of the government’s disagreement with the message.<sup>134</sup> The restrictions of FDAMA are based entirely on the message (i.e., the discussion of the off-label use) in a particular journal article or reference text. As WLF argued, “[T]he restrictions are not con-

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<sup>127</sup> 436 U.S. at 459.

<sup>128</sup> *Accord Washington Legal Found.*, 13 F. Supp.2d at 59 (noting that the relevant *conduct* is the prescribing of drugs off-label by physicians, and that the dissemination of information aimed at encouraging that conduct is *speech*).

<sup>129</sup> Indeed, one commentator posits (and WLF agrees) that disclosure alone should cure FDA concerns over the dissemination of off-label use information. See Edmund Polubinski III, Note, *Closing the Channels of Communication: A First Amendment Analysis of the FDA’s Policy on Manufacturer’s Promotion of Off-Label Use*, 83 VA. L. REV. 991 (1997).

<sup>130</sup> In addition, before disseminating enduring materials that discuss off-label use, the manufacturer must comply with at least two other more onerous requirements, namely, the 60-day predissemination submission to FDA and the SNDA requirements. See *supra* notes 99, 101, and accompanying text.

<sup>131</sup> The current policy is that manufactures *may not* disseminate this material unless it is in response to an unsolicited request. The current guidelines allow manufacturers to distribute only peer-reviewed journal articles that may be inconsistent with the approved product labeling, but the principal subject of the article must be an original study on which FDA based its approval of the drug (i.e., the adequate and well-controlled clinical studies that got the drug approved for its intended use). For medical texts, manufacturers may distribute them only if the text does not focus significantly on an unapproved use. See 61 Fed. Reg. at 52,801.

<sup>132</sup> See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988).

<sup>133</sup> *Id.*

<sup>134</sup> See *American Library Ass’n v. Reno*, 33 F.3d 78, 84 (D.C. Cir. 1994).

tent neutral in any meaningful sense.”<sup>135</sup> If the restrictions are deemed content-based, under strict scrutiny the government must show that the restriction is “necessary to serve a compelling [government] interest and that it is narrowly drawn to achieve that end.”<sup>136</sup>

The Court will subject restrictions on commercial speech to a slightly less stringent, “intermediate” scrutiny review known as the *Central Hudson* test.<sup>137</sup> If, as a threshold matter, the commercial speech concerns lawful activity and is not misleading, then to survive this level of intermediate scrutiny the government must show three things: a “substantial interest in support of the regulation”; that the restriction “directly and materially advances that interest”; and that the restriction is “narrowly drawn.”<sup>138</sup>

For the last twenty years, the Supreme Court has recognized that even commercial speech enjoys protection under the First Amendment.<sup>139</sup> The Court first recognized commercial speech protection under the First Amendment in 1975, in *Bigelow v. Virginia*.<sup>140</sup> At issue in that case was a state law that prohibited the sale or circulation of any publication that advertised abortions. The Court struck down the Virginia statute and recognized at least some First Amendment protection for advertisements, but declined to say to what extent the First Amendment would prohibit laws that regulate commercial speech regarding conduct that the government regulates.<sup>141</sup>

The next year in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>142</sup> the Court explicitly held that even commercial speech that “does no more than propose a commercial transaction” is protected under the First Amendment.<sup>143</sup> The Court struck down a law that deemed it unprofessional conduct for a pharmacist to advertise the price of a prescription drug, and noted that society has “a strong interest in the free flow of commercial information.”<sup>144</sup> Worthy of note is the identity of the plaintiffs in *Virginia Board of Pharmacy*; they were consumers who, like some of the WLF members, invoked their right to receive information under the First Amendment.<sup>145</sup>

The next milestone in Supreme Court commercial speech jurisprudence came in 1980 when the Court developed the *Central Hudson* test,<sup>146</sup> the standard that the Court still uses to evaluate commercial speech under the First Amendment.<sup>147</sup> Since its adoption, the *Central Hudson* test has been the subject of further elaboration from

<sup>135</sup> *Washington Legal Found. v. Friedman*, No. 94-1306, Mem. in Opp. to Defendant’s Cross-Motion for Summary Judgment, at 11 (Jan. 26, 1998).

<sup>136</sup> *Washington Legal Found. v. Friedman*, No. 94-1306, Mem. in Supp. of Plaintiff’s Motion for Summary Judgment, at 21 (Nov. 24, 1997) (citing *Boos*, 485 U.S. at 321).

<sup>137</sup> See, e.g., *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995); *Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

<sup>138</sup> *Went for It*, 515 U.S. at 623, 624 (citing *Central Hudson*, 447 U.S. at 564-65).

<sup>139</sup> See *CHEMERINSKY*, *supra* note 70, at 882-903.

<sup>140</sup> 421 U.S. 809 (1975).

<sup>141</sup> See *id.* at 825.

<sup>142</sup> 425 U.S. 748 (1976).

<sup>143</sup> *Id.* at 762.

<sup>144</sup> *Id.* at 764.

<sup>145</sup> Justice Rehnquist, however, said that prior decisions of the Court where plaintiffs successfully invoked their right to receive information were distinguishable in that the information was not reasonably available from any other source, as it presumably was in *Virginia Board of Pharmacy* (i.e., consumers could call the pharmacy and inquire about the price). See 425 U.S. at 782-83 (Rehnquist, J. dissenting). Justice Rehnquist further criticized the majority for adopting a rule that would not be limited to dissemination of price, and that would likely extend to other professions, like lawyers. See *id.*

<sup>146</sup> See *Central Hudson*, 447 U.S. at 566.

<sup>147</sup> See *supra* note 137 and accompanying text.

the Court.<sup>148</sup> Indeed, the application of that test may be in a state of flux as the result of a recent decision.<sup>149</sup>

Despite the attention to the *Central Hudson* test itself, the Court has addressed in depth the definition of commercial speech in only one case — *Bolger v. Young's Drug Products Corporation*.<sup>150</sup> *Bolger* is the only case in which the Supreme Court defined commercial speech because it is the only case, so far, in which it was necessary. In most of the cases in which the Supreme Court has addressed commercial speech, the speech at issue fit the category, for example: *44 Liquormart* (holding ban on advertising prices of liquor unconstitutional);<sup>151</sup> *Florida Bar v. Went For It* (holding thirty-day wait before lawyers may contact victims/survivors and potential clients constitutional);<sup>152</sup> *Rubin v. Coors* (holding ban on displaying the alcohol content of beer on labels unconstitutional);<sup>153</sup> *Federal Communication Commission v. Edge* (holding ban on lottery advertisements by radio stations licensed in a state where lotteries are illegal constitutional);<sup>154</sup> *Central Hudson* (holding ban on promotional advertising by a utility unconstitutional);<sup>155</sup> and *Virginia State Board of Pharmacy* (holding ban on pharmacists' advertising the price of prescription drugs unconstitutional).<sup>156</sup> In all of these examples the speech in question clearly was commercial.

In *Bolger*, however, the Court found it necessary to identify factors that it would consider to determine whether the speech was "pure speech" entitled to full protection of the First Amendment or "commercial speech" entitled to somewhat less protection. At issue in *Bolger* were flyers and informational pamphlets that described the benefits and availability of condoms. The material was sent out by the condom manufacturer in the form of a mass mailing to the public. The U.S. Postal Service notified the manufacturer that the mailing violated a federal law against mailing contraceptive advertisements. The manufacturer brought the case seeking a declaratory judgment.<sup>157</sup> The Court noted that most of the materials in question met the "core" definition of commercial speech: "speech which does no more than propose a commercial transac-

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<sup>148</sup> Specifically, the second and third prongs of the test have been addressed in detail. In *Edenfield v. Fane*, 507 U.S. 761 (1993), the Court found that a Florida ban on in-person solicitation was unconstitutional as applied to certified public accountants, who wanted to provide truthful information to prospective clients. In applying the *Central Hudson* test, the Court clarified that the burden is on the government to justify a restriction on commercial speech, and that the burden only can be satisfied by showing that the harms they are concerned about are real and that the regulation that restricts the speech will "in fact alleviate them to a material degree." *Id.* at 770-71. The third prong was addressed in *Board of Trustees of the State of New York v. Fox*, 492 U.S. 469 (1989). Justice Scalia clarified that the *Central Hudson* test did not require that the regulation in question be the "absolute least restrictive means to achieve the desired end." *Id.* at 476-77. Rather, what is required is a reasonable "fit between the legislator's ends and the means chosen to accomplish those ends." *Id.* at 480 (citing *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986)).

<sup>149</sup> In *44 Liquormart v. Rhode Island*, 116 S. Ct. 1495 (1996), the Court further muddied the waters of commercial speech protection under the First Amendment. The Court seems to doubt the validity of the application of the *Central Hudson* test — at least as to all commercial speech restrictions. Justice Steven's plurality opinion states that complete bans on commercial speech are unlikely to be upheld unless the speech is false or misleading. *Id.* at 1506. The plurality opinion also said that commercial speech restrictions that serve a purpose that is not related to consumer protection should still be reviewed under the *Central Hudson* test, but with "special care." *Id.* at 1508. The plurality concluded, however, that the regulation in question failed to pass even the regular, less-than-strict scrutiny under a *Central Hudson* review. *See id.* at 1510.

<sup>150</sup> 463 U.S. 60 (1983). *See also* CHEMERINSKY, *supra* note 70, at 886 (citing *Bolger*, 463 U.S. at 67).

<sup>151</sup> 116 S. Ct. 1495 (1996).

<sup>152</sup> 515 U.S. 618 (1995).

<sup>153</sup> 514 U.S. 476 (1995).

<sup>154</sup> 509 U.S. 418 (1993).

<sup>155</sup> 447 U.S. 557 (1980).

<sup>156</sup> 425 U.S. 748 (1976).

<sup>157</sup> *See* 463 U.S. 60 (1983) (citations omitted).

tion.”<sup>158</sup> The Court noted, however, that some of the material did not fit that definition because it contained, for example, information on venereal disease that would be valuable to the public in general, and was not related to a commercial transaction.<sup>159</sup> Accordingly, the Court identified the following three factors that led ultimately led to their characterization of the condom-information pamphlets as commercial speech: 1) the manufacturer conceded that the pamphlets were advertisements; 2) the pamphlets referred to a specific product; and 3) the manufacturer had an economic motivation for distributing the pamphlets.<sup>160</sup> The Court said that no one factor alone would make the pamphlets commercial speech, but all three factors taken together did make them commercial speech.<sup>161</sup>

Under the three-factor *Bolger* test, the *Washington Legal Foundation* court found that the dissemination of peer-reviewed journal articles and medical texts (as well as manufacturer sponsorship of educational seminars at which the manufacturer’s products are discussed) should be classified as commercial speech.<sup>162</sup> The *Washington Legal Foundation* court found that the first prong was met because “the activities are advertisements as that term is commonly understood.”<sup>163</sup> The court found that the second prong was met because the materials “presumptively refer to a specific product — the drug that is the subject of the off-label use.”<sup>164</sup> And the court found that the third prong was met because the “pharmaceutical companies clearly have an economic motivation for providing the information . . . .”<sup>165</sup>

As discussed above, this article argues for the opposite result; the same enduring materials (peer-reviewed journal articles and medical texts) should fail the three-pronged *Bolger* test and be deemed pure speech in the context of a future First Amendment challenge to the FDAMA provisions. Three parameters not explicitly focused on by the *WLF* court lead to this alternate conclusion: 1) enduring materials are not necessarily advertisements (in *Bolger*, the manufacturer *conceded* this point);<sup>166</sup> 2) enduring materials do not always mention the “product name”; and, most importantly, 3) plaintiffs who invoke their right to receive the enduring materials may have no economic motivation at all. Given the *Bolger* court’s emphasis that it was not any one factor, but all three factors taken together, that rendered the material in question commercial speech,<sup>167</sup> and the enduring materials at issue here are more like pure speech than commercial speech.

Thus, if the *Bolger* factors are analyzed with emphasis on the three parameters discussed above, it seems unlikely that enduring materials would be deemed commercial speech. Enduring materials are not advertisements — at least no one has conceded that point. Enduring materials may or may not mention the “product name.” Indeed, scientific journal articles may be more likely to use the scientific or generic name of the drug. While the manufacturers’ motivation to distribute the information would probably have to be conceded to be economic, it would only be so in part. In addition, if a future First Amendment challenge tracks the *WLF* case, the plaintiffs would include individuals invoking their right to *receive* such information. Those

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<sup>158</sup> *Id.* at 66.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 66-67.

<sup>161</sup> *Id.*

<sup>162</sup> See *Washington Legal Found.*, 13 F. Supp.2d at 64.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See *Bolger*, 463 U.S. at 66.

<sup>167</sup> *Id.* at 67

individuals (like the physician members of the WLF) would have no economic motivation to receive the information. The *Bolger* Court was careful to point out that it was *all three* factors taken together that tipped the scale to a finding of commercial speech.<sup>168</sup> Thus, enduring materials are more like pure speech than commercial speech, although they fit neither category perfectly.<sup>169</sup>

Indeed, enduring materials that discuss off-label uses of approved products seem to embody a new category of speech that falls somewhere between pure and commercial speech. Perhaps to evaluate a future First Amendment challenge of the new statutory provisions, the Supreme Court would have to further layer its commercial speech jurisprudence and adopt a new category of “quasi-commercial speech.”<sup>170</sup> Carving out a new category seems a bit unlikely, however, given how close the two principal standards of review already are. The major difference between the two standards — “compelling” versus “substantial” government interest — is elusive at best. It is difficult to envision a standard of review that could be squeezed between, and yet still be meaningfully distinguished from, the other two (or three) standards.<sup>171</sup>

Regardless of the precise standard of review ultimately applied, FDA will have a heavy burden in defending a First Amendment challenge to the new statutory provisions. If enduring materials that discuss off-label uses are deemed to be pure speech, strict scrutiny review would apply, and FDA would have to demonstrate a “compelling [government] interest and that [the provisions are] narrowly drawn to achieve that end.”<sup>172</sup> FDA, however, may meet this burden. FDA is likely to assert a compelling government interest in “protecting public health.”<sup>173</sup> FDA likely will argue that the two most onerous provisions of FDAMA, the sixty-day preclearance and the submission of, or promise to submit, an SNDA are both narrowly drawn to protect the public health. The sixty-day preclearance requirement is designed to give the FDA an opportunity to ensure that the information disseminated is balanced (i.e., that health care providers receive any pertinent negative information about the new use). The SNDA provision is designed to ensure that, when feasible, the adequate and well-controlled studies of the drug or device in the new indication are, or are soon to be, underway. Those adequate and well-controlled trials, and the dissemination of balanced information, are vital to avoiding disasters like the anti-arrhythmic post infarction off-label use.<sup>174</sup> It would certainly be difficult for an opponent to argue that heading off a disaster like the post-heart attack misuse of anti-arrhythmic agents is anything less than “compelling.” Preventing that kind of harm to the public, moreover, is clearly a mandate of FDA.

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<sup>168</sup> See *id.* at 67.

<sup>169</sup> At least one author, however, predicted that restrictions on the dissemination of information regarding off-label uses would be resolved as restrictions on *commercial* speech. See Polubinski, *supra* note 129, at 994.

<sup>170</sup> In *Liquormart*, the plurality already proposed one new layer: a heightened standard of review for restrictions on speech, in which the speech is clearly commercial, but the corresponding government interest is something other than consumer protection. See *Liquormart*, 116 S. Ct. at 1507, 1510. The theorized “quasi-commercial speech” category refers to the subject matter of the restricted speech. Under the provisions of FDAMA, the asserted government interest is not consumer protection (at least not in a commercial sense). Thus, it is possible that the provisions of FDAMA would be reviewed under a standard two notches above the “regular” *Central Hudson* test. See *id.*

<sup>171</sup> See *supra* notes 149, 170, and accompanying text.

<sup>172</sup> See *Washington Legal Found. v. Friedman*, No. 94-1306, Mem. in Supp. of Plaintiff’s Motion for Summary Judgment, at 21 (Nov. 24, 1997) (*citing Boos*, 485 U.S. at 321).

<sup>173</sup> See, e.g., *Washington Legal Found. v. Friedman*, No. 94-1306, Mem. in Opp. to Plaintiffs Motion for Summary Judgment and in Supp. of Defendant’s Cross-Motion for Summary Judgment, at 28 n.16 (Dec. 24, 1997).

<sup>174</sup> See *supra* note 42 and accompanying text.

The seriousness of the potential harm, however, could cut against FDA's argument as well. Perhaps the best argument of an FDA opponent would be that the provisions are not narrowly drawn because the very same information is deemed appropriately disseminated, notwithstanding the requirements of FDAMA, as long as it is done in response to an unsolicited request.<sup>175</sup> Furthermore, the fact that a manufacturer may be exempted from conducting additional clinical trials based solely on economic concerns,<sup>176</sup> tends to undercut the compelling or even substantial nature of FDA's interest in restricting the constitutionally protected speech.

## V. AN ALTERNATIVE CHALLENGE TO THE NEW STATUTORY PROVISIONS

Another possible challenge to the provisions of FDAMA may center around the requirement that an SNDA be submitted, promised to be submitted, or an exemption obtained.<sup>177</sup> Specifically, a future attack on FDAMA may center on the exemption provision. On receiving a request, the Secretary is given broad authority under FDAMA to grant an exemption from the SNDA requirement.<sup>178</sup> That exemption may be granted if the Secretary deems that it would be unethical to conduct studies in the particular indication or if she deems that it would be economically prohibitive for the manufacturer to conduct the clinical trials necessary to compile the SNDA.<sup>179</sup> FDAMA lists two criteria to consider when determining if it would be economically prohibitive for the manufacturer to conduct the additional clinical trials: 1) lack of opportunity for the manufacturer to obtain a period of market exclusivity for the new use; and 2) the size of the patient population that would potentially benefit from the new use.<sup>180</sup> In addition to these two criteria, FDAMA allows for the use of "any other considerations the Secretary finds appropriate."<sup>181</sup> This authority seems to extend beyond the expertise of FDA, an agency largely consisting of scientists, physicians, and biostatisticians, not experts in the economics of complicated business decisions.

Indeed, this authority seems well beyond — even in opposition to — FDA's mission to promote and protect the public health. In fact, this exemption may well undermine the entire SNDA requirement of this section of FDAMA. As long as a manufacturer makes a colorable argument that it would be economically prohibitive for it to conduct the clinical trials necessary to compile the SNDA, then an FDA denial of that exemption will be vulnerable to challenge. FDA's interpretation of the exemption provision may not be granted the same level of deference by the court as in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.<sup>182</sup>

When an agency's interpretation of a statutory provision raises serious First Amendment (or other constitutional) questions a court may refuse to defer to the agency's interpretation.<sup>183</sup> Furthermore, one reason that "an agency's interpretation is

<sup>175</sup> See *supra* note 41 and accompanying text.

<sup>176</sup> FDAMA § 401 (FDCA § 554(d)(2)(A)).

<sup>177</sup> *Id.* (FDCA § 554). See also *supra* note 101 and accompanying text.

<sup>178</sup> *Id.* (FDCA § 554(d)).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* (FDCA § 554(d)(2)(A)).

<sup>181</sup> *Id.*

<sup>182</sup> 467 U.S. 837 (1984). In this case the Court set forth the *Chevron* two-step test. First, a court will determine if Congress has spoken directly to question at issue, and if so, then the court and the agency are bound to that edict. Second, if Congress has not spoken directly on the issue, the court will defer to the agency's interpretation. See WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW §§ 78, 305 n.35 (2d ed. 1997).

<sup>183</sup> See *Williams v. Babbitt*, 115 F.3d 657, 661 (9th Cir. 1997) (citing *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988)).

generally accorded *Chevron* deference is because the agency has *superior expertise* in the particular area.<sup>184</sup> These two concepts can be invoked in combination in a future challenge to an FDA denial of an SNDA exemption.

Thus, if FDA interprets the “any other considerations”<sup>185</sup> language of the economic exemption provision less than liberally, it might lose *Chevron* deference under a rule of construction invoked by the Supreme Court in *DeBartolo*.<sup>186</sup> In *DeBartolo*, the Court invoked the rule of statutory construction developed in *Catholic Bishop*,<sup>187</sup> which states that: “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”<sup>188</sup> In *DeBartolo*, the Court refused to defer to the agency, and struck down the National Labor Relations Board’s (NLRB’s) interpretation of a statutory provision because it would have resulted in prohibiting unions from peacefully distributing handbills in a shopping mall.<sup>189</sup> The *DeBartolo* Court said that it was appropriate to use the *Catholic Bishop* rule because NLRB’s construction of the statute, as applied, raised serious questions as to the validity of the statute under the First Amendment.<sup>190</sup> A similar case could arise if FDA denied a company’s reasonable request for an SNDA exemption. Indeed, liberal interpretation by FDA of the statute’s “any other consideration” provision may side-step any future First Amendment challenge, at least as to the SNDA requirement of FDAMA.

As noted above, one reason courts generally grant *Chevron* deference to an agency interpretation of a statute is because of the agency’s superior expertise in the area.<sup>191</sup> In *Williams v. Babbitt*,<sup>192</sup> the U.S. Court of Appeals for the Ninth Circuit cited *DeBartolo* and refused to give *Chevron* deference to the U.S. Department of the Interior, Board of Indian Affairs (IBIA) interpretation of the Reindeer Industry Act, emphasizing that the agency was outside its area of expertise.<sup>193</sup> Specifically, IBIA was outside its area of expertise because it was interpreting provisions of the Reindeer Industry Act in a way that raised serious equal protection concerns. IBIA’s interpretation would have prohibited nonnatives from participating in the reindeer herding industry.<sup>194</sup> Similarly, when FDA interprets the criteria for granting exemptions from the SNDA requirement, it will be in danger of impinging on the constitutional (First Amendment) rights of those seeking the exemption.

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<sup>184</sup> *Williams*, 115 F.3d at 662 (emphasis added).

<sup>185</sup> FDAMA § 401 (FDCA § 554(d)(2)(A)).

<sup>186</sup> 485 U.S. at 575.

<sup>187</sup> *National Labor Relations Bd. v. Catholic Bishops of Chicago*, 440 U.S. 490 (1979).

<sup>188</sup> *DeBartolo*, 485 U.S. at 575 (citing *Catholic Bishop*, 440 U.S. at 499-501). In *Catholic Bishop* (a pre-*Chevron* case) the Court declined to defer to the National Labor Relations Board (NLRB), and interpreted the National Labor Relations Act such that NLRB did not have jurisdiction over church-operated schools, thus avoiding a First Amendment question. *See id.*

<sup>189</sup> *Williams*, 115 F.3d at 661 (citing *DeBartolo*, 485 U.S. at 575).

<sup>190</sup> *DeBartolo*, 485 U.S. at 575.

<sup>191</sup> *Williams*, 115 F.3d at 662.

<sup>192</sup> *Id.* at 657.

<sup>193</sup> *See id.* at 662. The court refers to the rule of statutory construction as the *DeBartolo* rule, as opposed to the *Catholic Bishop* rule. *Id.*

<sup>194</sup> *See id.* at 663. In following *DeBartolo*, the Ninth Circuit explains that the Court’s more recent decision in *Rust v. Sullivan*, 500 U.S. 173 (1990), did not overrule *DeBartolo*. *Id.* at 661. In *Rust*, the Court did grant *Chevron* deference to the Department of Health and Human Services (DHHS) interpretation of the Public Health Service Act (Ch. 288, 37 Stat. 309 (codified at 42 U.S.C. §§ 201 et seq. (1994))), which prohibited federally funded clinics from providing abortion counseling. *See id.* Although the regulations were challenged on constitutional grounds, the Court applied *Chevron*. The Ninth Circuit, however, explained that the *Rust* majority did not abandon the *DeBartolo* rule, but simply disagreed on whether the constitutional questions raised in *Rust* were serious enough to defeat *Chevron* deference. *See id.*

Moreover, FDA's action in this area may be problematic in two ways. First, the agency will be in danger of violating the constitutional rights of those who want to disseminate (or receive) information. Second, FDA will be outside its area of expertise because it will be making an economic, rather than a medical or scientific, decision. Thus, in the context of a challenge to an FDA denial of an SNDA exemption, two situations that point away from *Chevron* deference — an agency interpretation impinging on a constitutional right and an agency operating outside of its area of expertise — converge. Conversely, liberal interpretation of the SNDA exemption provisions of FDAMA could avoid reaching the constitutional question.

This reasoning reduces the SNDA exemption essentially to a rubber stamp, and brings the argument full circle. After all, if the principal issue of agency concern (that adequate and well-controlled clinical trials be conducted and assessed before information is widely disseminated about a new use) can be reduced to one that is primarily economic in effect, then the argument that the government's interest is "compelling" or even "substantial" is undermined. Thus, the exemption itself seriously impedes FDA's ability to argue that the provisions of FDAMA pass constitutional muster under strict, or even intermediate, scrutiny.

## V. CONCLUSION

On its face, FDAMA seems to cure the allegedly impermissible restrictions on speech embodied in recent FDA policies. The prerequisites to dissemination, however, may prompt a future First Amendment challenge in which the new statutory provisions are likely to be analyzed as government restrictions of pure speech. Even under strict scrutiny, FDA may successfully defend the new statutory provisions. Arguably, the provisions are narrowly drawn to protect the public health by ensuring that the information disseminated is balanced, and by ensuring that, when feasible, adequate and well-controlled clinical trials in the new indication are, or are soon to be, underway. On the other hand, a future opponent of FDA may argue that the provisions are not narrowly drawn because the same information may be disseminated without regard to FDAMA, as long as it is in response to an unsolicited request.

Furthermore, the provisions of FDAMA may be vulnerable to challenge because FDA has been delegated authority that is outside of the agency's expertise. FDA now has the authority to determine whether or not it is economically prohibitive for a manufacturer to compile an SNDA. A future challenge to the provisions of FDAMA may take the form of a challenge to an FDA denial of that SNDA exemption. In that challenge, the court may decide not to defer to the FDA's interpretation of the statutory provisions because FDA will be operating outside of its area of superior expertise and because FDA will be in danger of crossing a constitutional line.

Thus, for the pharmaceutical industry manufacturers and WLF members who want to exchange important scientific information about off-label uses, FDAMA's provisions, which at face value appear to solve the problem, actually represent one step forward and two steps back. As it interprets the provisions of FDAMA, the agency undoubtedly will continue to struggle to balance its mission to promote and protect the public health against the public's fundamental First Amendment right to give and receive sound scientific information, whatever the motivation.

