

PROMOTING OFF-LABEL IN PURSUIT OF PROFIT: AN EXAMINATION OF A FRAUDULENT BUSINESS MODEL

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I. INTRODUCTION

“There is only one valid definition of business purpose: to create a customer Because its purpose is to create a customer, the business enterprise has two—and only these two—basic functions: marketing and innovation.”¹ The pharmaceutical industry faces scrutiny due to the competing interests of advancing public health and profit maximization.² Nevertheless, statistics that break down drug manufacturers’ budgets provide an example of this industry’s prioritization of creating customers through marketing rather than innovation.³ For over a decade, drug manufacturers have spent approximately twice as much on the marketing of existing drugs than on the research and development of new drugs.⁴ For example, in 2002, the ten largest U.S. drug manufacturers spent thirty-one percent of revenues on marketing and only fourteen percent on research and

¹ Drucker maintains that, in business, marketing and innovation produce results and all other aspects are costs. PETER F. DRUCKER, *THE ESSENTIAL DRUCKER* 20 (Harper Collins Publishers, Inc. 2001).

² See generally *ETHICS AND THE PHARMACEUTICAL INDUSTRY* 1–4 (Thomas M. Gorrie & Michael A. Santoro eds., Cambridge University Press 2005) (explaining the tension between the pharmaceutical industry and society that arises from the pharmaceutical industry’s conflicting ends of increasing profit and public health).

³ See Marcia Angell, *Excess in the Pharmaceutical Industry*, 171 *CANADIAN MED. ASS’N J.* 1451, 1452 (2004), available at <http://www.cmaj.ca/cgi/content/full/171/12/1451>.

⁴ *Id.*; see also Stephanie Greene, *False Claims Act Liability for Off-Label Promotion of Pharmaceutical Products*, 110 *PENN ST. L. REV.* 41, 41 (2005).

development.⁵ This equates to \$67 billion spent on marketing by these ten drug manufacturers alone.⁶ What is disconcerting is the fact that some manufacturers⁷ are realizing increased profits by knowingly implementing illegal marketing strategies.⁸

The potential exists for manufacturers to cross the line between legal and illegal marketing strategies when they actively promote Food and Drug Administration (FDA) approved drugs for uses other than the approved use — a practice known as off-label promotion.⁹ The enticement to promote off-label exists because physicians are free to prescribe “any legally marketed device” for uses other than those approved by the FDA.¹⁰ This conduct is permitted under the premise that it allows physicians to provide the best-available treatments when the FDA approval process does not keep pace with medical advancements or when rare diseases do not affect enough patients to economically justify manufacturers’ seeking FDA approval for new uses to treat these diseases.¹¹

Although physicians who prescribe off-label uses may provide obvious benefits to society, the pharmaceutical industry’s pursuit of off-label promotion is often self-serving.¹² Off-label promotion can be an extremely profitable and common marketing strategy for pharmaceutical companies.¹³ In response, fighting off-label promotion has become a primary task of the FDA, Department of Justice (DOJ), and the Office of the Inspector General (OIG) of the United States Department of Health and Human Services (HHS).¹⁴ In

⁵ Angell, *supra* note 3, at 1452.

⁶ *Id.*

⁷ The term “manufacturers” in this article refers to corporations that develop and manufacture FDA-approved drugs.

⁸ *E.g.*, *infra* Part III.

⁹ See 21 C.F.R. § 310.303(a) (2000).

¹⁰ 21 U.S.C. § 396 (2000).

¹¹ David M. Fritch, *Speak No Evil, Hear No Evil, Harm the Patient? Why the FDA Needs to Seek More, Rather than Less, Speech from Drug Manufacturers on Off-Label Drug Treatments*, 9 MICH. ST. J. MED. & LAW 315, 334–35 (2005).

¹² See Greene, *supra* note 4, at 43 (noting that “there is strong temptation for manufacturers to promote off-label use of products purely for profit”).

¹³ *E.g.*, *infra* Part IV.

¹⁴ See generally Jonathan K. Henderson & Quintin Cassady, *Drug Deals in 2006: Cutting Edge Legal and Regulatory Issues in the Pharmaceutical Industry*, 15 ANNALS HEALTH L. 107 (Winter

fact, the OIG has listed off-label promotion in its annual work plans, which identify "areas perceived as critical to the [OIG's] mission" of improving healthcare and reducing fraud and waste.¹⁵ In addressing the topic of off-label promotion, Associate Attorney General Robert McCallum stated "[t]he Department of Justice is committed to rooting out and prosecuting health care fraud" and "[t]he Department's commitment to effective health care fraud enforcement is driven by a mandate that all wrongdoers be brought to justice, to deter conduct which threatens the safety and welfare of all Americans . . ."¹⁶ It is apparent that off-label promotion by manufacturers can create a number of serious and potentially problematic issues.

This comment analyzes the off-label promotional strategies used by pharmaceutical manufacturers and the methods that are currently being used to fight this problem. Part II analyzes the sources and limitations of the government's authority to regulate off-label promotion and illustrates why the law surrounding this activity is somewhat unclear. Part III explains the False Claims Act (FCA) and analyzes two major settlements regarding off-label promotion that arose from qui tam actions. Part IV suggests that despite the threat of large monetary settlements and demanding Corporate Integrity Agreements (CIAs), manufacturers may continue to promote off-label because this activity is the result of calculated business plans that weigh potential risks and consequences against the rewards. Part V advocates the government's use of proactive measures to regulate off-label promotion by increasing the risks that pharmaceutical companies will be caught in this activity. Moreover, this section proposes imposing increased monetary penalties when manufacturers are caught, but addresses the problems associated with increasing these penalties. This paper concludes that off-label promotion may not subside under the current tactics imposed by the government. Although the government possesses some powerful

2006).

¹⁵ *Id.* at 110.

¹⁶ Press Release, Dep't of Justice, Warner-Lambert to Pay \$430 Million to Resolve Criminal & Civil Health Care Liability Relating to Off-Label Promotion (May 13, 2004), available at http://www.usdoj.gov/opa/pr/2004/May/04_civ_322.htm [hereinafter Warner-Lambert Press Release].

tools to fight off-label promotion, current trends in this area may prevent these tools from being used.

II. THE STATUS OF THE LAW SURROUNDING OFF-LABEL PROMOTION IS SOMEWHAT UNCLEAR

A. The Promotion of Off-Label Uses by Pharmaceutical Manufacturers Could Result in Federal Statutory Violations

The leading investigations surrounding off-label promotion have “relied on two theories under the Food, Drug, and Cosmetic Act (FDCA).”¹⁷ One theory is “that a product promoted for off-label use is ‘misbranded’ if it has inadequate directions for the unapproved use or because the [manufacturer] has provided ‘false and misleading’ information regarding the product.”¹⁸ According to the FDA, “[a] new drug may not be approved for marketing unless it has been shown to be safe and effective for its intended use(s).”¹⁹ Therefore, a manufacturer must resubmit its existing drugs for FDA approval any time it wishes to promote a new “intended use” not listed on the original FDA approved labeling.²⁰ The unapproved uses are considered off-label until a manufacturer receives FDA approval for these new uses.²¹ Thus, a manufacturer that promotes a drug for off-label uses violates the FDCA proscription on misbranding by failing

¹⁷ Jack Cinquegrana & Diana K. Lloyd, *Shifting Perspective on Off-Label Promotion*, PHARMACEUTICAL EXECUTIVE, Jan. 1, 2006, available at <http://www.pharmexec.com/pharmexec/article/articleDetail.jsp?id=282490> [hereinafter Cinquegrana & Lloyd].

¹⁸ *Id.* The FDCA prohibits the introduction of any misbranded drug into interstate commerce. 21 U.S.C. §331(a) (2000). A drug is misbranded when its label is false or misleading or when it has inadequate directions for use. 21 U.S.C. § 352(a), (f) (2000). Therefore, a drug promoted for uses that are not listed on the label, by definition, must be misbranded because there are no directions for this use. See generally Warner-Lambert Sentencing Memorandum, *infra* note 69, at 4–5 (discussing misbranding violations).

¹⁹ 21 C.F.R. § 310.303(a) (2000); see also Greene, *supra* note 4, at 45–46 (detailing the FDA’s authority to regulate off-label promotion).

²⁰ Wash. Legal Found. v. Friedman, 13 F. Supp. 2d 51, 55 (D.D.C. 1998) (explaining that new uses for approved drugs are subject to the same FDA-approval process as the initially approved uses).

²¹ *Id.* The Food and Drug Administration Modernization Act of 1997 amended this somewhat to permit certain promotional materials. See *infra* note 43.

to provide adequate directions for the off-label use.²²

In addition, a manufacturer may be prosecuted for the off-label promotion of FDA-approved drugs under the theory that it constitutes the introduction of an unapproved new drug into interstate commerce, which is also a misbranding violation.²³ Even if a manufacturer is promoting a drug that has already received approval for marketing and distribution by the FDA, the drug may be considered "new" when it is promoted for uses that have not received FDA approval.²⁴ As such, promoting an existing drug for a new use is perceived to be the same as introducing an unapproved new drug into interstate commerce.

The FDCA violation of misbranding may result in numerous repercussions. The FDCA permits injunctions for 21 U.S.C. § 331 violations and allows the seizure of misbranded or unapproved new drugs that are introduced into interstate commerce.²⁵ Moreover, a manufacturer may be subjected to criminal liability for its off-label promotional activities.²⁶

B. The FDA's Authority to Regulate Off-Label Promotion has Been Successfully Challenged on First Amendment Grounds

Although off-label promotion may violate the FDCA, there is uncertainty regarding what level of manufacturer activity constitutes illegal conduct and the FDA's ability to regulate manufacturers' conduct. Because off-label prescribing by physicians is a widely-accepted practice, and can even constitute the standard of care in certain situations,²⁷ a certain level of communication between

²² 21 U.S.C. § 331(a) (2000).

²³ Cinquegrana & Lloyd, *supra* note 17; *see also* Warner-Lambert Sentencing Memorandum, *infra* note 69, at 7 (citing 21 U.S.C. §§ 331(d), 355(a) (2000)).

²⁴ 21 C.F.R. § 310.3(h)(4)–(5) (2000); *see also* Warner-Lambert Sentencing Memorandum, *infra* note 69, at 7–8.

²⁵ 21 U.S.C. §§ 332(a), 334(a) (2000); *see also* Greene, *supra* note 4, at 46.

²⁶ 21 U.S.C. § 333 (2000); *see also* Greene, *supra* note 4, at 46.

²⁷ For example, amoxicillin has an on-label use of treating respiratory tract infections and an off-label use for treating stomach ulcers. Although amoxicillin is not FDA-approved for the latter use, all textbooks and medical guides discussing stomach ulcers mention amoxicillin as a potential treatment. Physicians who do not consider prescribing amoxicillin to treat stomach ulcers are considered negligent. Fritch, *supra* note 11, at 335 (citing Daniel B. Klein & Alexander Tabarrok, *Do Off-Label Drug Practices Argue Against FDA Efficacy Requirements?*,

physicians and manufacturers is necessary.²⁸ Moreover, the manufacturer of a specific drug might be best-suited to inform the physician about off-label uses because the manufacturer researched and developed the drug in question. For these reasons, certain documents advocating restricted communication between manufacturers and physicians have been scrutinized for infringing on the freedom of speech.²⁹

The Washington Legal Foundation (the Foundation) litigated this First Amendment issue in a series of cases.³⁰ In *Washington Legal Foundation v. Friedman* (WLF I), the Foundation sought to enjoin the FDA and HHS from restricting certain types of off-label communication between manufacturers and physicians.³¹ Specifically, the FDA and HHS created Guidance for Industry-Supported Scientific and Educational Activities (Guidance Documents) that limited manufacturers' abilities to participate in continuing medical education seminars (CME) and to distribute medical journals and textbooks discussing off-label uses.³² The Guidance Documents "represent[] the [FDA's] current thinking on industry-supported scientific and educational activities" by listing twelve factors that the FDA will consider when evaluating programs and materials and determining whether they are independent from

at 2 (unpublished manuscript, to appear in AM. J. ECON. & SOC.) available at <http://mason.gmu.edu/~atabarro/Do%20Off-Label%2024.pdf>; see also *Richardson v. Miller*, 44 S.W.3d 1, 13-14 (Tenn. Ct. App. 2000) (noting that the FDA recognizes off-label uses of approved drugs as an acceptable and even essential medical practice, thus constituting the standard of care in certain situations).

²⁸ See *Friedman*, 13 F. Supp. 2d at 56 (noting that "physicians need reliable and up-to-date information concerning off-label uses").

²⁹ "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

³⁰ The Foundation is a non-profit organization with the goal "to defend and promote the principles of freedom and justice." Founded over twenty-nine years ago, the Foundation is recognized as one of the nation's leading organizations for public interest law, advocating libertarian causes. The Foundation advocates free enterprise, property rights, and a balanced justice system using litigation, legal publications, and reform initiatives. WLF Mission, <http://www.wlf.org/Resources/WLFMission> (last visited Feb. 15, 2007).

³¹ *Friedman*, 13 F. Supp. 2d at 54.

³² See generally 62 Fed. Reg. 64,074 (1997) [hereinafter Guidance]. The FDA and HHS were concerned that manufacturers could influence physicians' decisions to prescribe off-label and expose patients to the potential harms associated with off-label uses. *Friedman*, 13 F. Supp. 2d at 57-58.

manufacturer influence and “nonpromotional” in nature.³³ These factors include, *inter alia*, whether a manufacturer has controlled the content of a CME, whether there has been a meaningful disclosure to the audience at a CME regarding a manufacturer’s funding of the program and whether unapproved uses of products will be discussed during the program.³⁴

In its discussion of the First Amendment issue, the WLF I court ruled that manufacturer participation in a CME and the distribution of medical journals and textbooks were forms of commercial speech.³⁵ Because of this classification, the court determined the Guidance Documents’ constitutionality under the Central Hudson test.³⁶ To satisfy the first prong of this test, the speech at issue must be lawful and not inherently misleading.³⁷ Therefore, any off-label promotion that includes false, misleading, or unlawful information about a product will be subject to scrutiny and regulation by the FDA.³⁸ Further, some promotional strategies that disseminate truthful information about off-label uses could potentially be subject to regulation.³⁹ However, the WLF I court held that the Guidance Documents failed the fourth prong of the Central Hudson test

³³ Guidance, *supra* note 32, at 64,094, 64,097; *see also* Greene, *supra* note 4, at 49.

³⁴ Guidance, *supra* note 32, at 64,097–99.

³⁵ *Friedman*, 13 F. Supp. 2d at 65. Commercial speech is that speech which is typically uttered by commercial entities in an effort to create financial gains. Due to commercial speech’s potential to mislead consumers, restrictions on such speech are viewed with less scrutiny than the First Amendment typically demands. *Id.* at 62–67.

³⁶ *Id.* The constitutionality of governmental regulations on commercial speech must be determined under the following four-prong analysis: (1) the speech must concern lawful activity and must not be illegal, (2) there must be a substantial government interest in protecting the speech, (3) the governmental regulation must directly advance the interest, and (4) the regulation must not be more extensive than necessary to advance the interest. *Cent. Hudson Gas and Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980).

³⁷ *See, e.g., Friedman*, 13 F. Supp. 2d at 65–66; *Central Hudson*, 447 U.S. at 566.

³⁸ The WLF I court explicitly held that nothing in its opinion should be construed to limit the FDA’s enforcement of any material that is false or misleading. *Friedman*, 13 F. Supp. at 75–76. *See generally* Fritch, *supra* note 11, at 346 (noting that “[t]he first notable exclusion from the WLF holdings is that, to claim constitutional protection, the information being disseminated must not be false or misleading”).

³⁹ Such a scenario could arise if a manufacturer aggressively promotes data concluding that an off-label use is effective when there is equally credible data that reaches an opposing conclusion. *Friedman*, 13 F. Supp. 2d at 65.

because they were “more extensive than necessary to further the substantial government interest in encouraging manufacturers to get new uses on-label.”⁴⁰ Therefore, the Guidance Documents amounted to unconstitutional restrictions on commercial speech.⁴¹

Shortly after WLF I, the Food and Drug Administration Modernization Act (FDAMA) became effective, which overrode the Guidance Documents and permitted the dissemination of information on off-label uses by manufacturers to physicians under very limited conditions.⁴² Under the FDAMA, manufacturers could only disseminate information about off-label uses if they had previously filed a supplemental application with the FDA for approval of these uses and provided copies of the information to the FDA sixty days before dissemination, among other requirements.⁴³ After the FDAMA went into effect, the FDA and HSS filed a motion to, *inter alia*, limit the scope of the WLF I decision to the Guidance Documents discussed in that case.⁴⁴ However, the court held that the injunction in WLF I “was intended to apply to the policies underlying the Guidance Documents,” not solely to the provisions contained within the Guidance Documents.⁴⁵ As such, this part of the motion was denied.⁴⁶

In 1999, the court in *Washington Legal Foundation v. Henney* officially declared the supplemental application requirements of the FDAMA unconstitutional because they “burden[ed] substantially more speech than necessary.”⁴⁷ The FDA and HHS appealed, but the D.C. Circuit dismissed the suit and vacated the district court’s decisions insofar as they declared the FDAMA and the Guidance Documents unconstitutional.⁴⁸ This was because the FDA and the Foundation ultimately reached an agreement, and the FDA asserted

⁴⁰ *Id.* at 72-73.

⁴¹ *Id.* at 72.

⁴² See 21 U.S.C. § 360aaa (1997); see also Fritch, *supra* note 11, at 340.

⁴³ 21 U.S.C. § 360aaa; see also Fritch, *supra* note 11, at 340.

⁴⁴ Wash. Legal Found. v. Friedman, 36 F. Supp. 2d 16, 17-18 (D.D.C. 1999).

⁴⁵ *Id.* at 18.

⁴⁶ *Id.* at 20.

⁴⁷ Wash. Legal Found. v. Henney, 56 F. Supp. 2d 81, 87 (D.D.C. 1999).

⁴⁸ Wash. Legal Found. v. Henney, 202 F.3d 331, 337 (D.C. Cir. 2000).

that the FDAMA and the Guidance Documents “established nothing more than a ‘safe harbor’ that ensured certain forms of conduct would not be used against manufacturers in misbranding and ‘intended use’ enforcement actions. . . .”⁴⁹ In essence, the FDA and HHS asserted that neither the Guidance Documents nor the FDAMA prohibited any form of speech or deemed certain forms of conduct illegal.⁵⁰ As a result of the FDA and HHS interpretation of the Guidance Documents and the FDAMA, the Foundation no longer objected to their constitutionality.⁵¹

This anticlimactic resolution of the Foundation’s litigation provided limited insight into the FDA’s authority to regulate off-label promotion. Although the Foundation’s litigation failed to provide a clear-cut standard of what constitutes illegal off-label communication,⁵² it is the author’s opinion that manufacturers may cross the line when they move from communication for scientific advancement to promotion for increased profit.⁵³

III. OFF-LABEL PROMOTION AND THE FALSE CLAIMS ACT

The FCA provides an alternative strategy to fight off-label promotion. The statute was originally enacted during the Civil War

⁴⁹ *Id.* at 335.

⁵⁰ *See id.*; *see also* Fritch, *supra* note 11, at 346.

⁵¹ *Henney*, 202 F.3d at 336.

⁵² Various healthcare organizations have published commentary to provide additional guidance regarding legitimate marketing techniques by manufacturers. For example, the Pharmaceutical Research and Manufacturers of America (PhRMA) issued the Code on Interactions with Healthcare Professionals (the Code), which provides detailed guidelines regarding relationships between these parties. The Code provides, *inter alia*, that manufacturers should not provide entertainment, recreation, or even gifts of minimal value (i.e., golf balls) to healthcare professionals if the gifts are not associated with a healthcare professional’s practice. The Pharmaceutical Research and Manufacturers of America, *Code On Interactions with Healthcare Professionals*, available at http://www.phrma.org/code_on_interactions_with_healthcare_professionals/.

⁵³ It is noted that in October of 2007, the FDA released a draft proposal to allow increased off-label communication by manufacturers. This proposal would allow manufacturers to discuss uses that have not received approval from the FDA, but “have been studied in peer-reviewed medical journals.” *See* FDA Mulls Letting Drug Makers Go Off-Label, <http://blogs.wsj.com/health/2007/12/03/fda-mulls-letting-drug-makers-go-off-label/> (Dec. 3, 2007).

in response to procurement fraud,⁵⁴ and it creates liability for those who knowingly present, or cause to be presented, false or fraudulent claims paid by the government.⁵⁵ A cornerstone of the FCA is its *qui tam*,⁵⁶ or whistleblower provisions, which allow individuals who are aware of fraud against the government to file suit on the government's behalf and receive a portion of the recovered funds.⁵⁷

Whistleblowers can file suit under the FCA for fraud resulting from off-label promotion due to the negative effects it has on state and federally funded programs such as Medicaid, which may prohibit reimbursement for off-label prescriptions.⁵⁸ In the context of off-label promotion, there are separate theories of liability under the FCA.⁵⁹ One theory involves claims made pursuant to the Anti-Kickback Statute, which "prohibits payments in any form, direct or indirect, made purposefully to induce or reward the referral or generation of federal health care business."⁶⁰ Another theory involves causing false claims to be submitted to the government for improper off-label uses.⁶¹ Given that some federally funded programs may prohibit reimbursement for off-label uses, these claims are based on the theory that manufacturers promote off-label uses of drugs,

⁵⁴ Laura Laemmle-Weidenfeld, *The False Claims Act and Good Manufacturing Practices: The Next Frontier?*, Life Sciences Law Institute 2006, AHLA coursebook (2006), available at <http://www.pattonboggs.com/files/News/3e85e79f-2fb3-4e2d-af76-2c9c2ad81371/Presentation/NewsAttachment/a52efd9b-5ef5-4063-90de-3cecdf89f3bb/FalseClaimsAct.pdf>. See generally Joan H. Krause, *Health Care Providers and the Public Fisc: Paradigms of Government Harm Under the Civil False Claims Act*, 36 GA. L. REV. 121, 129-134 (2001) (providing a history of the False Claims Act).

⁵⁵ 31 U.S.C. § 3729 (2000).

⁵⁶ *Qui tam* is an abbreviation of the Latin saying: "*qui tam pro domino rege quam pro sic ipso in hoc parte sequitur*," which translates to "who as well for the king as for himself sues in this matter." What is *Qui Tam*?, <http://www.quitam.com/id8.html> [hereinafter *Qui Tam Description*].

⁵⁷ What is the False Claims Act & Why is it Important?, <http://www.taf.org/whyfca.htm> (last visited Apr. 15, 2008).

⁵⁸ Some federal healthcare programs may not pay for prescription drugs when physicians prescribe them for off-label uses. For example, under the Medicaid program, states may limit coverage to drugs that are prescribed for an FDA-approved use or a use included in specific drug compendia. See Laemmle-Weidenfeld, *supra* note 54, at 6 (citing 42 U.S.C. §§ 1396r-8(d)(1)(B)(ii), (k)(6), (g)(1)(B)(i) (2000)).

⁵⁹ See Laemmle-Weidenfeld, *supra* note 54, at 6-7.

⁶⁰ Greene, *supra* note 4, at 56 (citing 42 U.S.C. § 1320a-7b).

⁶¹ See Laemmle-Weidenfeld, *supra* note 54, at 6-7.

knowing that physicians will prescribe such uses to Medicaid patients and that these patients will seek reimbursement for these off-label prescriptions from Medicaid.⁶² Federal prosecutors successfully used these theories in two actions against manufacturers, each resulting in large settlements, but no admission of liability under the FCA.

A. Warner-Lambert Pays \$430 Million to Resolve Charges Relating to its Marketing of Neurontin

In 1996, Dr. David Franklin (Franklin) brought a qui tam action alleging that his former employer, Parke-Davis,⁶³ violated the FCA by engaging in a fraudulent marketing scheme to boost off-label sales of its prescription drug Neurontin.⁶⁴ Specifically, Franklin accused Parke-Davis of knowingly causing false claims to be submitted to the government through off-label promotion.⁶⁵ Parke-Davis did not dispute that the government would have denied paying these claims had it known they were submitted for off-label uses.⁶⁶

The FDA approved Neurontin as an “adjunctive treatment for epilepsy” for use in doses ranging from 900 to 1800 mg per day.⁶⁷ However, during the five months Franklin was employed, he alleged that medical liaisons were instructed to make false claims regarding Neurontin’s safety for off-label uses such as pain and bi-polar disorder, misrepresent their credentials by falsely posing as scientific experts and advocate daily dosages of the drug up to 4800 mg.⁶⁸ As a result of Franklin’s suit, the government launched its own

⁶² *See id.*

⁶³ Parke-Davis is now a division of Warner-Lambert Company, which is owned by Pfizer. *See United States ex rel. Franklin v. Parke-Davis*, 147 F. Supp. 2d 39, 44 (D. Mass. 2001).

⁶⁴ Parke-Davis employed Franklin on a team of “medical liaisons,” which are typically linked to the research divisions of a manufacturer. However, Parke-Davis used its medical liaisons for sales and promotional purposes. *Franklin*, 147 F. Supp. 2d at 43–45. *See generally* Greene, *supra* note 4, at 58–59.

⁶⁵ *See Franklin*, 147 F. Supp. 2d at 53.

⁶⁶ *Id.*

⁶⁷ *Id.* at 45. Neurontin’s approval as an adjunctive treatment meant the drug was only to be used “as a second-line defense for patients who were already taking another anti-seizure medication.” Warner-Lambert Sentencing Memorandum, *infra* note 69, at 12.

⁶⁸ *Franklin*, 147 F. Supp. 2d at 45.

investigation of the alleged misconduct.⁶⁹ The following analysis is based on information and allegations contained in the sentencing memorandum accompanying the global settlement agreement between the United States⁷⁰ and Warner-Lambert.⁷¹

The United States alleged that Parke-Davis used the following six tactics to implement its off-label promotional scheme.⁷² First, management at Parke-Davis instructed its sales representatives to initiate discussions with doctors during sales calls regarding off-label uses of Neurontin, while knowing such promotion was illegal.⁷³ The second tactic was Parke-Davis's use of the medical liaisons working in conjunction with sales representatives when the medical community believed the liaisons were individuals hired to provide scientific knowledge rather than sell a manufacturer's drugs.⁷⁴ Third, Parke-Davis paid doctors to allow its sales representatives to participate in discussions with patients regarding treatment options.⁷⁵ Fourth, Parke-Davis paid doctors to travel to lavish locations such as Palm Beach and Maui to attend "consultant" or "advisory" meetings that exclusively discussed off-label uses of Neurontin.⁷⁶ Fifth, Parke-Davis hosted hundreds of teleconferences where doctors were paid to deliver speeches, frequently scripted by Parke-Davis, to other doctors about the off-label uses of Neurontin.⁷⁷

⁶⁹ See Sentencing Memorandum of the United States, *United States v. Warner-Lambert Co. LLC*, Criminal No. 04-10150 RGS (D. Mass., filed June 2, 2004) [hereinafter Warner-Lambert Sentencing Memorandum].

⁷⁰ The term "United States" represents the "United States Attorney [in the District of Massachusetts], the United States Department of Justice, the negotiating team for prosecutors in fifty states and the District of Columbia, and the Office of General Counsel for the Department of Health and Human Services . . ." *Id.* at 1.

⁷¹ The final settlement was between the United States and Warner-Lambert Company, LLC, the parent corporation of Parke-Davis. *Id.*

⁷² *Id.* at 26-27.

⁷³ *Id.* at 27-28.

⁷⁴ *Id.* at 28-29.

⁷⁵ In one such discussion, a Parke-Davis sales representative encouraged a doctor to increase a patient's daily dosage of Neurontin and take the patient off of other epilepsy medications to reduce side effects. Because Neurontin was only FDA-approved to treat epilepsy in conjunction with other epilepsy medications, this constituted the promotion of an off-label use. Warner-Lambert Sentencing Memorandum, *supra* note 69, at 32.

⁷⁶ *Id.* at 33-38.

⁷⁷ *Id.* at 39-40.

Sixth, Parke-Davis hosted CME seminars delivering supposedly independent medical education regarding the off-label uses of Neurontin.⁷⁸ To the contrary, Parke-Davis controlled the content of these seminars by developing the curriculum and choosing the speakers.⁷⁹ Further, Parke-Davis allegedly disclaimed having influence over the seminars and falsely stated that the distributed materials were created in compliance with applicable CME guidelines that prohibit manufacturer participation.⁸⁰

These allegations of Parke-Davis's illegal activities led to Warner-Lambert's settlement with the United States. In 2004, Warner-Lambert pled guilty to charges for introducing a misbranded drug into interstate commerce by reason of inadequate labeling for use and for introducing "an unapproved new drug into interstate commerce in violation of 21 U.S.C. §§ 331(a), 331(d), 352(f)(1) and 355(a)."⁸¹ Warner-Lambert agreed to a monetary punishment of \$240 million as a result of its criminal activities, representing "the second largest criminal fine ever imposed in a health care fraud prosecution."⁸² In addition to criminal penalties, Warner-Lambert settled its civil liabilities for \$190 million.⁸³ Finally, Pfizer,⁸⁴ which had acquired Warner-Lambert in the interim, agreed to the terms of a CIA.⁸⁵ The CIA requires, *inter alia*, Pfizer to train and certify its employees regarding appropriate marketing strategies, to independently review its marketing strategies, and to routinely disclose information to HHS relating to its compliance with the CIA.⁸⁶

⁷⁸ *Id.* at 40–41.

⁷⁹ *Id.* at 40–41.

⁸⁰ *Id.* at 41.

⁸¹ *Id.* at 1–2.

⁸² Warner-Lambert Press Release, *supra* note 16.

⁸³ The \$190 million in civil penalties breaks down as follows: \$83.6 million to the United States for losses suffered by the federal portion of the Medicaid program, \$68.4 million to the fifty states and the District of Columbia for losses suffered by state Medicaid programs, and \$38 million to the fifty states and the District of Columbia for harm caused to consumers. All these losses were allegedly the result of Warner-Lambert's fraudulent off-label promotional scheme. *Id.*; *see also* Warner-Lambert Sentencing Memorandum, *supra* note 69, at 4.

⁸⁴ Pfizer Inc. acquired Warner-Lambert in June 2000. *See* Warner-Lambert Press Release, *supra* note 16.

⁸⁵ *Id.*

⁸⁶ Warner-Lambert Sentencing Memorandum, *supra* note 69, at 52. *See generally* Corporate

B. Serono Pays \$704 Million to Resolve Charges Relating to its Marketing of Serostim

Between 2000 and 2004, five employees of Serono, S.A. (Serono) and an independent foundation filed suit under the qui tam provisions of the FCA.⁸⁷ Similar to the suit against Parke-Davis, these allegations were based on the theory that Serono's off-label promotion of its prescription drug Serostim caused false claims to be submitted to the government.⁸⁸

The FDA approved Serostim in 1996 solely for the purpose of treating AIDS wasting, a condition that involves significant weight loss in AIDS patients.⁸⁹ Before Serostim's approval, AIDS wasting was a prevailing cause of death among AIDS patients.⁹⁰ However, due to the effectiveness of this drug, "the incidence and prevalence of AIDS wasting began to markedly decline and the demand for Serostim dropped significantly immediately following its launch."⁹¹ As a result, the DOJ alleged that Serono decided to find ways to continue reaping profits from its newly developed drug.⁹² It is noted that "[a]lthough the government alleged in the civil settlement agreement that Serono had engaged in off-label promotion of Serostim, it entered into a side agreement with Serono, specifically declining criminal prosecution for, among other things, off-label promotion. . . ."⁹³ The following analysis summarizes Serono's alleged misconduct and utilizes information contained in the civil settlement agreement.

Integrity Agreement Between the Office of the Inspector General of the Department of Health and Human Services and Pfizer Inc., available at http://oig.hhs.gov/fraud/cia/agreements/pfizer_5_11_2004.pdf (detailing the terms of the CIA).

⁸⁷ Civil Settlement Agreement between the United States and Serono, Inc., at 2-3, available at <http://www.corporatecrimereporter.com/documents/Serono-CivilSettlementAgreement.pdf> [hereinafter Serono Civil Settlement].

⁸⁸ *Id.* at 4.

⁸⁹ Press Release, Dep't of Justice, Serono to Pay \$704 Million For The Illegal Marketing of AIDS Drug (Oct. 17, 2005), available at http://www.usdoj.gov/opa/pr/2005/October/05_civ_545.html [hereinafter Serono Press Release].

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Cinquegrana & Lloyd, *supra* note 17.

The civil settlement agreement detailed the government's allegations that Serono sought increased profits by promoting Serostim for off-label uses.⁹⁴ Serono allegedly attempted to expand the market for Serostim by promoting the drug for the treatment of "lipodystrophy, (i.e., a separate condition involving weight gain in the midsection and/or weight loss in the extremities) and body cell mass ("BCM") wasting. . . ."⁹⁵ Also, the United States alleged that Serono sought to expand the existing definition of AIDS wasting to include losses in or deficiency of BCM regardless of any losses in weight, thus increasing the instances in which Serostim would be prescribed.⁹⁶ However, the FDA never approved Serostim to treat either lipodystrophy or BCM wasting.⁹⁷

In conjunction with its efforts to increase the market for Serostim, the government alleged that Serono conspired with computer manufacturers to promote bioelectrical impedance analysis (BIA) software devices.⁹⁸ Serono purportedly claimed that these devices could calculate individuals' BCM, and Serono sales representatives would use the devices to perform BIA on patients for the purpose of diagnosing BCM and/or AIDS wasting even though the FDA never approved the devices for such uses.⁹⁹ It was also alleged that Serono offered illegal payments to doctors including, *inter alia*, all-expense paid trips to a medical conference in Cannes, France as a reward for writing a predetermined number of Serostim prescriptions.¹⁰⁰ Illegal payments were also purportedly made to pharmacies in the form of rebates and discounts in order to induce them to recommend Serostim or arrange for its use.¹⁰¹

The United States¹⁰² reached a settlement with Serono after

⁹⁴ See Serono Civil Settlement, *supra* note 87, at 5.

⁹⁵ *Id.*

⁹⁶ *Id.*; see also Cinquegrana & Lloyd, *supra* note 17.

⁹⁷ Serono Civil Settlement, *supra* note 87, at 5.

⁹⁸ *Id.* at 5-6.

⁹⁹ *Id.*; see also Cinquegrana & Lloyd, *supra* note 17.

¹⁰⁰ Serono Civil Settlement, *supra* note 87, at 6; see also Serono Press Release, *supra* note 89.

¹⁰¹ Serono Civil Settlement, *supra* note 87, at 6.

¹⁰² In the Serono case, the term "United States" collectively refers to the:

United States of America, acting through its Department of Justice and the United States Attorney's Offices for the Districts of Massachusetts, Maryland and

completing its own investigation of the pharmaceutical manufacturer's actions. In late 2005, Serono pled guilty to two criminal charges: (1) conspiracy "to introduce and deliver for introduction into interstate commerce, with intent to defraud or mislead, adulterated medical devices" and (2) conspiracy "to knowingly and willfully pay illegal remuneration to health care providers to induce them to refer patients to pharmacies for the furnishing of the drug Serostim for which payments were made in whole or in part by the Medicaid program."¹⁰³ Serono agreed to a \$136.9 million fine to settle its criminal liability.¹⁰⁴ The monetary settlement also included \$567 million in civil liabilities, which represents \$305 million paid to the United States "for losses suffered by the federal portion of the Medicaid program" and \$262 million paid to state Medicaid programs.¹⁰⁵ Finally, Serono agreed to the terms of a CIA, which was more severe than the CIA imposed on Warner-Lambert.¹⁰⁶ Major additions to the Serono CIA included a requirement to implement policies that ensure "financial incentives do not inappropriately motivate . . . promotion, sales, and marketing,"¹⁰⁷ and to document and review all inquiries regarding Serostim to assess whether an undue amount of requests for off-label uses have occurred in a particular region, possibly suggesting improper off-label promotion.¹⁰⁸ Although one objective of these penalties is to deter the practice of off-label promotion by

Connecticut, the Office of Inspector General of the United States Department of Health and Human Services; the United States Office of Personnel Management; the United States Department of Defense TRICARE Management Activity.

Serono Civil Settlement, *supra* note 87, at 1.

¹⁰³ Letter from Michael J. Sullivan, U.S. Attorney, Dist. of Mass. to Henry J. DePippo and Melissa Tearney, at 1 (Oct. 12, 2005) (outlining plea agreement in *United States v. Serono Laboratories, Inc.*), available at <http://www.corporatecrimereporter.com/documents/Serono-PleaAgreement.pdf> [hereinafter Serono Plea Agreement].

¹⁰⁴ *See id.* at 5.

¹⁰⁵ Serono Press Release, *supra* note 89.

¹⁰⁶ *See* Cinquegrana & Lloyd, *supra* note 17 (discussing the differences in the Warner-Lambert and Serono settlements). *See generally* Corporate Integrity Agreement Between the Office of Inspector General of the Department of Health and Human Services and Serono Holding, Inc., available at http://oig.hhs.gov/fraud/cia/agreements/SeronoHoldings_101405.pdf [hereinafter Serono CIA].

¹⁰⁷ Serono CIA, *supra* note 106, at 8; *see also* Cinquegrana & Lloyd, *supra* note 17.

¹⁰⁸ Serono CIA, *supra* note 106, at 27-28; *see also* Cinquegrana & Lloyd, *supra* note 17.

pharmaceutical manufacturers in the future, it is the author's opinion that such desirable results may not occur.

IV. DESPITE THE RISK OF MONETARY PENALTIES AND CORPORATE INTEGRITY AGREEMENTS, PHARMACEUTICAL MANUFACTURERS MAY CONTINUE OFF-LABEL PROMOTION

A. Off-Label Promotion is the Result of a Calculated Business Plan

Commentary suggests that manufacturers should heed recent settlements and voluntarily implement policies that will help prevent off-label promotion by their company.¹⁰⁹ Indeed, it would be ideal if manufacturers were to take the initiative to curb off-label promotion. However, manufacturers may not be inclined to implement or follow such policies because off-label promotion is a profitable, albeit illegal, business plan.

In the author's opinion, the alleged actions of Parke-Davis provide an example of a manufacturer's calculated decision to undergo potentially illegal business practices in search of higher profits. The following analysis is based on allegations contained in the Warner-Lambert sentencing memorandum;¹¹⁰ however, Warner-Lambert may not have admitted liability with respect to each allegation. According to the sentencing memorandum, Parke-Davis was dissatisfied with Neurontin's sales as an adjunctive epilepsy treatment after the drug's launch.¹¹¹ Nonetheless, it noticed that competing drugs were also being prescribed to treat bipolar disorder and pain.¹¹² As a result, Parke-Davis created financial models to estimate revenues from such off-label uses with and without FDA

¹⁰⁹ See generally Greene, *supra* note 4, at 45 (suggesting that increased governmental scrutiny of manufacturers' marketing strategies should encourage manufacturers to educate their employees and implement compliance programs to ensure compliance with the law).

¹¹⁰ For further discussion see Harris L. Pogust, *Neurontin – A History of Deception and Death*, ATLA Winter Convention Reference Materials (2006) (providing a similar analysis, which advocates the belief that Warner-Lambert's off-label promotion of Neurontin was the result of a business decision).

¹¹¹ Warner-Lambert Sentencing Memorandum, *supra* note 69, at 13.

¹¹² *Id.*

approval.¹¹³ Although some of the models projected higher revenues if the uses were FDA-approved, Parke-Davis's senior management decided not to seek FDA approval.¹¹⁴ There were several reasons for this decision. For example, additional FDA-approved uses of Neurontin would expand the scope of the drug's generic competition once its patent expired,¹¹⁵ which could eat into Neurontin's profits in the long term.¹¹⁶ In addition, Parke-Davis had a new drug in its pipeline called Pregabalin, which was "chemically similar to Neurontin, but the company anticipated obtaining approval for a broader range of uses. . . ."¹¹⁷ Parke-Davis feared that if Neurontin were approved for any of the uses that were planned for Pregabalin, sales of this new drug would also suffer from Neurontin's generic competition due to the similarity of the two drugs.¹¹⁸

In connection with Parke-Davis's decision not to seek FDA approval, the company's New Product Committee concluded that "clinical studies [of Neurontin] should be designed for publication rather than regulatory purposes" and a Parke Davis Marketing Assessment referred to bipolar disorder as "an attractive commercial opportunity" for Neurontin.¹¹⁹ Promoting off-label uses of Neurontin became a primary objective, and the Neurontin Strategic Plan for 1997 overtly stated the goal to "maximize Neurontin opportunities in emerging applications."¹²⁰ Records show that Warner-Lambert's Southeast Customer Business Unit (SECBU) even delivered a

¹¹³ *Id.* at 19.

¹¹⁴ *Id.*

¹¹⁵ "The labeled indications for a generic drug must be the same as for the innovator drug. Thus, by not seeking broader approvals for Neurontin, Parke-Davis limited the scope of generic competition." *Id.* at 18.

¹¹⁶ Competition from generic drugs is a major concern for pharmaceutical companies due to its potential to reduce profits. In early 2007, Pfizer announced that it would terminate 7,800 employees and close several manufacturing and research plants in response to competition from lower priced generic drugs. This downsizing will include the closing of a research site which employed 2,400 researchers. Andrew Pollack, *Pfizer, Hurt by Rival Generic Drugs, Will Lay Off 7,800*, N.Y. TIMES, Jan. 23, 2007, at C1.

¹¹⁷ Warner-Lambert Sentencing Memorandum, *supra* note 69, at 19.

¹¹⁸ *Id.* at 20.

¹¹⁹ *Id.* at 18.

¹²⁰ *Id.* at 15. Parke-Davis's use of the term "emerging applications" implies non FDA-approved or off-label uses.

marketing presentation to Warner-Lambert's upper-management in which they boasted of "exploiting [Neurontin's] new frontiers of pain management and bipolar depression . . ." ¹²¹ Evidence suggests that Parke-Davis' business plan ultimately included annual sales goals and marketing budgets strictly for off-label uses of Neurontin. ¹²²

The decision to forego FDA approval and actively promote off-label uses of Neurontin was extremely profitable. Prior to the launch of Parke-Davis's off-label promotional scheme, only fifteen percent of Neurontin uses were off-label, ¹²³ and the drug's annual sales totaled \$97.5 million. ¹²⁴ At the time of the settlement, Neurontin ranked ninth among all drugs sold in the United States, and annual sales of the drug exceeded \$2.5 billion. ¹²⁵ During the years leading up to the settlement, it is estimated that over ninety percent of these sales were derived from off-label uses. ¹²⁶ Although it is impossible to calculate the overall financial gains resulting from Parke-Davis's off-label promotional scheme with precision, it is the author's opinion that the multi-billion dollar annual sales figures dwarf the \$430 million global settlement.

B. Off-Label Promotion is Widespread and Recent Settlements Indicate That This Problem Will Persist

The actions of Parke-Davis and Serono do not represent isolated events. At approximately the same time as Serono's settlement, pharmaceutical manufacturer Eli Lilly (Lilly) pled guilty to criminal misbranding violations and paid \$36 million related to its off-label promotion of Evista. ¹²⁷ Lilly's business plan mirrored that of Parke-

¹²¹ The SECBU's off-label marketing plan was outlined in a slide show, which included a slide containing the picture of a target under the words "SECBU RIGHT ON THE MARK WITH NEURONTIN AND PAIN," and listed strategies to boost sales of this off-label use. *Id.* at 16.

¹²² Warner-Lambert Sentencing Memorandum, *supra* note 69, at 14-15.

¹²³ *Id.* at 14.

¹²⁴ Evelyn Pringle, *Neurontin Deal - Slap On the Hand to Pfizer*, Lawyers and Settlements (May 25, 2006), available at <http://www.lawyersandsettlements.com/articles/neurontin.html>.

¹²⁵ *Id.*

¹²⁶ Warner-Lambert Sentencing Memorandum, *supra* note 69, at 14; see also Anna Wilde Mathews & David Armstrong, *Pfizer Case Signals Tougher Action on Off-Label Drug Use*, WALL ST. J., May 14, 2004, at B1.

¹²⁷ Evista is approved to treat osteoporosis in post-menopausal women. Press Release, Dep't of

Davis, in that Lilly allegedly initiated the use of consultant meetings and sales representatives to promote off-label uses of the drug after it initially produced disappointing sales.¹²⁸

Additional investigations indicate that off-label promotion may have been a common business practice at Lilly. The manufacturer also faces federal and state investigations regarding allegations that off-label promotion is driving the sales of its best selling drug, Zyprexa.¹²⁹ Lilly marketing documents detail a campaign entitled "Viva Zyprexa," which appears to instruct Lilly sales representatives to promote the drug for dementia,¹³⁰ an unapproved and potentially dangerous use of the drug.¹³¹ During the time in which Lilly was allegedly engaged in an off-label promotional scheme for Zyprexa, annual sales of the drug doubled from \$1.5 billion to \$3 billion.¹³² As of late 2006, numerous cases were pending against Lilly relating to Zyprexa and sales of the drug accounted for thirty percent of Lilly's total revenues.¹³³

Allegations surrounding off-label promotion by manufacturers continue to make the news, affirming that this is a common practice. In May 2007, Purdue Pharma (Purdue) agreed to pay \$600 million to settle charges related to the misbranding of its painkiller OxyContin, which generated over \$1 billion in annual revenues for this

Justice, Eli Lilly and Company to Pay U.S. \$36 Million Relating to Off-Label Promotion (Dec. 21, 2005), available at http://www.usdoj.gov/opa/pr/2005/December/05_civ_685.html.

¹²⁸ Lilly's tactics included hosting a "market research summit" to promote Evista for reducing the risk of breast cancer and creating a videotape stating that "Evista truly is the best drug for the prevention of all these diseases' referring to osteoporosis, breast cancer, and cardiovascular disease." *Id.*

¹²⁹ Alex Berenson, *Drug Files Show Maker Promoted Unapproved Uses*, N.Y. TIMES, Dec. 18, 2006, at A1.

¹³⁰ The documents state that "dementia should be [the] first message" to doctors who treat this disease. Further, the documents provide profiles of fictitious patients that would be suitable Zyprexa candidates, which include a grown woman with agitation and difficulty sleeping. This profile lacks the trademark symptoms that are typically linked to paranoia and schizophrenia, which are the only two conditions that Zyprexa is FDA-approved to treat. *Id.*; see also Bonnie Goldstein, *How Lilly Sells Zyprexa*, available at <http://www.slate.com/id/2159880/entry/2159881/> (last visited Apr. 15, 2008).

¹³¹ Berenson, *supra* note 129.

¹³² *Id.*

¹³³ *Id.*

manufacturer.¹³⁴ Purdue also “agreed to pay \$19.5 million to 26 states and the District of Columbia” to settle allegations related to off-label promotion; specifically, that it encouraged physicians to prescribe greater doses of the drug than were permitted under the FDA-approved labeling.¹³⁵ Even more recently, in July 2007, Jazz Pharmaceuticals, Inc. agreed to pay roughly \$20 million related to misbranding violations by one of its subsidiaries, Orphan Medical, Inc (Orphan).¹³⁶ Investigators alleged that employees of Orphan promoted a product, which was FDA-approved to treat excessive sleepiness in narcolepsy patients for uses such as weight loss, depression and bipolar disorder.¹³⁷ Given the prevalent occurrences of off-label promotion, it is the author’s opinion that manufacturers may continue this practice as long as it is a profitable venture.

V. THE CURRENT APPROACH TO COMBATING OFF-LABEL PROMOTION: IS THERE A SOLUTION TO THE PROBLEM?

A. Increasing the Risks that Pharmaceutical Manufactures Will Be Caught

Off-label promotion appears to be a profitable business plan that may persist despite the possibility of monetary settlements and CIAs. This is largely due to the fact that every business decision entails some comparison of the potential risks and rewards—and currently the potential rewards associated with off-label promotion appear to outweigh the related risks. Ideally, a manufacturer’s decision to pursue off-label promotional schemes could be deterred by substantially increasing the risks of being caught in such schemes.

Many individuals employed in the pharmaceutical industry may be aware of off-label promotion and the issues surrounding it. However, it is the author’s opinion that continuing to promote

¹³⁴ Barry Meier, *Narcotic Maker Guilty of Deceit Over Marketing*, N.Y. TIMES, May 11, 2007, at A5.

¹³⁵ *Id.*

¹³⁶ *Jazz Pharma to pay \$20M to Settle Orphan Medical Misbranding Charges*, SILICON VALLEY / SAN JOSE BUSINESS JOURNAL, July 13, 2007, available at <http://sanjose.bizjournals.com/sanjose/stories/2007/07/09/daily80.html>.

¹³⁷ *Id.*

awareness of the FCA's qui tam provisions is one way to increase the chances that a manufacturer will be exposed in an off-label promotion scheme. The effectiveness of the FCA's qui tam provisions is proven. To date, the top five FCA recoveries are the result of whistleblower cases against healthcare companies,¹³⁸ and efforts are being made to ensure that personnel in every area of the pharmaceutical industry are aware of the FCA and its qui tam provisions.

Congress took a step towards the goal of increasing FCA awareness by passing the Deficit Reduction Omnibus Reconciliation Act of 2005.¹³⁹ Section 6032 of this Act, entitled "Employee Education About False Claims Recovery," requires entities that receive or make \$5 million or more in annual Medicaid payments to include detailed information in their employee handbooks regarding the laws surrounding the FCA and employees' rights as whistleblowers.¹⁴⁰ At the very least, this Act will ensure that numerous employees in the pharmaceutical industry will have access to information regarding the FCA.

Similarly, the OIG encourages manufacturers to implement compliance programs and has issued Compliance Program Guidance for Pharmaceutical Manufacturers (Compliance Guidance).¹⁴¹ The Compliance Guidance represents the OIG's views "on the value and fundamental principles of compliance programs for pharmaceutical manufacturers and the specific elements that pharmaceutical manufacturers should consider when developing and implementing an effective compliance program."¹⁴² The Compliance Guidance suggests that manufacturers create written compliance procedures and distribute them to employees in order to guide them in day-to-day operations.¹⁴³ In addition, the Compliance Guidance promotes

¹³⁸ Pringle, *supra* note 124, at 3.

¹³⁹ See Taxpayers Against Fraud, <http://www.taf.org> (last visited Apr. 15, 2008).

¹⁴⁰ *Id.*; see also Conference Report on S. 1932, Deficit Reduction Act of 2005, House of Representatives (Dec. 18, 2005) § 6032(a)(3)(A)-(C) (detailing the written policies that must be included in employee handbooks).

¹⁴¹ See generally OIG Compliance Program Guidance for Pharmaceutical Manufacturers, 68 Fed. Reg. 23,731 (May 5, 2003).

¹⁴² *Id.* at 23,731.

¹⁴³ *Id.* The OIG suggests that these written policies include information regarding "the federal

the training and periodic retraining of employees as a critical element of a compliance program.¹⁴⁴

Written policies and training sessions should specifically address the types of activities that have been found to constitute off-label promotion and misbranding violations. Moreover, it would be beneficial for educational and training materials to include specific examples of successful qui tam suits in which whistleblowers have revealed FCA violations related to off-label promotion. This is because the rewards to whistleblowers in FCA cases dealing with off-label promotion have been substantial. For example, the Parke-Davis whistleblower received approximately \$24.64 million of the civil recovery,¹⁴⁵ while the Serono whistleblowers shared approximately \$51.8 million of the civil recovery.¹⁴⁶ Although some scholars contend that whistleblowers are motivated by monetary reasons rather than an interest in exposing fraud, examples of these recoveries would undoubtedly encourage employees to be responsive in reporting possible instances of fraud. If these figures served as examples of one of the benefits to filing an FCA claim, the increased number of pharmaceutical employees that are willing to blow the whistle would hopefully cause manufacturers to think twice before engaging in off-label promotion.

Promoting compliance programs and requiring education regarding the FCA signifies a proactive shift towards fighting off-label promotion. An increased number of informed whistleblowers in the pharmaceutical industry will increase the chances that manufacturers will be exposed and decrease the possibility for manufacturers to engage in full-blown off-label promotional efforts. Viewing the problem from an optimistic perspective, one hopes that the risk of engaging in an off-label promotional scheme would begin to outweigh the reward. However, the disparaging fact remains that

anti-kickback statute and the constraints it places on the marketing and promotion of products reimbursable by the federal health care programs" in addition to information regarding how violations of this statute may give rise to liability under the FCA. *Id.* at 23,734.

¹⁴⁴ Similar to the written policies, the OIG believes that training sessions should include information on the anti-kickback statute and its application to sales and marketing practices. *Id.* at 23,740.

¹⁴⁵ Warner-Lambert Press Release, *supra* note 16.

¹⁴⁶ Serono Press Release, *supra* note 89.

this business plan is a profitable one and manufacturers may not be inclined to abide by compliance programs. Even if it becomes virtually inevitable that pharmaceutical manufacturers will be caught because of the number of informed employees, it is questionable whether this risk will serve as a sufficient deterrent or if companies will simply accept the risk as a cost of doing business.

B. The Issues Surrounding Monetary Penalties When Pharmaceutical Manufacturers are Caught

In addition to attempting to increase the risks that manufacturers are caught, the government should also make efforts to decrease the rewards that manufacturers receive through off-label promotion. While this could be accomplished by increasing monetary penalties imposed when manufacturers are caught, this objective presents its own set of problems.

It is undisputed that the government is intent on fighting off-label promotion. In the DOJ's press release regarding the Warner-Lambert settlement, Associate Attorney General Robert McCallum stated: "It is of paramount importance that the [DOJ] use every legal tool at its disposal to assure the health and safety of the consumer of America's health care system, and to pursue companies and individuals that steal from the taxpayers and inflict suffering on patients and families."¹⁴⁷ Arguably the most powerful legal tool at the DOJ's and United States government's disposal is the FCA's treble damages provision.¹⁴⁸ Anyone who violates the FCA "is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus three times the amount of damages which the Government sustains. . . ."¹⁴⁹ Although this powerful tool could potentially be used in a litigated case, its implementation is highly unlikely because the government has experienced little success when it brings pharmaceutical health care fraud cases to trial.

Perhaps the most vivid example of the government's lack of success at a trial for pharmaceutical health care fraud is the federal

¹⁴⁷ Warner-Lambert Press Release, *supra* note 16.

¹⁴⁸ See 31 U.S.C. § 3729 (2000).

¹⁴⁹ *Id.* at (a)(7).

prosecution of individual employees of TAP Pharmaceutical Products (TAP).¹⁵⁰ In 2001, TAP pled guilty and paid \$885 million to settle criminal and civil charges related to the sales and marketing practices for one of its drugs.¹⁵¹ When similar charges were brought against eight current and former employees of TAP, a jury vindicated all of the defendants.¹⁵² More recently, a federal grand jury acquitted four former executives of Serono for charges related to its promotion of Serostim, which was previously discussed.¹⁵³ It is equally surprising that these executives were acquitted after Serono, in essence, admitted to the wrongdoing and paid \$704 million to settle related charges just two years earlier.¹⁵⁴

Given the government's difficulty in prevailing at trial, settlement is the most realistic course of action. However, the government possesses a lot of power during the settlement process because most manufacturers do not want to take their chances at trial. Instead, it is in the manufacturer's best interest to resolve any liability outside of the courtroom in order to avoid a lengthy trial that could damage its reputation and stock price.¹⁵⁵ It is the author's opinion that larger monetary settlements may be necessary to deter off-label promotion.

The monetary fines imposed in the Warner-Lambert and Serono settlements were near record-breaking;¹⁵⁶ however, they technically could have been higher. For example, the parties in these two settlements determined the criminal portion of the fines by

¹⁵⁰ See Shelly Murphy & Alice Dembner, *All Acquitted in Drug Kickbacks Case: Jury Deals a Blow to U.S. Prosecutors*, THE BOSTON GLOBE, July 15, 2004, available at http://www.boston.com/news/local/articles/2004/07/15/all_acquitted_in_drug_kickbacks_case/.

¹⁵¹ *Id.*

¹⁵² *See id.*

¹⁵³ *See Ex-Serono Executives Acquitted in Massachusetts*, Reuters, May 4, 2007, available at <http://www.reuters.com/article/health-SP/idUSN0322831120070504>.

¹⁵⁴ *See Serono Press Release*, *supra* note 89.

¹⁵⁵ *See Krause*, *supra* note 54, at 204 (quoting Uwe E. Reinhardt, *Medicare Can Turn Anyone into a Crook*, WALL ST. J., Jan. 21, 2000, at A18).

¹⁵⁶ The \$240 million criminal fine in the Warner-Lambert settlement was the second largest criminal fine related to health care fraud. Warner-Lambert Press Release, *supra* note 16. The \$704 million Serono settlement represented "the third largest health care fraud recovery by the U.S." Serono Press Release, *supra* note 89.

multiplying the pecuniary gain¹⁵⁷ the manufacturer received by a multiplier.¹⁵⁸ In the Warner-Lambert settlement, the parties agreed that the pecuniary gain was “approximately \$150 million.”¹⁵⁹ The pecuniary gain was measured from the time when Warner-Lambert’s illegal activity “began to have an impact midway through 1995 [to when it] diminished somewhat . . . and thereafter tailed off after the first quarter of 1999.”¹⁶⁰ Warner-Lambert’s multiplier range was from 1.6 to 3.6. However, the statutory maximum penalty in this situation was two times the pecuniary gain; therefore, the range was reduced to between 1.6 and 2.0.¹⁶¹

Although the 2.0 multiplier potentially could have been applied, resulting in a criminal fine of \$300 million, the parties agreed to the lowest available multiplier of 1.6, resulting in a penalty of \$240 million.¹⁶² The parties referred to this settlement amount as “one that comports with the factors that the Court is required to consider under 18 U.S.C. §§ 3553(a) and 3572(a).”¹⁶³ Factors to consider under 18 U.S.C. § 3553(a) include “the nature and circumstances of the offense” and “the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. . . .”¹⁶⁴ Under 18 U.S.C. § 3572(a) these factors include the defendant’s “earning capacity[,] . . . the burden that the fine will impose upon the defendant[, and] the need to deprive the defendant of illegally obtained gains from the offense”¹⁶⁵ Given the egregious nature of Parke-Davis’s offense, the need to promote respect for the law among other manufacturers, and the financial wherewithal of Warner-Lambert’s parent

¹⁵⁷ Pecuniary gain is “the additional before-tax profit to the defendant resulting from the relevant conduct of the offense.” 18 U.S.C.A. app. § 8A1.2, appn. n. 3(h) (2000); *see also* Warner-Lambert Sentencing Memorandum, *supra* note 69, at 46, 52.

¹⁵⁸ Multiple damages are “[s]tatutory damages . . . that are a multiple of the amount that the fact-finder determines to be owed.” BLACK’S LAW DICTIONARY 418 (8th ed. 2004).

¹⁵⁹ Warner-Lambert Sentencing Memorandum, *supra* note 69, at 50.

¹⁶⁰ *Id.* at 48.

¹⁶¹ *Id.* at 51.

¹⁶² \$150 million (Pecuniary Gain) x 1.6 (Multiplier) = \$240 million (Criminal Fine). *Id.* at 51-52.

¹⁶³ *Id.* at 52.

¹⁶⁴ 18 U.S.C. § 3553(a) (2000).

¹⁶⁵ 18 U.S.C. § 3572(a) (2000).

corporation Pfizer, it is this author's opinion that using something higher than the 1.6 multiplier in this situation would have been appropriate.¹⁶⁶

Unfortunately, the reality is that Warner-Lambert could essentially refuse to agree upon anything higher than the 1.6 multiplier, thus forcing the United States to accept a lower settlement amount. The very nature of settlements, an agreement between two parties, precludes the government from making any sort of demand in terms of monetary fines. Therefore, while the author believes that larger monetary fines may be necessary to deter off-label promotion in the future; this objective could be difficult to achieve.

Given the numerous benefits provided by manufacturers, a line obviously must be drawn so a fine would not drive a manufacturer into bankruptcy or paralyze its ability to remain in business. However, when examining fines relating to off-label promotion settlements, Pfizer's acquisition of Warner-Lambert in the midst of its Neurontin investigations is noteworthy.¹⁶⁷ Although large monetary penalties were looming, Pfizer nevertheless viewed Warner-Lambert as an appealing investment opportunity. In fact, Pfizer's website refers to the Warner-Lambert acquisition as "bringing together two of the fastest-growing companies in the pharmaceutical industry and adding to Pfizer's global strengths and rich heritage."¹⁶⁸ If Pfizer thought a potential settlement could severely hurt Warner-Lambert, the acquisition probably would not have taken place. This indicates that monetary penalties could be stricter without endangering the viability of manufacturers.

VI. CONCLUSION

Prescribing off-label by physicians is a useful and sometimes essential medical practice that can spark innovation in health care.

¹⁶⁶ It is noted that the Serono criminal fine was calculated in the same fashion, using the lowest multiplier in a possible range of 1.2 to 2.4. Therefore, the criminal penalty was calculated as follows: \$114.113 million (Pecuniary Gain) x 1.2 (Multiplier) = \$136.9 million (Criminal Fine). Serono Plea Agreement, *supra* note 103, at 5.

¹⁶⁷ *Pfizer Joins Forces With Warner-Lambert*, http://www.pfizer.com/about/pfizer_warner_lambert.jsp (last visited Sept. 25, 2007).

¹⁶⁸ *Id.*

However, manufacturers distort the process when they promote off-label uses with the primary goal of increasing profits. This conduct may expose patients to potentially dangerous uses of prescription drugs and take money from state and federally funded health care programs. Ideally, manufacturers would learn from the wrongdoings of their counterparts and create internal controls to prevent off-label promotion. However, it is the author's opinion that such behavior is unlikely because these fraudulent business models may be the result of a conscious decision by management to defy the law. Increasing the risks and decreasing the rewards related to off-label promotion is one way to try and fight this problem; however, manufacturers may continue on this path until it is no longer a worthwhile or profitable venture.