FEBRUARY 3, 2021

MOVING FROM THE INFORMED CONSENT TO APPROVED LABELING: PREPARING FOR RISKS IN PRODUCT MARKETING & USE

Julie Tibbets
Nilda Isidro
Brian Mukherjee

GOODWIN

With You Today

Julie Tibbets
Partner, Washington, DC

Nilda Isidro
Partner, New York

Brian Mukherjee
Counsel, Boston

GOODWIN

Transitioning from Pre-Commercial Communications to Post-Approval Promotion

What a Difference a Label Makes

Pre-Commercial Stage

- Clinical trial materials
- Medical meetings and publication strategy
- Confidential advisory boards
- Corporate communications
- Disease awareness

FDA Landscape

- Pre-approval promotion prohibition
- Informed consent and investigator brochure required contents
- IRB review/approval of study materials
- IND filings and investigator communications

Commercial-Stage

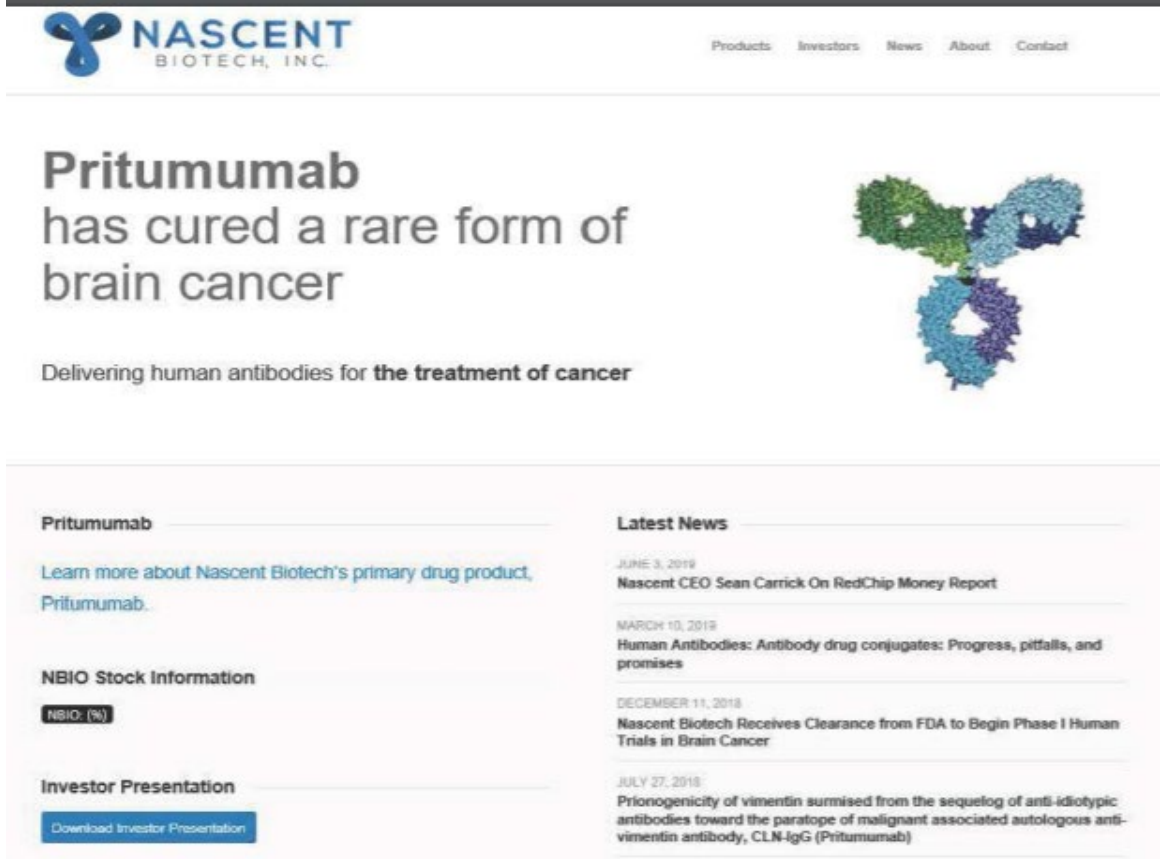
- Detailing, advertising & promotional labeling
- Direct-to-consumer marketing
- Reprint distribution
- Medical meeting promotional booths

FDA Landscape

- Labeling and advertising regulations/misbranding/2253 submissions
- Presenting risk information/brief summary
- On-label/consistent with FDA labeling
- Managing unsolicited off-label requests
- Drug sampling

Example: Pre-Approval Promotion Untitled Letter (2019)

Office of Prescription Drug Promotion review of corporate website



"PRITUMUMAB HAS CURED A RARE FORM OF BRAIN CANCER"

"DELIVERING HUMAN ANTIBODIES FOR THE TREATMENT OF CANCER"

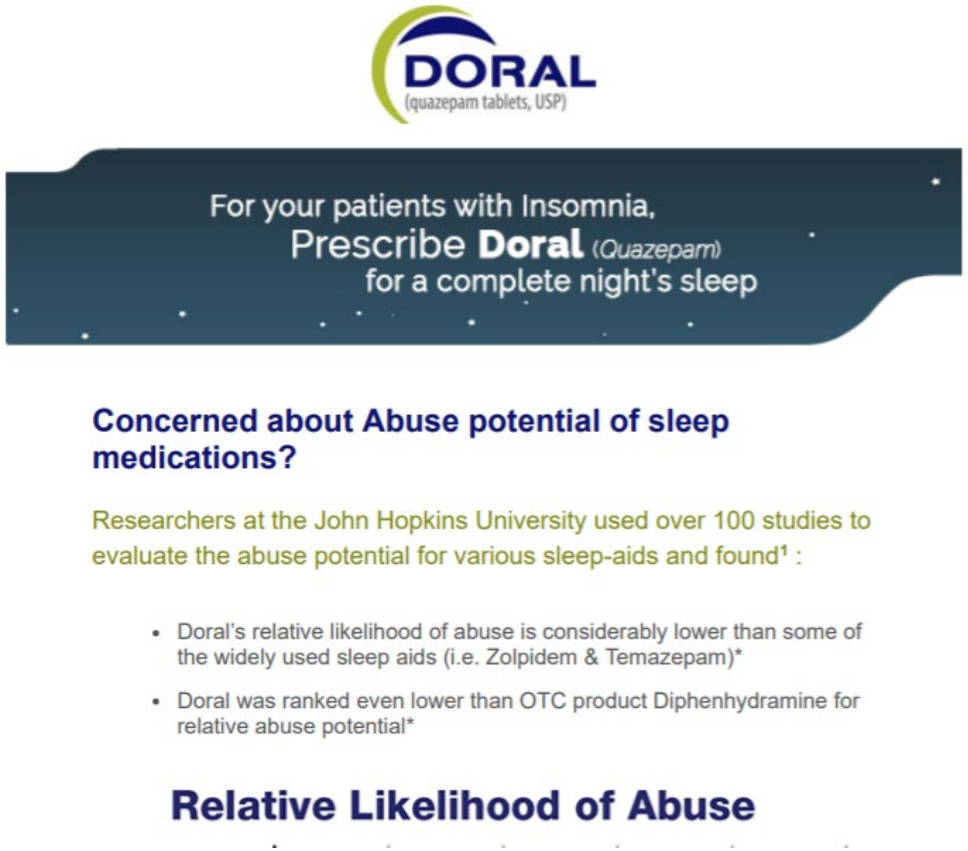
"AFTER 5 YEARS, PATIENTS TREATED WITH PRITUMUMAB HAVE AN OVERALL SURVIVAL RATE OF 25-30%, COMPARED TO 3% STANDARD THERAPY, DEMONSTRATING ANTIBODIES ARE SAFE AND EFFECTIVE"

"THE STATEMENTS ON THE WEBSITE MAKE CONCLUSORY REPRESENTATIONS IN A PROMOTIONAL CONTEXT REGARDING THE SAFETY AND EFFICACY OF PRITUMUMAB...."

GOODWIN

Example: Approved Product Warning Letter (2019)

Office of Prescription Drug Promotion review of professional email submitted on Form FDA 2253 for DORAL (quazepam) tablets for oral use C-IV



"THE EMAIL MAKES FALSE OR MISLEADING CLAIMS AND/OR REPRESENTATIONS ABOUT THE RISKS ASSOCIATED WITH AND EFFICACY OF DORAL."

"THE EMAIL…COMPLETELY OMITS THE WARNING AND PRECAUTION REGARDING BENZODIAZEPINE WITHDRAWAL SYNDROME."

THE EMAIL FAILS TO DISCLOSE INFORMATION FROM THE WARNINGS AND PRECAUTIONS, CNS-DEPRESSANT EFFECTS AND DAYTIME IMPAIRMENT SECTION, SEVERE ANAPHYLACTIC REACTIONS SECTION, ABNORMAL THINKING AND BEHAVIOR CHANGES SECTION, AND WORSENING DEPRESSION SECTION OF THE PI.

Best Practices for Pharmaceutical Promotion

No pre-approval promotion
No false or misleading claims
No minimization or omission of risk information
No off-label marketing or claims *inconsistent with* the approved labeling
No omission of material facts
No imbalance of benefits/risks → employ FDA's "net impression" standard
No unsubstantiated benefit, preference, or quality of life claims
No unsubstantiated comparative or superiority claims
No repeating other companies' mistakes → follow FDA's Untitled/Warning Letters
No pushing the envelope on marketing claims FDA previously has rejected

Key FDA Risk Management Activities in the Commercial-Stage

Understanding learnings from label negotiations – what sensitivities did FDA have along the way and what did FDA outright reject in negotiations

Training of sales, marketing, and medical affairs team members on promotion “dos” and “don’ts” and the regulatory and legal landscape in which they must operate - e.g., mock sales calls and Zoom-a-longs

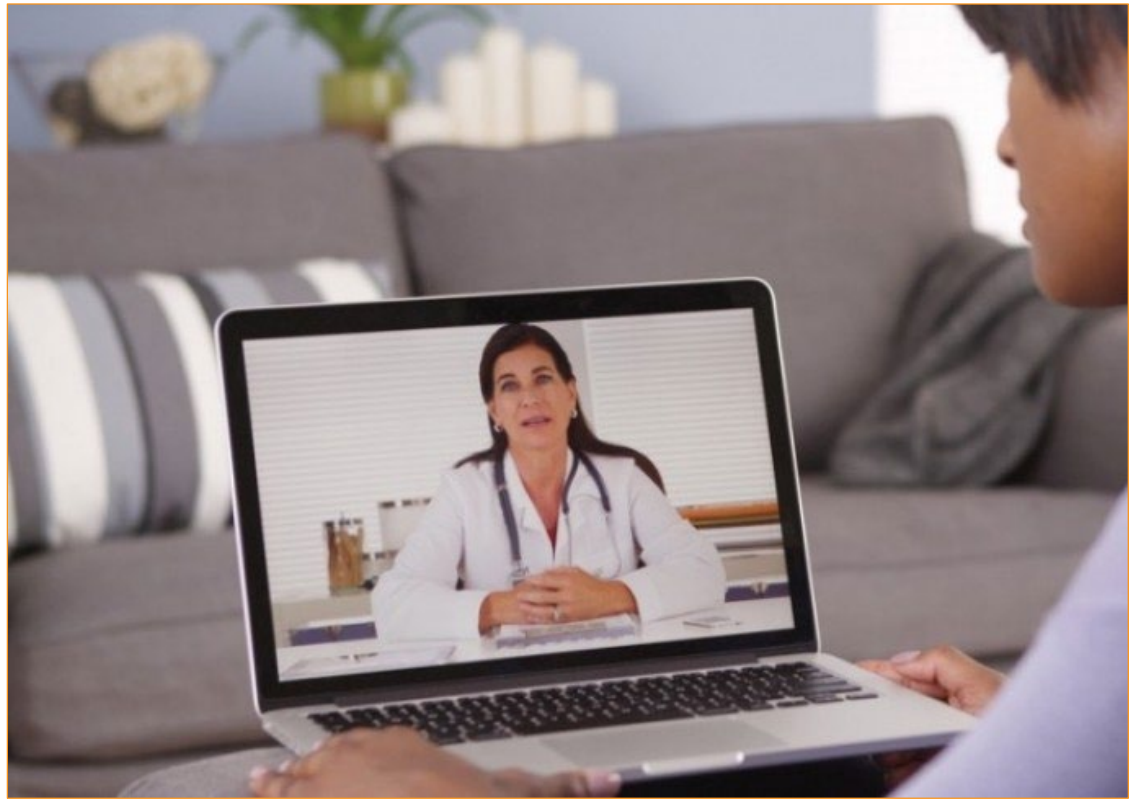
Preparing standard response letters and directing unsolicited off-label requests to Medical Information

Managing intake of product complaints and adverse events from the public and from field personnel & capturing, investigating, and acting on that information

Dealing with Emerging Product Information

- Updating FDA-approved labeling
- Re-examining your current promotional campaigns
- Updating medical affairs and medical information materials
- Expiring and seeking the return/destruction of outdated materials not reflecting revised product labeling

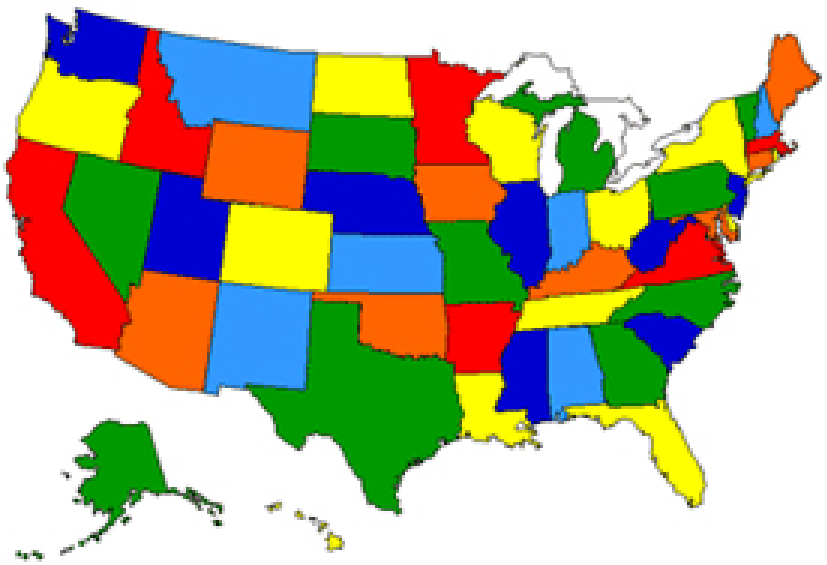
Impact of COVID-19 on Product Promotion



- Marketing innovation – Zoom details and Zoom lunch and learns
- Patients using the internet more than ever for locating medical and disease information
- Virtual conferences, medical meetings and booths
- Remote drug sampling

Preparing Your Product to Face Post-Marketing Operational Risks

FDA Compliance Is Just the Beginning



- FDA requirements create a **floor**, not a **ceiling**
  - *Wyeth v. Levine*, 555 U.S. 555 (2009)
- State law duties apply
  - "Must" versus "could" and "should"
- Failure-to-warn claims (NDA)
  - *Merck v. Albrecht*, 129 S. Ct. 1668 (2019)
  - Plaintiff's burden to identify "new information"
  - Defendant's burden to show "clear evidence" that FDA would have rejected the change

When Regulatory Risk & Litigation Risk Go Hand-In-Hand

- High Risk of Litigation
  - FDA Form 483
  - Warning Letter
  - Recall
- Where are your risks?
  - Your company
  - Suppliers
  - Manufacturers
  - Distributors
- BE PROACTIVE

GOODWIN

Be Proactive

- **Planning & Preparation**
- **Agility**
- **Narrative**

GOODWIN

Be Proactive: Planning & Preparation

- Have a crisis response team in place
- Proactively assess your risks
- Have contingency plans

GOODWIN

Be Proactive: Agility

- Early detection
  - Involves all levels
- Don’t just plan – PRACTICE
  - Mock Recalls
  - Traceability Exercises
  - Tabletop Exercises
- Constantly refine your systems and plans

Be Proactive: Narrative

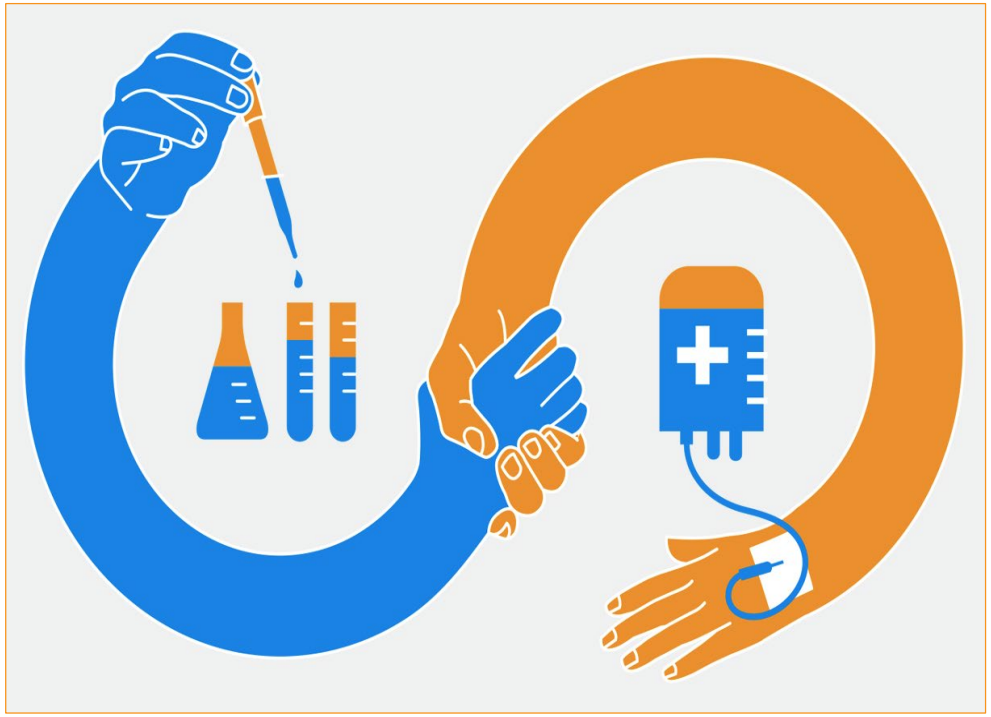
- Don’t wait for litigation to think about this
- People: Who tells your company story?
  - How is this affected by turnover?
- Paper: What story do your documents tell?
  - Not just your formal documents
    - Emails
    - Slack, Teams, Google Chat
  - Do your documents provide enough context?
    - “Possibility of increased [type of adverse event] is a great concern”

Using Insurance to Help Mitigate Risk

Insurance Considerations – Clinical Trials

Know Your Clinical Trial Insurance Program

- May be stand-alone or in combination with general liability (GL) insurance
- Coverage for claims for bodily injury and property damage caused by participation in an approved clinical trial
- Also may provide coverage for medical expenses due to participation in clinical trials, regardless of fault
- Controlled master program (CMP), including locally-issued policies
- “Claims Made” coverage
  - Importance of procuring tail Insurance or “sunset” clauses
- Are there any adverse events or claims that should reported under the current clinical trial insurance?



Product Liability Insurance

Maybe stand-alone or part of GL insurance

Scope of Coverage

- Injury to consumers or others resulting from product defects or failure, as well as “failure to warn” claims
- Claims arising from the provision of professional or manufacturing services

“Claims-made” vs. “occurrence-based” coverage

Benchmarking of Limits

- Per occurrence and aggregate limits
- Sales, geography and risk profile of product
- Separate product liability limit?

GOODWIN

Product Liability Insurance – *Cont.*

CMP vs. local policies

Potential coverage for contractual counterparties

- As required by contract
- Generally no coverage is provided for additional insured's own acts

Coverage generally written on a "duty to defend" basis

- Choice of counsel
- Defense within or outside the limits

Product liability policies will not cover product recall costs

Product Recall & Business Interruption Insurance

– Product Recall Coverage

- Difference in coverage between mandatory vs. permissive recalls
- May be a “sub-limited” coverage
- Intended to cover product recall, testing, destruction and replacement costs
- May not cover legal expenses associated with recall or dealing with regulators

– Business Interruption Coverage

- Sub-contracting of manufacturing
- Coverage for lost profits
- Cleaning and repair of equipment

Other Insurance Coverages

Property Coverage

Cyber and Data Privacy

- Costs associated with investigating data breaches
- Notification costs
- Coverage for third-party claims
- Often combined with professional liability coverage

Directors and Officers Insurance

- Claims by shareholders
- Investigations coverage for insured persons
- Scope of “bodily injury”, “errors and omissions” and “regulatory” claim exclusions

About Your Speakers

Julie Tibbets
Partner, Washington, DC

Julie Tibbets is a partner in Goodwin's Technology and Life Sciences groups and a member of its FDA practice. Ms. Tibbets focuses her practice on FDA-regulated product development, marketing and corporate communications as well as the intersection of each of those with corporate strategy and securities disclosure obligations. Her product areas of focus include biologics, drugs, medical devices, in vitro diagnostics, lab-developed tests, as well as digital health tools and apps. Ms. Tibbets advises clients on product development strategy, interactions with the FDA, clinical trial conduct and documentation, adverse event reporting, commercial strategy, product labeling and advertising and FDA inspections. She also leads the regulatory due diligence reviews of FDA-regulated M&A or investment targets, potential collaborators and licensees, and guides the regulatory disclosures of FDA-regulated entities in their initial public offerings.

Nilda Isidro
Partner, New York

Nilda Isidro is a partner and trial lawyer in the firm's Products Litigation and Counseling practice. She focuses her practice on defending innovative and highly-regulated consumer products and services in litigation, including mass torts and multi-district litigation (MDL). Her clients span a variety of industries, including: life sciences, technology, healthcare, personal care, and hemp-derived cannabinoids. In addition to defending clients in litigation, Ms. Isidro also provides strategic counseling on matters including: recall and incident response policies, product launches, product warnings, litigation preparedness, risk mitigation, and FDA/FTC regulatory compliance. Ms. Isidro was included in *Benchmark Litigation's* 2018-2020 40 & Under Hot List, selected as a 2015 Rising Star by the *New York Law Journal*, and has been recognized by *The Legal 500* for her work in Product Liability, Mass Tort and Class Action.

Brian Mukherjee
Counsel, Boston

Brian Mukherjee, a counsel in Goodwin's Complex Litigation & Dispute Resolution practice, concentrates on insurance and risk management matters for financial institutions, technology companies, private equity firms and other business clients. Mr. Mukherjee advises corporations, directors and officers, risk managers, and other professionals on insurance coverage, corporate indemnification, and litigation matters. He also has extensive experience in the negotiation and review of the terms and conditions in executive and professional liability policies, including cyber risk and related coverages. In addition, Mr. Mukherjee assists the firm's clients in evaluating insurance coverages in connection with initial public offerings, mergers and acquisitions and other corporate transactions.