

5 Social Media Pitfalls In The Pharmaceutical Industry

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Law360, New York (April 21, 2017, 2:39 PM EDT) -- In an ever fast paced and changing world, legal thinkers and practitioners must not only keep up with the changing laws and legal dynamics but stay ahead of them. This was the theme of the life sciences symposium co-sponsored by Mayer Brown and Seton Hall Law. The symposium, which was the second of its kind, was on March 2, 2017 in Newark, New Jersey. There were panel discussions covering many emerging topics, including advertising by the pharmaceutical industry on social media.[1] This discussion included in-house counsel from the pharmaceutical industry, law professors and Mayer Brown practitioners. This unique combination of perspectives created lively and thought provoking discussions on each emerging issue. There were several key take away points that we should all keep in mind as we navigate the future of the life sciences industry.

In an age where more than 40 percent of consumers use social media to make health decisions[2], pharmaceutical companies are increasingly using it as a tool to engage and educate patients. Here lies an opportunity for pharmaceutical companies to connect with patients and health care providers to offer reliable information about ways to improve health and well being. Social media is a mechanism for the industry to create an online community where patients can connect, share information and feel supported.[3]

The U.S. Food and Drug Administration has provided some guidance when it comes to advertising pharmaceuticals on social media. In particular, the FDA specifically has addressed internet/social media platforms that impose character space restrictions such as Twitter. In essence, the FDA has counseled that when using internet/social media platforms with character space limitations, a company must, despite space limitations, ensure that it gives a balanced presentation of both the risks and benefits of any medical product. Notably, the FDA mentioned that it was not necessarily addressing media platforms that did not impose character space restrictions.[4]

The FDA has also provided guidance when advertising on social media relates to “Third-Party User Generated Content”.[5] In its draft guidance, the FDA describes its current thinking about if and how pharmaceutical companies should respond to misinformation disseminated by independent third parties.[6] A company is responsible for the communications that contain misinformation that it controls



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and are made by its employees or any agents acting on behalf of the company.[7] If a company does not have control over third party misinformation about its product, a company is generally not required to correct such information.[8] If, however, a company chooses to correct such misinformation, it should consider the FDA's guidance on how to go about doing so.[9]

Because the FDA has provided only some basic guidance to date, companies should take care when using social media in such a highly regulated industry where the FDA is clearly watching. Many will recall the FDA's censure when Kim Kardashian posted an Instagram picture touting the benefits of the morning sickness drug Diclegis. The FDA objected that Kardashian, a paid spokesperson for the maker of Diclegis, did not present a "fair balance" of risks and benefits in her promotion of the drug on social media.

Here are five suggestions to avoid potential pitfalls when advertising pharmaceutical products on social media.

1. Set a clear internal policy. It is important to decide if there will be centralized social media postings (e.g., a dedicated, company sponsored webpage, Twitter feeds, etc.). In creating a concrete social media advertising policy, it is crucial to define who may engage on social media on the company's behalf. It can be a specific group of employees that will control the content being posted or there may be allowances for individual employees to participate online. Either way, the policy should be definitive, explicit and it is imperative that all employees understand their role and understand the rules. There should also be a consensus on the content that will be posted on line to ensure that there is a consistent and regulatory compliant message.
2. Create a controlled environment. Instead of shying away from social media, companies should embrace it but maintain control. Choosing online platforms that allow for the control of the web based medium is key. For example, hosting a company website or a company-initiated chat area may create an environment where the company can foster relationships with patients, and provide support while managing the proper dissemination of information about its product. Also, companies may consider working with social media platforms for customized approaches tailored to the highly regulated pharma industry to establish tighter control over the content and flow of information. For example, Facebook may disable commentary for pharma advertisements.[10] This is an important development because companies could face regulatory issues if they fail to report postings that are deemed "adverse events".
3. Create a compliance strategy. Once a policy is in place and employees' roles are defined when it comes to discussing product information on social media, it is wise to create a compliance system. It is also advisable to appoint a compliance director so that the company's social media policy can consistently be adhered to throughout the company. With proper controls and planning, the many benefits of advertising on social media can be realized while minimizing any risks associated with off label promotion and reporting of adverse events.
4. Comply with all Health Insurance Portability and Accountability Act privacy laws. As social media advertising continues to grow in importance in medical practice, one must be aware of the challenges associated with complying with HIPAA rules and regulations in this new media. Any disclosure of protected health information, even an inadvertent posting of a picture of a consumer, is a privacy violation. To avoid noncompliance, ensure all employees have a thorough understanding of the patient privacy laws and how they pertain to the business. Create a social media working group to discuss any concerns or issues. Save and capture records that preserve the format of social communications, including edits and deletions.
5. Keep future litigation in mind. The potential discovery of social media content in a litigation should also be considered. This underscores the need for a coordinated message and the

creation of carefully vetted internal policies, standards and compliance mechanisms before embarking on a social media campaign.

As forms of communication continue to evolve — radio to television to Instagram — the pharmaceutical industry will continue to adapt. With proper planning and execution, the internet is a great vehicle for the industry to continue to advance health improvement and disease prevention.

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[1] For more information about the Mayer Brown LLP and Seton Hall Life Sciences Symposium, please go to <https://www.mayerbrown.com/Hot-Topics-in-Life-Sciences-Law1/>

[2] Pew Research Center: Internet, Science, & Technology; Allied Health World “A tweet a Day Keeps the Doctor Away”

[3] Social Media” A New Fix for Pharma, thought leadership and innovation for the Pharmaceutical Industry –Eyefor Pharma.

[4] 2014 FDA Draft Guidance for Industry: Internet/Social Media Platforms with Character space Limitations- Presenting Risk and Benefit Information for Prescription Drugs and Medical Devices.

[5] 2014 FDA Draft Draft Guidance for Industry: Internet/Social Media Platforms: Correcting Independent Third-Party Misinformation About Prescription Drugs and Medical Devices.

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] STAT. Get ready for more drug ads: Facebook is making a bid for pharma dollars <https://www.statnews.com/2016/11/01/facebook-pharma-drug-ads/>.