When an outbreak of fungal meningitis in late 2012 that caused a series of deaths was traced back to an injectable from a compounding pharmacy, national attention centered on the regulation of compounding. FDA commissioner Margaret Hamburg testified before both a Senate and House committee seeking federal authority over “nontraditional” compounding. Two different bills which would allow FDA to regulate compounding were introduced in the House. In late 2012, FDA called a meeting with the heads of state boards of pharmacy to discuss perceived gaps in regulation. Neither bill made it to the House floor before the end of the 2012 Congressional session and therefore, died in committee.

Legislation giving FDA authority to regulate compounding will likely be reintroduced in the 2013 Congressional session. The meningitis outbreak has created a national discussion about if and how the regulation of compounding should change. To appreciate this debate requires an understanding of the current state of play. This article summarizes the history of the federal law regarding compounding and presents the recent FDA and Congressional proposals to grant FDA clear authority over compounding pharmacy.

I. Federal Attempts to Regulate Compounding

A. Congress Regulates Compounding

Compounding is a process whereby a pharmacist creates a specialized medication for the individual needs of a patient. Drug compounding has traditionally been regulated by the states. While FDA historically required all new drugs to go through the new drug approval (“NDA”) process, it never required this of compounds, as they were prepared pursuant to the directive of a physician and for a specific patient.
In 1992, FDA began to express concern that some pharmacists were using the compounding process to avoid the requirements of the Federal Food Drug and Cosmetic Act (“FDCA”) and were “manufacturing under the guise of compounding.” FDA issued a Compliance Policy Guide (“CPG”) announcing that FDA may exercise its enforcement discretion and initiate federal actions when the scope of a pharmacy’s activities raised concerns normally associated with a manufacturer. FDA listed nine examples of activities that it believed would raise such concerns. In 1997, Congress turned portions of this policy into law, passing the Food And Drug Administration Modernization Act (“FDAMA”), which specifically exempts compounds meeting certain criteria from FDCA requirements like the NDA.

To be exempt from these FDCA requirements, FDAMA required that a drug be compounded by a licensed pharmacist for an individual patient based on a valid prescription. It forbid pharmacists from compounding drugs withdrawn from the market for safety reasons or drugs that are “copies” of commercially available drugs. FDAMA put certain restrictions on the volume of compounded drugs that a pharmacy could sell, including limiting the percentage of a pharmacy’s sales out-of-state to five percent of its total sales. It also forbid pharmacies from soliciting prescriptions or advertising their drugs.


A group of compounding pharmacies challenged FDAMA on First Amendment grounds, claiming that its restriction on solicitation and advertising put an undue burden on speech. The district court, Ninth Circuit, and United States Supreme Court agreed that FDAMA’s advertising provisions violated the First Amendment by restricting pharmacies’ rights to solicit prescriptions and advertise.

The courts did not agree as to what effect this had on the remainder of the statute. The district court held that the remainder of FDAMA—the non-speech related portions—remained in effect because the unconstitutional portion could be severed from the remainder of the statute. The Ninth Circuit disagreed. Analyzing the legislative history, the Ninth Circuit found FDAMA’s ban on advertising and solicitation was so integral to the statute that it could not survive without the advertising ban. An initial legislative proposal exempting compounding from the requirements of the FDCA failed because it did not have advertising restrictions. Without an advertising ban, FDA feared that the exemption would cause large scale manufacturing under the guise of compounding. Responding to these fears, the subsequent proposal, which became FDAMA, exempted compounds from the FDCA and restricted their advertising. Based on this legislative history, the Ninth Circuit found it could not sever the offending advertising ban and invalidated FDAMA in its entirety.

The United States Supreme Court did not have the opportunity to consider the severability issue, as neither party appealed this issue. The Supreme Court affirmed the lower courts, agreeing that FDAMA’s ban on advertising was unconstitutional. Whether the advertising provision could be severed from the remainder of FDAMA remained an open question outside the Ninth Circuit.

C. Post Western States—FDA Position On Compounding

With FDAMA invalidated, FDA issued another CPG in 2002 outlining how the agency intended to address pharmacy compounding. As with all FDA compliance guidelines, the guide noted that it represented FDA’s “current thinking” on the subject, but did not create or infer any rights for anyone, and did not operate to bind either FDA or the public. The CPG stated FDA would “seriously consider” enforcement action if a pharmacy engaged in certain behavior, such as compounding in anticipation of receiving a prescription, compounding from bulk ingredients, using commercial scale equipment, and compounding commercially available drugs that are essentially “copies” of commercially available drugs.

D. FDA Gains the Right to a General Inspection—Wedgewood Village Pharmacy v. United States of America, 421 F.3d 263, (3d Cir. 2005)

A compounding pharmacy moved to quash an FDA warrant on grounds that FDCA prohibited FDA from inspecting pharmacies compliant with state law. The FDCA contains an exemption from inspection for pharmacies that are compliant with state law, regularly engage in dispensing prescription drugs pursuant to a prescription, and do not manufacture, compound, etc., other than in the regular course of their business of dispensing or selling drugs or devices at retail. The pharmacy argued that this FDCA provision exempted all pharmacies meeting these criteria from any FDA inspection. The Third Circuit rejected this position. It held that all pharmacies are subject to the general inspection authority of FDA, applying the exemption only to the inspection of the pharmacies’ books and the records.

E. FDAMA Resurrected—Medical Center Pharmacy v. Mukasey, 536 F.3d 383, (5th Cir. 2008)

Ten compounding pharmacies sued FDA seeking a declaration that compounded
drugs are not “new drugs” under the FDCA, and therefore, are not subject to its requirements.14

The district court found compounds created for an individual patient pursuant to a prescription from a licensed practitioner are “implicitly exempt” from the FDCA’s new drug definitions; therefore, compounds are not subject to the NDA. To reach this conclusion, the court resurrected FDAMA. This court was not bound by the Ninth Circuit’s determination in Western States that FDAMA provisions banning advertising could not be severed from the remainder of the statute. Performing its own analysis, the district court found the unconstitutional advertising provision could be severed. Based on FDAMA, the Supreme Court’s acknowledgment of the importance of compounding in Western States, and the FDCA’s exemption for pharmacies compliant with state law from a records inspection, the court held that compounds are “implicitly exempt” from the FDCA new drug definitions.15

The Fifth Circuit reversed; it found compounds are new drugs under the FDCA but that FDAMA exempts compounds that comply with its requirements from the NDA. Like the district court, the appellate court found the unconstitutional advertising provision could be severed, leaving the remainder of FDAMA in effect. In doing so, it relied heavily on the severability clause of the FDCA. In contrast to the Ninth Circuit, the Fifth Circuit did not read the legislative history to support the view that Congress would only have passed FDAMA with the limitation on advertising. Severing the limitation on advertising, the Fifth Circuit held that compounds are excluded from the NDA “[i]f and only if” they meet the remaining criteria set forth in FDAMA.16

This circuit split created two different federal schema with the potential for non-uniform enforcement. In the Fifth Circuit, compounds are new drugs, specifically exempt from FDCA NDA requirements if they meet FDAMA criteria. In the Ninth Circuit, FDAMA is invalid, leaving a pre-FDAMA FDCA as the governing law.

II. Response to the Meningitis Outbreak—A Call for Legislation

A. FDA Asks Congress for Authority Over Compounding

Given this circuit split, in response to the meningitis outbreak, FDA called Congress for legislation to fill “perceived gaps andambiguity” associated with FDA’s authority over compounding. Commissioner Hamburg testified before the House Committee On Energy And Commerce Subcommittee On Oversight And Investigations and the Senate Committee On Health, Education, Labor, and Pensions where she recommended Congress enact a statute recognizing two categories of compounding: traditional and non-traditional. FDA asked for authority over the nontraditional compounding, leaving traditional compounding to the states to regulate.

FDA defined traditional compounding to include combining, mixing or altering ingredients to create a customized medication for an individual patient with an individualized medical need in response to a patient specific prescription which documents the medical need.

FDA suggested some factors that define non-traditional compounding, including the type of product, the amount of product made, whether the product is being prepared before the receipt of an order, whether the drug is shipped interstate, and whether it is being dispensed to someone other than the ultimate user. FDA stated that compounds that are “essentially copies” of FDA approved drugs, and certain complex dosage forms should not be compounded at all. FDA proposed that non-traditional compounders should be required to register with the FDA and be subject to “greater oversight,” with the riskiest products subject to good manufacturing practice standards.

FDA also asked Congress for clear inspection authority over all aspects of compounding pharmacies, including all pharmacy records. FDA further requested Congress explore requirements for clearer labels, identifying the nature and source of the product, and a requirement that non-traditional compounders report adverse events.17

B. Congressional Proposals to Give FDA Authority Over Compounding

In response to the meningitis outbreak and to Commissioner Hamburg, Congressman Markey and Congresswoman Delauro introduced two different bills in the House to give FDA authority over compounding. Both bills provide FDA with greater authority over compounding than FDAMA, and certainly more authority than the FDCA without FDAMA.

Congressman Markey’s bill, the Verifying Authority and Legality in Drug Compounding Act of 2012 (“VALID”), codifies FDA’s distinction between traditional versus nontraditional compounding, and leaves the statute to regulate pharmacies engaging in traditional compounding. VALID requires pharmacies that are “in effect” manufacturing drugs to register with FDA. FDA determines if pharmacies are “in effect” manufacturing, taking into account the extent to which a pharmacy sells drugs across state lines and the volume of drugs sold. These pharmacies also lose current FDCA
protection from a records inspection. VALID further requires pharmacists to report adverse events associated with compounds to label compounds that have not been tested for safety or efficacy and are not FDA approved.

VALID embraces the concept of traditional compounding by exempting compounds from NDA if they were prepared for an identified individual patient pursuant to a prescription and are not copies of commercially available drugs. FDA may waive the requirement for an identified patient in the case of a drug shortage or to protect public health. Certain pharmacies (hospital pharmacies compounding for their patients) may apply for a waiver, but no pharmacy required to register (i.e. that FDA has determined is “in effect” manufacturing) is eligible for a waiver. To the extent FDA allows the states to grant waivers, they will only apply within their borders. FDA may also waive the requirement that compounds not be copies in the case of a drug shortage or to protect public health. Unlike the waiver for the identification of an identified patient, all pharmacies, including those required to register, may apply.18

Congresswoman Delauro’s bill, Supporting Access to Formulated and Effective Compounded Drugs Act of 2012 (“S.A.F.E.”) gives FDA even greater authority over compounding. Like VALID, S.A.F.E. forbids compounding of “copies,” and requires that compounds are labeled as non-FDA approved. Unlike VALID, S.A.F.E requires all pharmacies to register with FDA, only excluding those with fewer than twenty employees and which perform “traditional” compounding for use in a single state. Although the bill does not define “traditional” compounding, it amends FDAMA thereby adopting its definition, requiring that the medication be compounded for an identified individual patient pursuant to a prescription. S.A.F.E. contains no exceptions to allow compounding where there is no identified individual patient.

S.A.F.E. also mandates patient notification, requiring that a physician inform the patient in writing before prescribing a compounded drug. Patients must be notified even when the compound is used in the physician’s office. Pharmacists are also required to confirm with the patient at the time the compound is dispensed that s/he is aware that the drug is a compound, and to provide another written document to the patient like that required of the physician.

S.A.F.E. further requires FDA establish a database for compounding pharmacies that are licensed in more than one state which includes the minimum standards for compounding pharmacy license in each state. FDA would share this information with the states to make oversight of compounding more uniform. There would be an advisory committee on the database that would include patient representatives, health care providers, compounding pharmacies, and state agencies that regulate compounding.19

As a proposal similar to these bills likely will be introduced into Congress during 2013, the debate over how and who should regulate compounding will continue. A

1. This article focuses on the developments in federal law for the compounding of human drugs.
2. Western States Medical Center v. Shalala, 238 F.3d 1090, 1092 (9th Cir. 2001).
3. Id.
5. Western States, 69 F.Supp.2d at 1293.
8. Western States, 69 F.Supp.2d at 1309-
9. Western States, 238 F.3d at 1096-98.
10. Western States, 535 U.S. at 360-77.
13. Wedgewood, 421 F.3d at 272-73.
14. Medical Center Pharmacy v. Gonzales, 451 F.Supp.2d 854, 856-58 (W.D. Tex. 2006). Plaintiffs also sought certain declarations about the compounding of drugs for non-food animals. As this article focuses on the developments in federal law for the compounding of human drugs, these additional issues will not be discussed.
15. Medical Center, 451 F.Supp.2d at 858-64.