Inclusion of Certain Devices Within the Accredited Persons Program – Third Party Review of Clinical Data

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A Report

by the

Secretary of Health and Human Services

to the

Committee on Labor and Human Resources
(U.S. Senate)

and to the

Committee on Commerce
(U.S. House of Representatives)

November 2000

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Executive Summary

Background

The Food and Drug Administration Modernization Act of 1997 (FDAMA) created a new section (523) of the Federal Food, Drug, and Cosmetic Act (the act) that directs the Food and Drug Administration (FDA) within the Department of Health and Human Services (DHHS) to accredit third parties (Accredited Persons) in the private sector to conduct reviews of premarket notification [510(k)] submissions for low (Class I) to moderate (Class II) risk medical devices. However, section 523(a)(3)(A) of the act excluded certain types of devices from third party review. The exclusions apply to any Class III device, or a Class II device which is intended to be permanently implantable or life sustaining or life supporting, or a Class II device which requires clinical data in the report submitted under section 510(k) for the device.

Section 210(d)(2) of FDAMA requires DHHS to report to Congress within 3 years after the date of enactment with a determination of whether the exclusion of Class II devices for which clinical data[1] are required should be removed. This report includes issues pertinent to third party review of clinical data and the basis of DHHS' determination and recommendation to Congress.

Expansion of the Accredited Persons Program

Both the FDA and the medical device industry have been disappointed that the Accredited Persons Program has not been used more. Therefore, FDA is significantly expanding the scope of the third party program in fiscal year (FY) 2000 to increase the number of devices eligible for third party review. The expansion includes a pilot program that would allow for review of Class II devices for which device-specific guidance does not exist. FDA has also updated the list of eligible devices to reflect changes in device classification and to include additional Class II devices for which device-specific guidance is available. The update of the list of eligible devices and the

[1] Clinical data is information that has been organized for analysis and that has been obtained from investigation or research involving one or more subjects to determine the safety and effectiveness of a device.

implementation of the expansion pilot program represent more than a 300 percent increase in the number of eligible devices.

Six Percent Limitation to the Clinical Data Exclusion

Section 523(a)(3)(A)(iii) of the act prohibits third parties from reviewing 510(k) submissions for Class II devices for which clinical data are required. This section of the act also established, for any given year, a six percent limitation on the number of Class II device 510(k) submissions that can be excluded from third party review due solely to the clinical data limitation.

FDA has determined that, in FY 1999, the number of 510(k) submissions for Class II devices that require clinical data and that were not otherwise excluded from third party review under the act did not exceed six percent.

Conclusion and Recommendation

DHHS recommends that Congress should delay any decision about removing the exclusion relating to Class II devices for which clinical data are required for third party review under the Accredited Persons Program until the year 2001, after there is one year of experience with third party review under the expansion pilot program. This will afford third parties an opportunity to review additional moderate risk Class II devices and give FDA a better opportunity to assess the interest and capability of Accredited Persons to review 510(k) submissions. A year of experience under the expansion pilot also will give all stakeholders a chance to evaluate the interest of the industry in using third parties.

I. Background

FDAMA was signed into law by the President on November 21, 1997. Section 210 of FDAMA directs FDA to accredit third parties (Accredited Persons) in the private sector to conduct the initial review of 510(k) submissions. The Accredited Persons Program is intended to enable FDA to target its scientific review resources at higher-risk devices, while maintaining a high degree of confidence in the review process by using third parties to assess low-to-moderate risk devices and at the same time provide manufacturers of eligible devices an alternative review process that may yield more rapid 510(k) decisions.

In accord with FDAMA, FDA established criteria to accredit or deny accreditation to persons who request to review reports submitted under section 510(k) of the act and make recommendations to FDA regarding the initial classification of devices under section 513(f)(1). FDA published those criteria in the FEDERAL REGISTER on May 22, 1998 (63 FR 28388). In addition, FDAMA requires FDA to respond to requests for accreditation in 60 days. On September 23, 1998, FDA made available a list of 13 organizations accredited to conduct 510(k) reviews for certain devices. Accredited Persons were not eligible to begin to review 510(k) submissions until they successfully completed a training session. Beginning on November 21, 1998, trained Accredited Persons could submit reviews and recommendations to the FDA. FDAMA requires FDA to make a determination regarding those reviews within 30 days.

Section 523(a)(3)(A) of the act specifies that an Accredited Person may not review a 510(k) for any Class III device, or a Class II device which is intended to be permanently implantable or life-sustaining or life-supporting, or a Class II device which requires clinical data in the report submitted under section 510(k) for the device. (Section 523 also sets limits on the number of Class II devices that may be ineligible for Accredited Person review because clinical data are required.) Any 510(k) submission for a Class II device for which clinical data are needed currently is subject to primary review by FDA and cannot be processed under the special procedures of the Accredited Persons Program. The decision to require clinical data is a matter of judgment that is often dependent on the nature of any differences between the new device and the device to which it is being compared (e.g., an additional specific indication for use). Manufacturers and Accredited

Persons seeking guidance on the need for clinical data in a 510(k) submission are to consult FDA device-specific guidance documents and may also contact the appropriate FDA scientific review staff.

Section 210(d)(2) of FDAMA (INCLUSION OF CERTAIN DEVICES WITHIN PROGRAM) requires DHHS to submit a report to Congress not later than 3 years after the date of the enactment of FDAMA, providing a determination of whether to eliminate the exclusion in the Accredited Persons Program established by section 523(a)(3)(A) (iii) of the act relating to Class II devices for which clinical data are required in 510(k) submissions.

II. Initial Implementation of the Accredited Persons Program

On May 20, 1998, FDA made available on the World Wide Web (WWW) a list of 50 Class I and 104 Class II devices that are eligible for review by Accredited Persons. FDA's position for inclusion of Class I devices not exempt from premarket notification is that general guidance is a sufficient basis for third party review. However, the inclusion of Class II devices was partly dependent on the existence of FDA device-specific guidance and/or FDA recognized consensus standards. In the first 17 months that the Accredited Persons Program was in effect, 28 companies used third parties to review a total of 54 510(k) submissions. During that same period, nearly 2,000 510(k) submissions from approximately 800 companies were eligible for third party review. Thus, industry use of the third party program has been low, despite the fact that the program has typically yielded rapid marketing clearance decisions. In FY 1999, the average total elapsed time between a third party's receipt of a 510(k) submission and FDA's substantial equivalence determination was 57 days. The portion of this time that occurred between FDA's receipt of the third party's recommendation and FDA's determination averaged just 15 days.

III. Expansion of the Accredited Persons Program

Both the FDA and the industry have been disappointed that the third party program has not been used more. As stated previously, FDA's current policy permits third party review of only those Class II devices for which device-specific guidance or recognized consensus standards exist. FDA instituted that policy when it implemented the program in order to ensure that there would be consistency among different third party reviewers and to enhance the timeliness of the review process once a recommendation is submitted by a third party. FDA believes the extremely short time frames that have been associated with third party reviews are, in part, attributable to this policy. However, on June 12, 2000, in an effort to expand use of the third party program, FDA proposed to initiate an expansion pilot program that will allow third party review of any device that is not prohibited from such review under the statute. The expansion pilot includes an additional 460 Class II devices. On the same date, FDA updated the list of eligible devices to reflect changes in device classification and to include additional Class II devices for which device-specific guidance is available. The updated list now includes 211 devices. This represents an increase of 57 devices (7 Class I and 50 Class II devices) from the May 1998 list. With the update of the list of eligible devices and the implementation of the expansion pilot program, 671 devices would be eligible for third party review. This represents a total increase of 517 devices to the Accredited Persons Program, more than a 300 percent increase in the number of eligible devices.

In order to maintain a high level of quality in third party reviews and to minimize risks to public health under the pilot, FDA proposed that an Accredited Person may review a Class II device that does not have device-specific guidance if:

1) The Accredited Person has previously completed three successful 510(k) reviews under the third party program. This should include at least one 510(k) review that was in the same or similar medical specialty area as the device the Accredited Person now intends to review. The prior 510(k) reviews can be for Class II devices that have device-specific guidance or for Class I devices;

2) The Accredited Person contacts the appropriate Center for Devices and Radiological Health, Office of Device Evaluation (ODE)

Branch Chief (or designee) within FDA before initiating a 510(k) review for a Class II device that does not have device-specific guidance to confirm that the Accredited Person meets the criteria in paragraph 1 above and to identify pertinent issues and review criteria related to this type of device; and

3) The Accredited Person prepares a summary documenting the discussions and submits the summary of those discussions to ODE.

FDA intends to review the expansion pilot program 12 months after it begins to see if the number of third party 510(k) submissions has increased significantly, if the timeliness of review is maintained, and to consider whether particular divisions within the Office of Device Evaluation are devoting disproportionate staff time to pre-submission discussions with Accredited Persons. The FDA reserves the option to stop or reevaluate the pilot at any time it determines that additional work load generated by third party consultations compromises the agency's ability to review other applications or the agency has reason to believe the quality of the reviews is significantly diminished by lack of device-specific guidance.

IV. Clinical Data Exclusion

As discussed below, FDA identified 56 Class II devices (representing 194 510(k) submissions in FY 1999) that routinely require clinical data and that are not eligible for third party review for this reason.

The update of the list of eligible devices and the expansion pilot program will increase the number of devices eligible for review under the Accredited Persons Program from 154 to 671, more than a 300 percent increase. If the 56 devices requiring clinical data were made eligible, this would further increase the number of devices in the Accredited Persons Program by only 8 percent and the 194 additional submissions would account for less than 5 percent of the total number of 510(k) submissions that are not otherwise excluded under the act.

V. Six Percent Limitation to the Clinical Data Exclusion

As discussed above, section 523(a)(3)(A)(iii) prohibits Accredited Persons from reviewing 510(k) submissions for Class II devices for which clinical data are required. However, the same section of the statute established a six percent limitation on the number of 510(k) submissions requiring clinical data that can be excluded from third party review under the Accredited Persons Program. In and of itself, the clinical data exclusion cannot account for more than six percent of the total of number of 510(k) submissions for any given year.[2] FDA has determined that in FY 1999 the number of 510(k) submissions for Class II devices that require clinical data and that were not otherwise excluded from third party review under the act did not exceed six percent. Specifically, FDA has identified 56 Class II devices, representing 194 510(k) submissions in FY 1999, that routinely require clinical data and that are not permanently implantable, life sustaining or life supporting. Of the 4006 510(k) submissions in FY 1999 that were for devices other than Class III devices or Class II Devices that are permanently implantable, life sustaining or life supporting, the 194 submissions that required clinical data represent 4.8 percent.

VI. Conclusion and Recommendation

DHHS recommends that Congress should delay any decision about removing the exclusion relating to Class II devices for which clinical data are required for third party review under the Accredited Persons Program until the year 2001, after there is one year of experience with third party review under the expansion pilot program. This will afford third parties an opportunity to review additional moderate risk Class II devices and give FDA a better opportunity to assess the interest and capability of Accredited Persons to review 510(k) submissions. A year of experience under the

[2] The statute specifies that the numerator in the formula for determining the clinical data exclusion shall be the number of 510(k) submissions which require clinical data less the number of such submissions for Class III devices and for Class II devices that are intended to be permanently implantable or life sustaining or life supporting. The denominator shall be the total number of 510(k) submissions less the number of 510(k) submissions for Class III devices and for Class II devices which are intended to be permanently implantable or life sustaining or life supporting.

expansion pilot also will give all stakeholders a chance to evaluate the interest of the industry in using third parties.

If, as FDA and industry hope, the expanded third party program results in more use of Accredited Persons, FDA will be in a better position to assess the capability and experience of Accredited Persons to review moderate risk devices and make reasonable judgments about the likely effect of further expanding Accredited Person reviews to 510(k) submissions that require clinical data. Following implementation and assessment of the expansion program, FDA will be in a better position to recommend whether the public health can be assured if the current exclusion for 510(k) submissions including clinical data is removed. For these reasons, the agency recommends that Congress delay any decision about whether to remove the exclusion until after the year 2001.