FDA Modernization Act of 1997
Guidance for the Device Industry on
Implementation of Highest Priority Provisions

February 6, 1998

In accordance with FDA's Good Guidance Practices (62 FR 8961), this Level 1 guidance document is being issued without prior public comment because it affects immediate implementation of new statutory requirements. Comments and suggestions regarding this document can be submitted within 90 days to Docket No.98D-0003.

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This guidance document summarizes FDA's strategy for implementing the highest priority provisions of the FDA Modernization Act of 1997 (Pub. L. 105-115).

FDA identified these provisions as being of the highest priority for implementation because: (1) they become effective on or before February 19, 1998, the general effective date of the act; (2) they are expected to impact a large number of products/applications; or (3) they are of high interest to the device community. Unless an alternative method of implementation is specified in the statute, FDA generally plans to issue individual guidance documents to implement these provisions of the new law.

Highest Priority Provisions

1. Early Collaboration on Data Requirements for Clinical Studies [Sections 201 and 205]
2. PMA Collaborative Review Process [Section 209]
3. Scope of Review: Labeling Claims for PMA's [Section 205(c)]
4. PMA Supplements for Manufacturing Changes [Section 205]
5. Premarket Notification Exemptions [Section 206]
6. Evaluation of Automatic Class III Designation [Section 207]
7. Device Standards [Section 204]
8. Scope of Review: Labeling Claims for 510(k)'s [Section 205(b)]
9. Ninety-Day Review of 510(k)'s [Section 209]
10. Device Tracking [Section 211]
11. Postmarket Surveillance [Section 212]
12. Dispute Resolution [Section 404]

For each of these 12 provisions, this guidance document will first summarize the statute in "plain English" and then describe FDA's strategy for implementation. These statutory summaries were previously made publicly available as "The FDA Modernization Act of 1997: Description of Select Medical Device Provisions" on December 3, 1997. This document is available on FDA's web site

at http://www.fda.gov/cdrh/modact/modern.html.

Consistent with FDA's Good Guidance Practices (62 FR 8961; February 27, 1997), this Level 1 guidance document is being issued without prior public comment because it affects immediate implementation of new statutory requirements. Comments and suggestions regarding this document can be submitted by May 7,1998 to Docket No. 98D-0003. Unless specified otherwise, other guidance documents referenced in this guidance will also be issued as Level 1 guidance that become effective upon publication, with the opportunity to submit comments to the Agency during the implementation stage.

Priority Provisions Applicable to PMA's and IDE's

1. Early Collaboration on Data Requirements for Clinical Studies [Sections 201(a) and 205(a)]

Section 201:

Sponsors that intend to perform a clinical study of any Class III device or any implantable devices in any class will be given an opportunity to have their investigational plan, including the clinical protocol, discussed with FDA for the purpose of reaching an agreement on the investigational plan before they apply for an investigational device exemption (IDE).

A written request from the sponsor to FDA is required prior to FDA review. The request shall include a detailed description of the device, proposed conditions of use and a proposed investigational plan (including clinical protocol), and, if available, expected performance of the device. FDA has 30 days to meet with the sponsor after receipt of the written request.

An official record will be made of any agreement that is reached between the sponsor and the FDA. This agreement will be binding and is not subject to change except: (1) with written agreement of the sponsor or; (2) if the sponsor has been notified by FDA in writing of a substantial scientific issue that was not included in the initial agreement. In the latter case, the written notification of the decision by FDA can not be given to the sponsor unless the sponsor has been given an opportunity to discuss the scientific issues.

Guidance

The meeting referenced in section 201 builds upon FDA's existing practice of encouraging sponsors to meet with FDA for a "pre-IDE" meeting.

Section 201 codifies that practice and adds to it the goal of reaching an "agreement" between FDA and the sponsor on the study plan, including the clinical protocol. Any such agreement would be "binding" and not subject to change except: (1) with written agreement of the sponsor; or (2) if the sponsor has been notified by FDA that a substantial scientific issue essential to determining the safety or effectiveness of the device involved has been identified. FDA believes this provision in the law will help both the sponsor and the agency, and that early agreement on

clinical protocols is perhaps the most significant factor both in decreasing IDE review times and in facilitating subsequent PMA review.

Section 205:

> *Sponsors planning to submit a Premarket Approval Application (PMA) can submit a written request to FDA for a meeting to determine the type of information (valid scientific evidence) that is necessary to support the effectiveness of their device.*
>
> *The request must include a detailed description of the device, proposed conditions of use, an investigational plan and, if available, information regarding the device's expected performance. FDA must meet with the requester and communicate the Agency's determination of the type of data that will be necessary to demonstrate effectiveness in writing within 30 days after the meeting. When making this determination FDA must assure that both the information they have specified is necessary to provide a reasonable assurance that the device is effective and that the Agency has considered the method of evaluation that is the least burdensome. FDA's decision will be binding and not subject to change unless the Agency determines that the decision could be contrary to the public health.*

Guidance

While the new law does not specify when the meeting described in section 205 is to occur, to the extent that the meeting is intended to determine the type of valid scientific evidence needed for approval, such a meeting will be most useful when conducted while the sponsor is planning clinical studies -- i.e., in the earliest stages of product development, prior to submission of the IDE. Indeed, industry commenters have described this as a "pre-pre-IDE" meeting which would focus on the "general plan" of the device study, in contrast to the "pre-IDE" meeting under section 201, which addresses a specific clinical protocol. It is important to note that a meeting under section 205 does not result in an "agreement," but rather results in the FDA's "determination" of the type of clinical testing needed to demonstrate effectiveness. This "determination" would be "binding;" the agency would neither ask for nor accept a different type of evidence of effectiveness unless such determination could be contrary to public health.

While FDA believes that the purposes of the meetings discussed in sections 201 and 205 can usually be accomplished in a single meeting, FDA understands that some sponsors will request and benefit from two meetings. FDA is also prepared to continue

to meet informally with potential applicants who may not wish to request meetings under the provisions of sections 201 and 205.

Successful meetings to collaborate on data requirements for clinical studies will require a substantial commitment on the part of both FDA and product sponsors. The responsibility of product sponsors will be to provide complete, detailed, and candid information in meeting requests on such issues as the device description, investigational plan, proposed conditions of use, and expected product performance. The responsibility of the agency will be to thoroughly evaluate the information, to consider, in consultation with the sponsor, the "least burdensome" means of evaluating device effectiveness, and to then commit to binding clinical study requirements. To assist product sponsors in submitting requests for early collaboration meetings, FDA will issue guidance on the type of information that should be included in the meeting request. The guidance, which is expected to be published by February 19, 1998, will also inform sponsors of what they can expect from FDA at these early collaboration meetings.

Effective date: February 19, 1998.

2. PMA Collaborative Review Process [Section 209(b)]

FDA must, upon the written request of the applicant, meet with that party within 100 days of receipt of the filed PMA application to discuss the review status of the application. With the concurrence of the applicant, a different schedule may be established.

Prior to this meeting, FDA must inform the applicant in writing of any identified deficiencies and what information is required to correct those deficiencies. FDA must also promptly notify the applicant if FDA identifies additional deficiencies or any additional information required to complete Agency review.

Guidance

This provision builds on the early collaboration/increased interaction theme set forth in sections 201 and 205. While FDA's past practice has sometimes been to complete a comprehensive review of the entire PMA before communicating deficiencies in writing to applicants, the clear intent of this provision is earlier and more frequent interactions with applicants to communicate application deficiencies. Accordingly, for PMA's submitted after the effective date, February 19, 1998, FDA will institute standard operating procedures to communicate with applicants on approximately the 90th day of the review process;

and to meet with the applicant on or about the 100th day or at such other time as the FDA and sponsor agree. As needed, FDA will continue to communicate with applicants after the review status meetings regarding newly identified deficiencies and/or requests for additional information. By February 19, 1998, FDA will issue guidance on the procedures to be used to implement this provision.

While FDA will honor requests for review status meetings from manufacturers with pending submissions (i.e., PMA's submitted prior to February 19, 1998), the timing for such meetings will vary depending on the review status of the individual application.

Effective date: February 19, 1998.

3. Scope of Review: Labeling Claims for PMA's [Section 205(c)]

FDA must rely solely on the conditions of use submitted as proposed labeling in the PMA application, so long as the proposed labeling is neither false nor misleading. In determining whether or not such labeling is false or misleading, FDA shall fairly evaluate all material facts pertinent to the proposed labeling.

Guidance

This provision is consistent with the manner in which FDA currently reviews PMA's in that proposed product labeling is reviewed to identify conditions for use. Moreover, this provision is also consistent with existing statutory criteria, which give FDA authority to deny a PMA if, based on a fair evaluation of all material facts, the proposed labeling is false or misleading. (See ' 515(d)(2)(D).) Accordingly, no change in FDA's current practice/process for reviewing PMA's is expected as a result of the scope of review provision in section 205.

Effective date: February 19, 1998.

4. PMA Supplements for Manufacturing Changes [Section 205(c)]

PMA supplements are required for all changes that affect safety or effectiveness unless such change involves modifications in a manufacturing procedure or method of manufacturing. Manufacturing changes affecting safety or effectiveness require only a written notice to FDA, which describes the changes in detail and which summarize the information that supports the change. The written notice

must also state that the changes were made in accordance with the Quality Systems Regulation (GMPs). The devices subject to manufacturing changes can be distributed 30 days after a notification report is submitted to FDA unless the agency notifies the submitter that the notice is not adequate.

If FDA deems the notice to be inadequate, FDA may request further information or require a supplement. FDA shall review the supplement within 135 days of receipt. The initial 30 day notification review period will be deducted from the 135 day supplement review period if the original notification meets the appropriate content requirements for a PMA supplement.

This notification procedure applies only to supplements relating to manufacturing changes.

Guidance

FDA will review all 30-day notices of manufacturing changes. By February 19, 1998, to assist manufacturers in submitting a complete notice, FDA will disseminate guidance on the content requirements for the 30-day notices -- specifically, what supporting data need to accompany the 30-day notice to document that the change maintains the device's safety and effectiveness. Recognizing the enormous breadth in the types of potential manufacturing changes, the guidance will also identify those types of manufacturing procedure changes or changes in manufacturing methods that may continue to require a PMA supplement.

Effective date: February 19, 1998.

Priority Provisions Applicable to 510(k)'s

5. Premarket Notification: Exemptions [Section 206]

A 510(k) submission is not required for a Class I device unless the Class I device:

(1) is intended for a use which is of substantial importance in preventing impairment of human health or

(2) presents a potential unreasonable risk of illness or injury.

A 510(k) submission will not be required for specified Class II devices. FDA plans to publish in the Federal Register

within 60 days of enactment a list of Class II devices that are exempt from 510(k).

After the list of Class II exempt devices has been published, additional class II devices may be exempted on FDA's own initiative or by petition of an interested person. FDA will publish in the Federal Register a notice of intent to exempt these device types and provide a 30 day period for comment. Within 120 days after the issuance of the notice, FDA will publish a final order regarding the exemption of the subject devices. If FDA fails to respond to a petition within 180 days, it will be deemed granted.

Guidance

On February 2, 1998, FDA published a list of all class I devices that are currently subject to premarket notification (510(k)) requirements. This list specifies which devices: (a) meet the reservation criteria under the new law for continued 510(k) submission requirements; or (b) will be exempt from 510(k) as of February 19, 1998. This list represents the agency's current interpretation of the reservation/exemption criteria for class I devices as set forth in section 206 of the new law -- i.e., devices will continue to be subject to 510(k) requirements (reserved) if they are intended for a use which is of substantial importance in preventing impairment of human health; or present a potential unreasonable risk of illness or injury. Comments on these lists can be submitted within 90 days of publication. After such time, FDA intends to issue a proposal to codify the changes in premarket notification requirements for class I devices required by the statute.

By January 21, 1998, FDA published a notice exempting specified class II devices from the requirements of section 510(k) of the act. These class II devices are exempt from 510(k) requirements as of the date of publication in the Federal Register. Comments on the exemption of class II devices can be submitted within 90 days of publication. Interested persons may petition FDA to exempt additional class II devices from premarket notification requirements. As provided in section 206, FDA will take final action on any such petition within 180 days. If FDA fails to respond to such a petition within 180 days, the petition is deemed to be granted. By February 19, 1998, FDA will issue guidance for the submission and review of such petitions.

Effective date (class II exemptions): Date of publication of Federal Register notice.

Effective date (class I reservations/exemptions): February 19, 1998.

6. Evaluation of Automatic Class III Designation [Section 207]

An applicant of a 510(k) who receives a Not substantially Equivalent (NSE) determination placing the device into a Class III category can request classification of the product into Class I or II.

The request must be in writing and sent within 30 days from the receipt of the NSE determination. In addition, the request shall include a description of the device, reasons for the recommended classification (into Class I or II), and information to support the recommendation. Within 60 days from the date the written request is submitted to FDA, the Agency must classify the device by written order.

If FDA classifies the device into Class I or II, the applicant has then received clearance to market the device. This device can be used as a predicate device for other 510(k)'s.

However, if FDA determines that the device will remain in the Class III category, the device cannot be marketed until the applicant has obtained an approved PMA or an approved IDE.

Within 30 days of notifying the applicant of the determination, FDA will announce the final classification in the Federal Register.

Guidance

FDA expects this "de novo" classification process to apply to low risk devices automatically classified through section 510(k) of the statute into class III because no predicate device exists. This process does not apply to devices that have been classified by regulation into class III -- i.e., preamendment class III devices, or class III devices for which a premarket approval application or a reclassification petition is appropriate. By February 19, 1998, FDA will publish guidance describing the information that should be submitted with the request to support the recommended classification. The guidance will also identify standard operating procedures for how FDA will

process such submissions.

Manufacturers that have reclassification petitions pending for postamendment class III devices that were found not substantially equivalent through the 510(k) process are encouraged to call the reviewing division to discuss whether their petition should be converted to a submission pursuant to this section of the new law.

Effective date: February 19, 1998.

7. Device Standards [Section 204]

This section adds a system for recognizing national and international standards in product reviews. FDA may, through publication in the Federal Register, recognize all or part of an appropriate standard established by a nationally or internationally recognized standards development organization.

A person may reference the recognized standard in a Declaration of Conformity, which can be used to satisfy a premarket submission requirement [PMA or 510(k)] or other requirement under the Act to which such a standard applies. FDA can request supportive data. FDA may reject the declaration if information supplied does not demonstrate that the device conforms to the standard, or if the standard is inapplicable.

FDA may withdraw such recognition of a standard, through publication of a notice in the Federal Register, if the Agency determines that the standard is no longer appropriate for meeting a requirement.

FDA may take action against a firm if information in the Declaration of Conformity is falsified, or for failure or refusal to provide data or information requested by FDA.

Guidance

FDA has already stated its intent to recognize the International Electrotechnical Commission (IEC) 60601 series of standards to address many aspects of safety common to electrical medical devices. In accordance with section 204 of the new law, FDA expects to publish its first list of recognized standards by February 19, 1998. After that date, FDA will provide for

updating the lists of recognized standards -- i.e., to add new standards, remove obsolete standards, or identify revised standards, in accordance with procedures to be established. For each recognized standard, FDA will identify types of devices covered by the standard where review requirements can be satisfied by an applicant's declaration of conformity to the standard. By February 19, 1998, FDA will also issue guidance on what constitutes an acceptable declaration of conformity as well as the types of circumstances under which FDA is likely to request the data or information underlying the declaration.

Because of the integral relationship between this provision and FDA's proposed new 510(k) paradigm under the Center's reengineering program, FDA will also issue final guidance on the new 510(k) paradigm by February 19, 1998. The new 510(k) paradigm provides for, in part, a greatly streamlined 510(k) submission based on a manufacturer's declaration of conformity to applicable recognized standards.

Effective date: February 19, 1998.

8. Scope of Review: Labeling Claims for 510(k)'s [Section 205(b)]

This section requires that determination of intended use of the device be based on the proposed labeling submitted in the 510(k). In making the SE determination, however, the Director of the Office of Device Evaluation (ODE) may determine that there is a reasonable likelihood that the device will be used for an intended use not identified in the labeling that could cause harm. In such cases, the Director shall communicate FDA's concerns to the 510(k) applicant in writing within 10 days of making the determination, and require a statement in the labeling specifying limitations on uses of the device.

The device will be found SE; but, its labeling must conform to the limitations specified by FDA. Responsibility for making such labeling determinations cannot be delegated below the Director of ODE.

Guidance

By February 19, 1998, FDA will develop internal procedures for reviewers of 510(k) submissions that prescribe how to alert the Director, Office of Device Evaluation, that they believe there is a reasonable likelihood that the device will be used for an intended use not identified in proposed labeling and that such use could cause harm. By February 19, 1998, FDA will also develop procedures for the prompt notification of applicants when

such circumstances have been identified, and for consultation between FDA and the applicant on this issue.

Effective date: February 19, 1998.

9. Certainty of Review Timeframes [Section 209]

The law now clearly directs FDA to review premarket notifications and make a determination not later than 90 days after receiving the report.

Guidance

This provision codifies FDA's goal to complete the review of 510(k)'s with 90 days. FDA will continue to pursue initiatives to streamline the review process for 510(k)'s and to reduce the time it takes to process these submissions.

Effective date: February 19, 1998.

Tracking, Postmarket Surveillance, Dispute Resolution

10. Device Tracking [Section 211]

The tracking requirement has been changed to allow FDA to order that certain devices are to be tracked but to delete any automatic requirements to track devices unless there is such an order. The FDA may now order manufacturers of certain types of Class II or Class III devices to initiate a program to track their medical devices down to the patient level. The illustrative list that has been published in 21 CFR 821 will be replaced with a list of products that FDA has ordered to be tracked.

The types of device subject to a tracking order may include any Class II or Class III device:

* *the failure of which would be reasonably likely to have serious adverse health consequences, or*

* *which is intended to be implanted in the human body for more than one year, or*

* *which is intended to be a life sustaining or life supporting device used outside a device user facility.*

The Act adds an important new right for patients receiving a

tracked device. Patients receiving a device subject to tracking will be able to refuse to release, or refuse permission to release, their name, address, social security number, or other identifying information for the purpose of tracking.

Guidance

FDA held an open public meeting on January 15, 1998 to solicit input on changes to the medical device tracking authority. Specifically, FDA solicited comment on additional criteria that may be useful to FDA to determine whether tracking should be ordered for those devices that satisfy the basic statutory requirements for discretionary tracking under section 519(e) of the Act.

By February 19, 1998, FDA intends to publish a revised list of devices subject to tracking. Until such list is published, manufacturers should continue to track devices that are currently subject to mandatory tracking under the 1990 law.

Effective date: February 19, 1998

11. Postmarket Surveillance [Section 212]

Manufacturers will no longer be automatically required to conduct postmarket surveillance studies for particular devices. Rather, FDA may order such studies to be conducted for certain Class II and Class III devices. FDA can now order postmarket surveillance for any Class II and Class III device:

* *the failure of which would be reasonably likely to have serious adverse health consequences, or*

* *which is intended to be implanted in the human body for more than one year, or*

* *which is intended to be a life sustaining or life supporting device used outside a device user facility.*

Manufacturers must, within 30 days of receiving an order to conduct a postmarket surveillance study from FDA, submit, for approval, a plan for the required surveillance. The FDA may order a study for up to 36 months. Any longer period has to be mutually agreed upon by the manufacturer and FDA. If no agreement on a longer time period can be reached, then

a dispute resolution process is to be followed.

After receiving the manufacturer's proposed plan, FDA has 60 days to determine if the person designated to conduct the surveillance is qualified and experienced, and if the plan will collect useful data that can reveal unforeseen adverse events or other information necessary to protect the public health.

Guidance

FDA's open public meeting on January 15, 1998 also solicited comment on additional criteria that may be useful to FDA to determine whether postmarket surveillance should be required for those devices that satisfy the basic statutory requirements for the Agency to order postmarket surveillance under section 522 of the Act.

By February 19, 1998, FDA will identify devices currently subject to postmarket surveillance orders that will remain subject to postmarket surveillance under section 522 of the Act. By February 19, 1998, FDA will also identify any devices that were previously subject to postmarket surveillance orders under section 522 of the act, but for which such surveillance will no longer be required. Until then, previous postmarket surveillance requirements remain in effect.

Because the need for postmarket surveillance is triggered by FDA's need for data about unforeseen adverse events or other information necessary to protect the public health, manufacturers should expect this list of devices to change over time; additional devices should be expected to be made subject to postmarket surveillance in the future. FDA will continue its current practice of issuing orders via letter to manufacturers responsible for conducting postmarket surveillance under section 522 of the Act.

Effective date: February 19, 1998.

12. Dispute Resolution [Section 404]

This requires the FDA to establish, by regulation, a process under which a sponsor, applicant, or manufacturer may request a review of a significant scientific controversy,

when no other provision of the FD&C Act or regulation provides for such a review. This process will include review by an appropriate scientific panel or advisory committee.

Guidance

To assist industry in understanding the broad array of pathways that currently exist for appealing decisions or for addressing grievances, FDA is developing a reference document entitled, "Medical Device Appeals and Complaints: A Handbook on Dispute Resolution." By February 19, 1998, this handbook will be available electronically via FDA's web site or in hard copy from the Division of Small Manufacturer's Assistance.

In addition, by November 21, 1998, CDRH intends to charter a panel to review scientific controversies for which no procedures for review currently exist and to review agency orders for postmarket surveillance studies of longer than 36 months when FDA and the manufacturer do not agree on the study duration. Moreover, in accordance with ' 515(g)(2)(B), the panel will also be responsible for reviewing petitions that challenge a PMA approval/denial. While the goal of the panel will be to resolve disputes in as timely a manner as possible, manufacturers need to be cognizant of the lead-time that will be required to convene such a panel and to publish a notice of panel meeting. Accordingly, manufacturers may want to pursue alternative review mechanisms for dispute resolution.

Effective date: November 21, 1998

Summary of Implementation "Deliverables"

By January 20, 1998 (60 days following enactment)

* Public Meeting on Tracking & Postmarket Surveillance (1/15/98)
* List of Class I Exemptions/Reservations (FR notice)
* List of Class II Exemptions (FR notice)

By February 19, 1998 (Effective Date of New Law)

* List of Recognized Standards
* Tracking Notice
* Postmarket Surveillance Notice
* Guidance to Implement Highest Priority Provisions
  - -- Early Collaboration Meetings
  - -- Interactive Process for PMA Reviews
  - -- Content Requirements for 30-Day Manufacturing Change Notices
  - -- Procedures for the Submission and Review of Class II Exemption Petitions
  - -- Content Requirements for "De Novo" Classification Requests
  - -- Procedures for Declaration of Conformity to Standards
  - -- Standard Operating Procedures for Scope of Review/ Labeling Claims for 510(k)'s
  - -- Handbook on Existing Appeal Mechanisms
* Guidance on New 510(k) Paradigm