DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
9200 Corporate Boulevard
Rockville MD 20850

OCT 26 2006

Charles G. Brown
National Counsel
Consumers for Dental Choice
1725 K Street, N.W., Suite 511
Washington, D.C. 20006

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Re: 2005P-0462, 2005P-0465

Dear Mr. Brown:

This letter responds to your petitions, dated November 9 and 10, 2005, regarding mercury amalgam (petitions). One petition, 2005P-0465, requested that the Food and Drug Administration (FDA or Agency) take several actions, which included withdrawing a draft regulation on mercury amalgam; convening a Panel with expertise in areas other than dentistry, such as neurology, on scientific developments; and providing a transparent forum where all interested parties might share information. The other petition, 2005P-0462, requested that FDA transfer regulatory responsibility from the Dental Devices Branch to the Division of General, Restorative, and Neurological Devices, and transfer classification responsibility to the Clinical Toxicology Devices Panel.

Decision Summary

After careful consideration of your petitions, we have granted them in part. Specifically, we have granted your requests that we convene a panel with expertise in areas other than dentistry on scientific developments and that we provide a transparent forum where all interested parties might share information. As you are aware, we published a Federal Register notice announcing a joint committee meeting of the Dental Products Panel of the Medical Devices Advisory Committee and the Peripheral and Central Nervous System Drugs Advisory Committee (71 Fed. Reg. 16582, April 3, 2006). This open public meeting was held on September 6 and 7, 2006, and the Docket related to this meeting is open until November 9, 2006 (Docket No. 2006N-0352). The joint committee reviewed and discussed peer-reviewed scientific literature on dental amalgam and its potential mercury toxicity, specifically as it relates to neurotoxic effects. The joint committee also heard from more than 50 members of the public.

We are currently in the process of reviewing information and recommendations from the joint committee meeting. In addition, the Docket is still open and receiving comments and information. When the Docket closes, we will carefully review the information submitted. Therefore, we are deferring a response to your substantive request related to rulemaking because we believe undertaking any actions related to rulemaking would be premature at this time.

With respect to your requests that we "transfer regulatory responsibility for mercury amalgam to General, Restorative and Neurological Devices" and "transfer classification recommendation responsibility to Clinical Toxicology Devices Panel," we are denying the requests that FDA transfer responsibility; however, we believe that the concerns underlying those requests—which appeared to

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include concerns that a panel with expertise in toxicology consider the toxicity of amalgam[1]—were addressed at least in part by the joint committee meeting. Moreover, after a closer review of these requests, we believe that the petitions reflected some misunderstanding of how the Agency makes regulatory decisions and the classification process. Below we provide a more detailed response to your requests that we transfer regulatory and classification responsibilities, including an overview of the classification process.

Request to Transfer Regulatory and Classification Responsibility

Your petition states that FDA should "transfer regulatory responsibility for mercury amalgam to general, restorative and neurological devices" (2005P-0462, page 4). You state that the "Dental Devices Branch must be stopped from regulating amalgam" because you believe that dentists do not have the necessary expertise in neurology or toxicology. Your petition implies that all dentists are pro-amalgam and you allege inappropriate conduct on the part of FDA employees.[2] Your petition also requests that we "transfer classification recommendation responsibility to clinical toxicology devices panel" (2005P-0462, page 7).

Overview of Classification Process for Preamendments Devices

Before specifically addressing these requests, we believe an overview of the classification process for preamendments devices might be helpful. Preamendments devices (such as dental amalgam) are devices that were in commercial distribution before the enactment of the Medical Device Amendments of 1976 (Public Law 94-295) (the date of enactment was May 28, 1976). The Medical Device Amendments amended the Federal Food, Drug, and Cosmetic Act (statute) to add premarket review authority and other authorities related to devices.

Under the statute, FDA classifies preamendments devices by first securing a recommendation from a panel of experts (section 513(b) of the statute; 21 USC 360c(b)). The panels established to provide recommendations related to the classification of devices must include "persons who are qualified by training and experience to evaluate the safety and effectiveness of the devices to be referred to the panel... and possess skill in the use of, or experience in the development, manufacturer, or utilization of, such devices" (section 513(b) of the statute). The panels must consist of members with "adequately diversified expertise in such fields as clinical and administrative medicine, engineering, biological and physical sciences, and other related professions" (section 513(b) of the statute). The Agency must organize the panels "according to the

[1] For example, in support of your request that FDA transfer classification responsibility to the clinical toxicology devices panel, you state "[t]oxicologists are better able to assess whether mercury from amalgam causes neurological harm, injures an unborn fetus, or interferes with the proper function of the kidneys" (2005P-0462, page 7). We believe that the joint committee meeting that included experts in toxicology helped ensure consideration of this concern. We also note that the Dental Devices Branch has consistently worked interactively with a toxicologist in the Center for Devices and Radiological Health's Office of Science and Engineering Laboratories on the dental amalgam issue.

[2] Your petition, 2005P-0462, references a complaint that you submitted to the Office of Internal Affairs. However, as stated in a December 2, 2005, letter issued by that Office to you, after a review of your allegations, no action was taken.

various fields of clinical medicine and fundamental sciences in which devices intended for human use are used" (section 513(c) of the statute).

The panel reviewing the preamendments device must provide a classification recommendation to the Agency (section 513(c) of the statute). The recommendation must include a summary of the reasons for the recommendation and a summary of the data upon which the recommendation is based, along with an identification of any risks to health (section 513(c) of the statute). Under the regulations implementing this section of the statute, classification panels are to consider the persons for whose use the device is represented or intended, the conditions of use for the device, the probable benefit to health from the use of the device weighed against any probable injury or illness, and the reliability of the device (21 CFR 860.7).

When the Agency receives the panel's recommendation, the Agency must publish in the Federal Register the panel's recommendation and a proposed regulation classifying the device and provide an opportunity to submit comments (section 513(d) of the statute). After reviewing the comments, the Agency must by regulation classify the device (section 513(d) of the statute).

After the initial classification of a preamendments device, a change to the classification may be made by regulation on the Agency's initiative or upon the petition of an interested person (section 513(e) of the statute). The Agency may secure from the panel to which the device was last referred a recommendation respecting the proposed change in the device's classification and publish in the Federal Register any recommendation submitted to the Agency by the panel respecting such change (section 513(e) of the statute).

Therefore, in summary, to classify a preamendments device, FDA must receive a recommendation from a device classification panel; publish the panel's recommendation for comment, along with a proposed regulation classifying the device; and publish a final regulation classifying the device. To change the classification of a classified preamendments device, FDA may obtain a panel recommendation from the panel that provided the original classification recommendation and must issue a regulation.

Request to Transfer Regulatory Responsibility

With regard to your specific requests to transfer regulatory and classification responsibility, we have carefully considered the information you provided related to these requests. In response to your request to transfer regulatory responsibility, we believe that premarket submissions for dental devices (e.g., devices intended for use in dentistry) are appropriately reviewed by staff of the Dental Devices Branch (Branch) who have expertise in dental sciences and the other relevant fields, including materials science, biomedical engineering, and biological science. We believe that experts in the field in which the device is intended for use, in this case, dentistry, are best positioned to identify whether the information submitted supports marketing clearance or approval. Please be aware, however, that if there are concerns raised by a particular device, a branch or division may always consult with experts from other branches, divisions, or offices within the Center for Devices and Radiological Health (CDRH or Center) or across the Agency. Consistent with this policy, the Branch consults regularly with toxicologists within the Division of Anesthesiology, General

Hospital, Infection Control, and Dental Devices (of which the Dental Devices Branch is a part), as well as with toxicologists in the Office of Science and Engineering Laboratories (OSEL).

Further, if expertise from other Centers or from outside the Agency is needed, the Agency will use those resources. The Agency may do this by convening a panel of outside experts, or an "advisory committee," to review and make recommendations on any matter before FDA (21 CFR 14.1). The advisory committees are composed of individuals from outside the Agency that have diverse interests, education, training, and experience (21 CFR 14.80). With regard to the experts at the September 2006 joint committee meeting, the expertise included dentistry, neurology, neuropharmacology, epidemiology, material science, pediatrics, biostatistics, pharmacology, environmental health, molecular biology, and toxicology. Therefore, in addition to being able to consult with its internal scientists and physicians, FDA also uses the expertise of scientists and physicians from outside the Agency, and has done so regarding mercury amalgam.

Your request to transfer regulatory responsibility to a different branch or division appears to have also been based on an incorrect understanding that the Dental Devices Branch is solely responsible for the regulation of dental devices. As noted, the Branch is part of the Division of Anesthesiology, General Hospital, Infection Control, and Dental Devices (Division). This Branch and Division are a part of the Office of Device Evaluation (ODE), which along with other offices, is a part of CDRH. ODE reviewing divisions are organized according to the specialties with which they are charged to review the premarket submissions. Consequently, the Division of Anesthesiology, General Hospital, Infection Control and Dental Devices is responsible for reviewing anesthesiology and respiratory devices, general hospital devices, infection control devices, and dental devices. Similarly, other ODE divisions are responsible for reviewing devices in their respective medical specialty areas.

As stated above, the staff of the Branch have responsibility for reviewing premarket submissions for dental devices. Contrary to what your petition implies, however, the Branch is not solely responsible for the regulation of dental devices. The Dental Devices Branch reviews premarket submissions under the management of the Division of Anesthesiology, General Hospital, Infection Control, and Dental Devices, as well as ODE. In addition, final decision making authority within CDRH for any device is with the Director of CDRH, not the Dental Devices Branch. Other offices within CDRH, including the Offices of Surveillance and Biometrics, Compliance, and Communication, Education, and Radiation Programs, are also involved in premarket and postmarket regulation of devices, including dental devices.

Request to Transfer Classification Responsibility

With respect to your request that we transfer classification recommendation responsibility to the Clinical Toxicology Devices Panel because "the Dental Products Panel is the wrong panel to classify encapsulated mercury and amalgam alloy" (2005P-04262, page 7), we disagree. We believe the Dental Products Panel is an appropriate panel to make recommendations regarding dental devices.
As described earlier, the statute requires the Agency to organize the panels according to the field "in which devices intended for human use are used" (section 513(c) of the statute). In conformance

with the requirements of the statute, the Agency organized the Dental Products Panel to make device classification recommendations related to devices used in the field of dentistry. Further, under the requirements of the statute and regulations, a panel established to make classification recommendations must also be able to consider the persons for whose use the device is intended and the conditions of use for the device. We believe the Dental Products Panel, which includes experts in dental sciences and other relevant fields such as materials science and neurosciences, is best positioned to consider these factors and make classification recommendations.[3] In comparison, the Clinical Toxicology Devices Panel is an advisory panel established to make recommendations related to in vitro diagnostic devices intended for clinical laboratories. However, FDA will (and has, as demonstrated by the joint committee meeting) seek the recommendations of other experts when appropriate under the statute and regulations.

Conclusion

As discussed earlier, we are reviewing comments and recommendations from the joint committee meeting regarding dental amalgam. We will carefully consider that information and all of the information we received at the meeting and submitted to the Docket.

Sincerely yours,

Linda S Kahan

Linda S. Kahan
Deputy Director
Center for Devices and
Radiological Health

[3] For changes to classification, if the Agency seeks a panel recommendation, the Agency must use "the panel to which the device was last referred" (section 513(e) of the statute). Therefore, if a change in classification is considered for a dental device originally reviewed by the Dental Products Panel, under the statute, the Agency would again use the Dental Products Panel.