

US Regulation of Advertising and Promotional Materials

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Medical device manufacturers do not always properly control the development of new or modified promotional labelling and advertising materials. This lack of control can lead to unexpected regulatory problems. This article discusses United States requirements for these materials and the type of controls that companies should exercise.

FDA authority

With the exception of products that are exempt from the regulatory submission process, manufacturers marketing medical devices in the United States (US) must provide proposed labelling to the Food and Drug Administration (FDA). For example, premarket notification and premarket approval (PMA) submissions should include copies of all proposed labels, labelling, package inserts, service manuals, instructions for use, and advertising and/or promotional materials. For this reason, it is critical that companies understand US labelling requirements, which are found in several parts of the US Code of Federal Regulations (CFR), including:

- General Device Labelling – 21 CFR Part 801
- In Vitro Diagnostic (IVD) Products – 21 CFR Part 809
- Investigational Device Exemptions – 21 CFR Part 812
- Good Manufacturing Practices – 21 CFR Part 820
- General Electronic Products – 21 CFR Part 1010.

A discussion of these requirements is beyond the scope of this article, however, comprehensive information on labelling requirements is on the FDA Device Advice website.¹

FDA authority over advertising is limited to restricted medical devices. Advertising of other medical devices is regulated by the Federal Trade Commission and is not discussed in this article. Devices can be designated as restricted as a result of a postapproval requirement in a PMA approval order, by regulation at the time of approval of the PMA or by regulation subsequent to approval. Cardiac pacemakers and heart valves are examples of

restricted devices. Hearing aids are restricted by a regulation that limits their sale to persons who have obtained a medical evaluation of their hearing loss by a physician within six months prior to the sale of the hearing aid.

FDA compliance programmes

The Office of Compliance within the FDA Center for Devices and Radiological Health (CDRH) develops, coordinates and evaluates compliance and surveillance programmes. This office has four Divisions, including two Enforcement Divisions that are made up of various branches, which cover specified types of products such as the Dental, Ear Nose and Throat and Ophthalmic Devices.

The Enforcement Divisions investigate complaints made regarding promotion and advertising. For example, they may be informed by a medical device company that a competitor company is marketing a product for an intended use that appears not to have been cleared or approved by FDA. It is the responsibility of the Enforcement Divisions to investigate and determine whether or not violations exist. They also routinely review quality system inspection reports for all US inspections that concern regulatory violations, and all inspection reports, whether possibly in violation or not, of inspections conducted outside the US. Any problems relating to promotion or advertising materials identified during these reviews are transmitted to an official responsible for promotions and advertising compliance in the Office of the Director for



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Evaluation.

Internet surveillance

The Internet is an extremely important medium for advertising, promoting and providing information on medical devices. In an effort to ensure that the information provided on the Internet is truthful and complying with the Food, Drug and Cosmetic (FD&C) Act, FDA has devoted significant resources to monitoring the Internet. This resulted in 22 Warning Letters being issued to companies advertising on the Internet during fiscal year 2000.

It was not possible to obtain data on the number of Warning Letters issued within the past few years relating to promotion and advertising; however, FDA surveillance of the Internet continues as shown in Warning Letters found posted on the FDA website.² Several of these are discussed later.

Ensuring continued compliance

Once the regulatory review process is completed, companies need to ensure that new or modified labelling, including promotional and advertising materials, remain in compliance. To ensure that the claims made continue to meet regulatory requirements, these materials should be subject to a regulatory review.

The level of control needed to ensure continued compliance of these materials will depend on the regulations that apply to the device. For example, devices that must be cleared under premarket clearance or 510(k) regulations must meet the requirements specified in Subpart E, Premarket Notification Procedures, in 21 CFR Part 807. Devices that have received premarket approval must meet the regulations under 21 CFR Part 814, Premarket Approval of Medical Devices.

Changes to cleared devices

When changes are made to a device subject to premarket clearance regulations, including changes to its labelling, technology or performance specifications or materials, these changes must be evaluated as specified in section 807.81 to determine whether or not a new 510(k) must be submitted to FDA for the particular change or changes. This includes changes made to promotional labelling. To assist manufacturers in making this determination, FDA has issued a guidance document, "Deciding When to Submit a 510(k) for a Change to an Existing Device," which can be obtained from the website.³ This is important when evaluating changes in promotional labelling, because frequently it is difficult to determine whether or not statements made in new or modified labelling have changed the intended use, or indications of use, that have been cleared or approved by FDA. The 510(k) regulation, 21 CFR 807, requires a new premarket notification for major changes in intended use. This is a critical determination that should be subject to regulatory review before the approval of this labelling. Quality system procedures

should include this type of control.

Changes to approved devices

FDA exercises stringent control over changes to devices, including its labelling, for devices that have received premarket approval. The regulations that specify these controls are found in section 814.37, PMA amendments and resubmitted PMAs, and section 814.39, PMA supplements. It should be mentioned that a PMA application must include copies of all proposed labelling for the device. This includes, for example, instructions for installation and any information, literature or advertising that constitutes labelling under section 201(m) of the FD&C Act.

In accordance with section 814.39, after approval of a PMA, an applicant must submit a PMA supplement for review and approval by FDA before making a change affecting the safety or effectiveness of the device, unless FDA has determined otherwise or this is not necessary under the provisions of the act specified in section 814.39. The regulation states that the burden for determining if a supplement is required rests primarily with the PMA holder. However, the regulation provides examples of changes that require a PMA supplement if the changes affect the safety and effectiveness of the device. These include labelling changes and new indications for use. On its website, FDA has provided regulatory information and links to related guidance documents for assisting manufacturers in determining whether or not PMA supplements are required for particular changes.⁴

Examples of violations

An examination of Warning Letters issued to companies for promotional or advertising violations is one of the more effective ways of understanding the types of problems that should be avoided.

IVD product. A Warning Letter dated 9 January 2006 to the manufacturer of IVD medical device reagents stated that the company's Internet site had been reviewed. As a result of this review, FDA was concerned that products promoted on the website as analyte-specific reagents (ASRs) did not appear to be stand-alone reagents intended for use in "a diagnostic application for identification and quantification of an individual chemical substance or ligand in biological specimens," which is the definition of an ASR under 21 CFR 864.4020(a). The website stated that a particular ASR was used for the detection of three types of viruses. Marketing products for the identification and quantification of multiple chemical substances exceeds the limits of the definition of an ASR. FDA also cited a press release on the website that made specific performance claims, which violate the requirement that advertising and promotional materials for ASRs may not make any statements regarding analytical and clinical performance. As a result, the letter concluded that the reagents were adulterated and misbranded under the FD&C Act.

Wound dressing. A Warning Letter dated 11 July 2003, →

to the manufacturer of a hydrophilic wound dressing, stated that FDA had reviewed the company's website and found statements made about the product to be inconsistent with the terms of the premarket notification exemption granted for the product. The company had submitted a 510(k) for the product, but FDA had determined that it was exempt from 510(k) requirements. A hydrophilic wound dressing is defined in 21 CFR 878.4018. The letter stated that the information found at the "Products" link of the website stated that the product "reduces clinician hold time and allows patients to be moved into a recovery area and discharged more rapidly in most cases." Also cited were statements made in a "Market Preference Study" and a press release that suggested that the device can be used following a catheterisation laboratory procedure to achieve closure of the arterial puncture site. The letter stated that these uses are not included in the cleared intended uses for hydrophilic wound dressings. As a result, FDA invited the company to submit a 510(k) to support the use of the product for the indications described.

Cooling system and disposable electrode. FDA may also identify problems with promotional labelling or advertising for devices during quality system inspections. For example, a Warning Letter dated 14 June 2003 was issued to a manufacturer of a skin cooling system and disposable therapy electrode. The letter stated that the product was identified as a reusable cold pack in the FDA device listing records, as defined in 21 CFR 890.5700. This regulation defines a cold pack as a device intended for medical purposes that consists of a compact fabric envelope that contains a specially hydrated pliable silicate gel capable of forming to the contour of the body, which provides cold therapy for body surfaces. The device is in Class I and exempt from premarket notification procedures. The Warning Letter stated that according to product literature, the "skin cooling system [is] designed for superficial laser skin procedures." Furthermore, the product literature also stated that "cold air -32°C skin cooling significantly reduces pain and discomfort for superficial laser applications, while protecting the tissues from possible thermal damage..." Based on this information, FDA concluded that the skin-cooling product, when intended for use as a stand-alone device for superficial laser skin procedures, is not exempt from premarket notification requirements.

Prudence

A regulatory review of the content of the website and product literature could have prevented these Warning Letters from being issued. Prudent companies will ensure that all website content and product promotional materials are properly reviewed to prevent these types of problems from occurring.

References

1. www.fda.gov/cdrh/devadvice/33.html
2. www.fda.gov/foi/warning.htm

3. www.fda.gov/cdrh/ode/510kmod.pdf
4. www.fda.gov/cdrh/devadvice/pma/supplement.html#overview [mdt](#)

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