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Client Alert

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Supreme Court Rules State Law Tort Claims Involving Drug Labels Approved by FDA Are Not Preempted

On August 21, 2009, the U.S. Food and Drug Administration published an important proposed rule in the *Federal Register* regarding postmarket medical device reporting and issued a related Draft Guidance. The proposed rule amends FDA's postmarket medical device reporting regulations to require that manufacturers, importers, and user facilities submit mandatory reports of individual medical device adverse events to the agency in an electronic format that the agency can process, review, and archive. See 74 Fed. Reg. 42203. The Draft Guidance entitled *Draft Guidance for Industry, User Facilities and FDA Staff eMDR- Electronic Medical Device Reporting* (Draft Guidance) addresses general issues related to FDA's proposed rule and provides information on how to prepare and send an electronic postmarket medical device report to the Center for Devices and Radiological Health (CDRH). The proposed rule is an effort by the agency to improve its process for collecting and analyzing postmarket device adverse event information. Similar proposed mandatory electronic reporting requirements were introduced for drug and biologic manufacturers. Comments to the proposed rule are due by September 21, 2009.

The collection of adverse event information on medical devices is mandated by Medical Device Reporting (MDR) requirements of the Food Drug and Cosmetics Act, (21 USC § 360i), and reports come primarily from manufacturers, user facilities, importers, and voluntary reporters. Specific requirements for the submission of postmarket medical device reports to FDA are in 21 CFR Part 803, and the proposed rule covers reports of death, serious injuries, and malfunctions that must be reported to FDA in initial 5 day, 10 day, or 30 day individual MDRs or supplemental reports. FDA indicates that mandatory electronic medical device reporting will expedite the agency's access to safety information, lead to more efficient analysis and reviews, and enhance the agency's ability to rapidly disseminate significant information to the medical device industry, health care providers, and consumers. By reducing the time and cost related to transcribing internal data systems into paper format and eliminating the need for mailing, FDA believes the transition to use of electronic submissions will also improve the speed and efficiency of both industry operations as well. This client bulletin summarizes the proposed rule and draft guidance.

Current Medical Device Reporting Requirements

Currently, CDRH receives most mandatory medical device adverse event reports on paper, which requires that reports are manually entered into the center's adverse event database, called the Manufacturer and User Facility

Device Experience (MAUDE) database, for further analysis. The current reporting requirements for manufacturers, importers, and user facilities are set forth below.

- **Manufacturers**. Federal regulation currently requires manufacturers of medical devices to submit a postmarket MDR of an individual adverse event no later than 30 calendar days after becoming aware of information that a device the manufacturer markets may have caused or contributed to a death, serious injury, or malfunction, using FDA Form 3500A and containing the information described in 21 C.F.R. § 803.52. Manufacturers must also provide supplemental information about such events on the same form within 30 calendar days of obtaining information, if such information becomes available after the initial MDR was filed. However, manufacturer may have to submit an MDR to the agency no later than 5 working days after becoming aware of the information where the medical device adverse event required remedial action be taken to prevent an unreasonable risk of substantial harm to the public health, or, if the agency determines, in its discretion, that a 5 day report is necessary.

- **Importers.** Importers of medical devices must submit a postmarket MDR to the agency and the manufacturer no later than 30 calendar days after becoming aware of information that reasonably suggests that one of the importer's marketed devices may have caused or contributed to a death or serious injury on the FDA Form 3500A. See 21 C.F.R. § 803.40(a). The information specified in 21 C.F.R. § 803.42 must be included. Importers must also submit reports to the manufacturer no later than 30 calendar days after becoming aware of information that reasonably suggests that one of the importer's marketed devices has malfunctioned and that this device or a similar device marketed by the importer would be likely to cause or contribute to a death or serious injury if the malfunction were to recur. 21 C.F.R. § 803.40(b).

- **User Facilities.** User facilities must submit a postmarket MDR of death to the agency and an MDR of death or serious injury to the device manufacturer within 10 working days of becoming aware of information that reasonably suggests that a device has or may have caused or contributed to the death or a serious injury of a patient of the facility. 21 C.F.R. § 803.30(a). Further, if the manufacturer of the device is unknown or cannot be identified, the regulation requires that user facilities submit postmarket reports of serious injury to the agency within 10 working days. 21 C.F.R. § 803.30(a)(2). These reports must be submitted on the FDA Form 3500A and include the information described in 21 C.F.R. § 803.32. In addition, user facilities are required to submit an annual summary of the reports they sent to manufacturers and FDA, using FDA Form 3419. See 21 C.F.R. § 803.33. Notably, the proposed rule does not apply to user facility annual reports made under 21 C.F.R. § 803.33, although other changes to 21 C.F.R. § 803.33 are proposed.

The Proposed Rule

Options for Electronic Reporting

According to the proposed rule, CDHR has established its MDR databases to support two options for electronic submissions of MDRs. One option is designed for low volume reporting and the other option is designed for high volume reporting, although both options allow for use of the FDA Electronic Submission Gateway (FDA ESG), a secure electronic portal for transmission of reports to FDA, as discussed below. Small

manufacturers with a limited number of reports may prefer to use CDRH eSubmitter (CeSub) software, which allows for submission of one MDR at a time and can be downloaded at no cost from FDA's website. Large manufacturers, which may submit hundreds of reports per year, may prefer to use a batch submission protocol, using the Health Level 7 Individual Case Safety report (HL7 ICSR) standard. Notably, the HL7 ICSR allows for the direct extraction of information from the reporter's database to fill an MDR, produce the appropriate data output, and transmit the MDR to the FDA ESG. Under the proposed rule, CDRH is now accepting electronic MDR submissions, prepared and transmitted in accordance with FDA guidance, in lieu of paper submission on a voluntary basis.

Submission of Electronic Reports

The proposed rule would revise 21 C.F.R. § 803.12 to require that manufacturers, importers, and user facilities submit postmarket MDRs to the agency in an electronic format that FDA can process, review, and archive. Under the proposed rule, reports between manufacturers and importers or user facilities would not be subject to the requirement of submission in electronic format, and may be in any format the recipient can read. The proposed rule would make conforming changes throughout part 803 to reflect the proposed requirement to submit reports to FDA in electronic format such as removing § 803.11, which currently addresses obtaining paper forms, and removing § 803.14, which currently provides for voluntary electronic submission of reports with FDA consent. Further, the proposed rule would amend § 803.19, which already addresses exemptions or variances from any of the requirements of part 803, to address specifically exemptions or variances related to reports in electronic format. Other changes such as removing references to "electronic equivalents" and updating wording in certain provisions will be made to ensure the regulations are consistent with the new mandatory requirement for submission of electronic MDRs.

If the proposed rule becomes final, manufacturers, importers, and user facilities would be required to make MDRs in electronic format no later than one year from the date of publication of the final rule. After the effective date, the agency would not accept paper MDRs using FDA Form 3500A, or submissions made in electronic format other than those identified for use under the rule, unless FDA has granted an exemption or variance. Under the proposed § 803.19, a manufacturer, importer, or user facility may submit a written request to FDA seeking a variance of the requirement to submit reports to the agency in an electronic format that the agency can process, review, and archive. Any written requests, however, must contain the reason(s) why the reporting entity requires a variance and for how long the variance is needed. If FDA grants a variance, the manufacturer, importer, or user facility would be required to submit MDRs as specified by FDA in the letter authorizing the variance.

With respect to recordkeeping requirements, FDA is proposing to amend § 803.18(b)(ii) to require that MDR files contain copies of all reports submitted under part 803, whether paper or electronic. Currently, § 803.18 of the regulation addresses requirements for establishing and maintaining MDR files or records for manufacturers, user facilities, and importers, and allows regulated entities to maintain required records either in hard copy, by printing out reports submitted in electronic format, or in electronic form.

FDA Electronic Submission Gateway (ESG)

The FDA ESG is the entry point for all electronic submissions to the agency. The FDA ESG is available 24

hours a day, 7 days a week. To use the FDA ESG, reporters need to obtain a digital certificate, which is an attachment to an electronic message that allows the recipient to authenticate the identity of the sender via third party verification from an independent certificate authority. Digital certificates are used to identify encryption and decryption codes between message senders and recipients.

Draft Guidance on Electronic MDR Submission

Electronic MDR Submissions

The Draft Guidance defines an electronic MDR submission as a file containing one or more medical device reports in an electronic format that FDA can process, review, and archive. With respect to what information needs to submitted with an electronic MDR, the Draft Guidance provides that an electronic MDR will contain the same data elements as provided in MDR regulation at 21 C.F.R. § Part 803. User facilities must include the information specified in 21 C.F.R. § 803.42, importers must include the information specified in 21 C.F.R. § 803.42, and manufacturers must include the information specified in 21 C.F.R. § 803.52. The format of an electronic report is made up of data element identifiers and associated data element values in a machine-readable format.

Preparing and Transmitting Electronic MDR Submissions

To submit an MDR in electronic format, manufacturers, user facilities, and importers will need to: (1) obtain a digital certificate; (2) prepare the electronic file containing the information specified in the appropriate section of 21 CFR Part 803; and (3) send the electronic file to FDA through the ESG. Reporters may select one of the options for electronic MDR submission (e.g., low-volume reporting using the CeSub program or high-volume reporting using HL7 ICSR). With respect to sending information on FDA's ESG website, reporters will need to:

- request a test account;
- obtain a digital certificate for use with the FDA ESG;
- send test submissions to FDA through the ESG; and
- set up a production account after testing is successful.

Reporters will know whether a MDR submission was successful because FDA's computer system will send three acknowledgements including:

- Acknowledgement 1- confirms that the submission was received by the ESG
- Acknowledgment 2 - indicates that the submission reached CDRH.
- Acknowledgment 3 - indicates which reports in your submission successfully loaded to CDRH's adverse event database and describes the errors for any reports that failed during the validation and loading process.

The Draft Guidance provides information on how to check the ESG or eMDR status of a report, if the reporter fails to receive any of the above acknowledgments. In addition, FDA recommends that reporters keep a copy

of the reports that are in electronic submissions and the acknowledgements pursuant to the requirements at 21 C.F.R. § 803.18(b)(1)(ii).

Updates on Reports

The Draft Guidance provides that for all updates reporters should include the initial report number, and state that the type of submission is a follow up report. Additional entries should be limited to those where reporters need to update previously provided information. According to the Draft Guidance, electronic MDR format that FDA can process, review, and archive contains discrete data fields, such as Brand Name or Model Number and narrative fields such as the event description. Updates to the narrative fields add additional narrative to the event record and changes to discrete fields replace the previous entry in the field.

Manufacturers responding to a request for additional information made under 21 C.F.R. § 803.15 can submit the response electronically. The Draft Guidance notes that this process is different from the from the process manufacturers use for supplemental or follow-up reports under 21 CFR 803.56. For a response to an FDA request for additional information, the reporter should enter the initial report number, indicate that the type of follow up is a Response to FDA Request and provide the additional information requested as Additional Manufacturer Narrative. All discrete data elements should be reported as Additional Manufacturer Narrative.

Additional Sources of Information

The Draft Guidance lists several sources of information relating to electronic MDR submissions.

- More detailed information on these methods used for electronic submission can be accessed here.
- Specific information relating to using the ESG is available here.
- Technical information, e.g., information on downloading the software, on the CeSub system is accessible here.