Building a Positive Relationship with FDA: Four Case Studies

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Continua Summer Summit 2009

Case Study #1

Getting Started with FDA

developing and maintaining a positive relationship

Colleen Hittle, RAC

Background – what are the rules?

- Types of FDA meetings with medical device manufacturers
  - Pre IDE
  - Determination Meeting
  - Agreement Meeting
  - Pre 510(k), pre PMA
  - 100 day meeting
    - For PMA's

Background - environment

- FDA is time constrained
- FDA is resource constrained
- FDA is under pressure not to get too ‘cozy’ with Industry
  - WSJ article series
- FDA is under new management
  - Transition ‘slow down’ while priorities are set

Facts

- BuyMore Electronics has a new technology that requires FDA to change the way they view clinical trial requirements for blood glucose testing.
- BuyMore has never met with FDA and their technology experts are from academic backgrounds

You're the Regulatory Expert. How would you proceed?

- What is the best meeting format?
  - Face to Face or telecon?
- What kind of preparations are required?
  - Plan for open ended discussion or prepare a more scripted agenda?
- Who should attend?
  - Allow academic from scientific team to lead discussion?

Case Study #2

Meeting with FDA over an approval issue

Colleen Hittle, RAC

Background – what are the rules?

- There are several pathways to seek FDA input on 510(k) clearance pathways
  - Some are submissions, without dialogue
    - Formal: 513(g) – user fee
    - Informal: Submit documentation, requesting feedback (no meeting) – no user fee
  - Some are meetings
    - Pre meetings to discuss regulatory strategies aren't technically 'allowed' but some reviewing groups will term them 'pre IDE' – no user fee

Background - environment

- FDA resources are limited
  - Written comments without statutory review times are taking longer and longer (90+ days)

Facts

- BuyMore has determined that there are possible 510(k) strategies for their new technology and want to review these options with FDA

You're the Regulatory Expert. How would you proceed?

- Would you recommend submitting written documentation, seeking input from FDA on strategy?
  - saving the user fee
- Would you recommend submitting a 510(k) application without any discussion?

Case Study #3

Meeting with FDA over an inspection/enforcement issue

Colleen Hittle, RAC

Background – what are the rules?

- FDA has publically communicated an ‘open door’ policy to allow manufacturers time to discuss compliance issues first at the District level
  - No requirement for them to meet within any certain time frame, or at all.

Background - environment

- District Offices prefer to be contacted by Manufacturers when quality system remediation efforts are in their planning stages
  - They prefer to have input early in the process
- Frequent and on-going written communication is also encouraged

Facts

- BuyMore's customers called FDA to complain about repeat quality issues associated with their products.
- FDA scheduled an inspection of their facility and identified systemic issues in their compliance with 21 CFR Part 820.
  - This resulted in a 483 and Warning Letter issued by BuyMore's District Office

You're the Regulatory Expert. How would you proceed?

- Is a meeting with FDA recommended?
  - If so, who should attend?
  - If not, what are ways to minimize damage associated with Warning Letter
- Should you hire an attorney or a consultant to contact FDA on your behalf?

Case Study #4

The Denial: What to do after hearing “no”

Bradley Merrill Thompson, Esq.

Background – what are the rules?

- Internal review of decisions by supervisors (21 C.F.R. 10.75)
- Petition for reconsideration (21 C.F.R. 10.33)
  - 30 day time limit
- Citizen Petition
- Agency and CDRH ombudsmen
- Many others described in Medical Device Appeals and Complaints (1998)

Background: The approval environment at FDA

1. July 2007: Consumer Advocates Complain
2. September 2007: Congress Acts
3. 2008: CDRH Reviewers Revolt
4. January 2009: GAO Issues its Report
5. The Future: Consumer Advocates Complain and Congress Acts

Statement of Diana Zuckerman

- These changes, supported by most members of the Patient and Consumer Coalition, include:
  - Excluding implanted medical devices from the 510(k) process;
  - Requiring clinical trials for all medical devices that could harm patients and consumers; and
  - The FDA needs to establish an appropriate definition of "substantial equivalence." They should revert to the original intent of the 510(k) process: the review of products that are substantially equivalent in terms of intended treatment, form, what they are made of, mechanism, and function.

Public Citizens' Peter Lurie says—

- "The 510(k) process is a loophole that's swallowed the law. Even among class III devices, the great majority of them go through 510(k), which I think is very different from what Congress intended in the first place."
- "What we'd like to see come out of this are two things that are related to one another. One is the 510(k) process would be used less often and that more products we go through the PMA process, and the second is that this provision whereby you can have a device called substantially equivalent without even using the same technology would be scrapped."

September 2007: Congress Acts

FDAAA Requires--

- § 225(a). [GAO] shall conduct a study on the appropriate use of the process under section 510(k) of the … Act as part of the device classification process to determine whether a new device is as safe and effective as a classified device.

2008: CDRH Reviewers Revolt

- May 31, 2008 CDRH Reviewers complain to FDA Commissioner that they are being over-ruled in the 510(k) process
- October 14, 2008, presumably the same reviewers complain to Congressman John Dingell
- January 7, 2009, these same folks complain to the Obama Transition Team in a six page letter, asking that FDA managers be replaced.

A sample of their 1/7/09 complaints:

- [We have provided] irrefutable evidence that managers at CDRH have placed the nation at risk by corrupting and distorting the scientific evaluation of medical devices
- Managers have ordered, intimidated, and coerced FDA experts to modify scientific evaluations, conclusions and recommendations in violation of the law.
- The same managers have knowingly tried to avoid transparency and accountability by failing to properly document the basis for their non-scientific decisions in administrative records.
- The Director of the Office of Device Evaluation has gone so far as to:
  - order physicians and scientists to ignore FDA guidance documents
  - knowingly allow her subordinates to issue written threats of disciplinary actions if physicians and scientists failed to change their scientific opinions and recommendations to conform to those of management
- An EEOC lawsuit in September, 2004 (they say) found that FDA promoted a hostile working environment and FDA managers demonstrated a systemic disregard for federal regulations as well as FDA's own policies.

Reforms Sought by CDRH Reviewers

- Replacing current FDA managers
- A complete restructuring of the evaluation and approval process such that it is driven by science and carried out by clinical and scientific experts in their corresponding areas of expertise.
- A rule preventing management from overruling them.
- The Office of Device Evaluation be dismantled and split into multiple offices, each headed by a physician or scientist with strong leadership credentials and extensive clinical and technical expertise.

Diana Zuckerman on GAO

- USA Today, on 1/15/09
  - "says the combination of the GAO report and last week's letter from agency scientists shows 'the FDA's Center for Devices is broken and needs a major overhaul.'"
- New York Times on 1/13/09
  - said the Bush administration had "finally made the device approval process so meaningless that it's intolerable to the scientists who work there." Ms. Zuckerman, a longtime critic of the agency's device approval process, particularly as it relates to breast implants, added, "Virtually everything gets approved, no matter what."

Where we are today

- The agency has been very dysfunctional
  - It got harder to appeal through the management chain.
- Waiting to see if the new management can turn this around
- Too soon to know

Facts

- BuyMore submitted its 510(k) for its home monitor, and got a letter saying the monitor is unlike any other and the agency either needs more information or it will find the monitor “not substantially equivalent”.
- You know that your competitor got 510(k) clearance for a very similar product. Your reviewer has appeared to be very closed minded, unlike the reviewer your competitor had. What do you do?

You're the Regulatory Expert. How would you proceed?

- What's the best first step?
- Where do we focus our story?
- What avenues are available?