The BRIDGE Coalition

December 13, 2018

Dockets Management Staff (HFA-305)

Food and Drug Administration

5630 Fishers Lane, rm. 1061

Rockville, MD 20852

Re: 510(k) Third Party Review Program; Docket No. FDA-2016-D-2565.

Dear Sir/Madam:

On behalf of the Bringing Real-world Insight for Device Governance and Evaluation ("BRIDGE") Coalition ("the Coalition"), I am pleased to submit these comments on the 510(k) Third Party Review Program draft guidance. The Coalition is a group of medical device companies dedicated to patient health and to the promotion of efficient, rational regulation of medical devices. The Coalition appreciates the opportunity to provide comments on the draft guidance.

The Coalition supports applying a logical and least burdensome approach in all FDA guidances, regulatory decisions and administrative processes. Least burdensome concepts must become engrained in the thinking of FDA and the regulated community, and guidances from FDA should explain how least burdensome principles were considered and how such principles and concepts were applied throughout the guidance. On-going education, training and oversight is needed to ensure that least burdensome principles are applied universally and equally. In this case, for example, FDA should set forth why these changes and processes advance least burdensome regulatory approaches across FDA.

Background

The Coalition is supportive of work being done on the 510(k) Third Party Review Program but believes it would be helpful for FDA to set forth the differences between this draft guidance and the prior draft guidance from 2016[1] to clarify why a new draft was issued and the key differences between the drafts. It would be helpful to understand, for example, the substantive differences between these drafts and any changes in policy. FDA's perspective on the reasons for the new draft are both unique and important. As a general matter, the Coalition believes that such information should be provided whenever the agency reissues a draft guidance.

Additionally, the Coalition has a few general questions:

[1] 510(k) Third Party Review Program, September 12, 2016. https://www.regulations.gov/document?D=FDA-2016-D-2565-0001

- Other than waiving the user fee, what are the anticipated benefits or value to industry of the third party review program? What will motivate industry to utilize this? Is the only anticipated benefit a shorter total review time?
- How does FDA envision this voluntary alternative review process yielding more rapid decisions on 510(k)s than from FDA? Is there data to support that the total cycle time is less if a sponsor utilizes the third party review system instead of going directly to FDA?
- How does this program fit into other FDA initiatives such as the recently announced "QUIK" program? Given proposed review times for the QUIK review process, does the third party review system offer any benefit?

It is important to know whether there is any data to show the total time for a traditional 510(k) review as compared to the total time for both the 3P review and FDA review and/or confirmation. This would include a breakdown of the time spent on the various steps. The Coalition believes it would be beneficial to know whether the anticipated efficiencies are meaningful.

Definitions

Within this section, the Coalition has a few comments. In general, the Coalition would like to know why the definitions used in the draft guidance will not be applicable beyond the document. There should be consistency in terminology across all guidances and other relevant documents to avoid confusion.

Additionally, FDA should not incorporate or utilize documents, or contents of documents, such as the IMDRF pronouncements, unless they have been recognized by FDA. This recognition process is required and provides needed transparency to stakeholders. As such, we recommend either recognition of the standards, or elimination of all references to non-recognized standards.

The Coalition also believes that the language in the definition of 510(k) Submitter is too narrow and should be revised to reflect the additional components of a Class II/510(k) submission. The Class II/510(k) process is more inclusive than just the substantial equivalence (SE) provisions. For example, a Class II/510(k) submission includes information such as intended use and the Submitter must comply with other relevant special controls. As drafted, the language in the definition gives the misleading impression that a Submitter need only show substantial equivalence to get clearance when actually more is required in both the content of the submission and the requirements that must be met (*e.g.*, special controls).

Factors Used in Determining Device Type Eligibility in the 3P Review Program

Within this section, the Coalition has a few general comments. First, the Coalition notes that certain devices not mentioned in the exceptions listed in draft guidance, such as implantable devices, seem not to be statutorily eligible for 3P review. Is that FDA's understanding?

Second, in note 4, the Coalition would like FDA to clarify that, as drafted, the information that is relevant to evaluating a device type may vary over time. How will FDA address such changes? As drafted, the determination that a device is eligible for third party review will be constantly changing (and without any process for public input or transparency). Submitters and 3P Review Organizations need certainty. The Coalition believes: 1) the factors listed in the draft may well not necessitate withdrawal of device eligibility, 2) the factors to be considered and weighed, if this approach is adopted need to be spelled out and 3) there must be a defined and transparent process that permits stakeholder input before eligibility is withdrawn.

Additionally, in note 5, the Coalition believes that a 3P Review Organization may have the necessary interdisciplinary expertise to conduct the specified review. The note seems to address whether the 3P Review Organization is capable of conducting the review, not whether the device should be eligible for third party review. These are different questions. A device might well be appropriately eligible for third party review, but a specific 3P Review Organization might not have the required expertise.

Additionally, in subsection (c), the Coalition wonders what would happen if, for that combination product, the PMOA is a device mode of action and the product is otherwise eligible for third party review. Also, in subsection (d), the Coalition would like FDA to clarify what "cross-labeled" combination products are in this context. Likewise, the Coalition believes that off-label uses should not be a factor that is considered in determining eligibility. Additionally, the language in this section seems to be inconsistent with (c) above.

In note 6, the Coalition believes that FDA should make major edits. Device eligibility is determined once. Recalls and other factors occur episodically in the future. As drafted, devices will go into and out of eligibility. This provides no certainty for developers or 3P Review Organizations. Having a system with constantly changing rules also creates unnecessary and complex questions. For example, what happens if a device is under review when a recall of a similar device happens – and that recall has nothing to do with the device under review? Additionally, FDA is overstating the certainty of safety signals. Safety signals are, by definition, not conclusive of a problem and may or may not reflect an actual field issue. Using safety signals in the way contemplated by this draft guidance seems entirely inconsistent with the explanation for the safety signals and their use at the time the safety signal process was created. Prior to finalization of the guidance, these issues should be considered, and the guidance refined to reflect them.

Finally, the Coalition would like to know how it will actually work in practice when a device type is considered eligible for a 3P review but concerns with other factors would make it such that the submission would be ineligible for third party review. There is neither certainty or criteria listed here, somewhat in opposition of Congress' requirement to have criteria.

Review of 510(k) Submissions by 3P Review Organizations

Within this section, the Coalition has a few comments and recommended changes. First, the language on lines 370-371 should be, "3P Review Organizations share FDA's mission to protect and promote the public health by ensuring medical devices *have a reasonable assurance of safety and effectiveness* for their intended uses." This is the correct legal standard, and the language in the draft guidance should be revised to align with statutory language.

The Coalition also has a few concerns with Figure 2. The Coalition believes that FDA should be concerned with the output, not the internal processes. For example, the 3P may not have or need all of the different people listed. Each 3P Review Organization should be empowered to implement its own organizational structure – provided only that the output is robust.

In subsection A, the Coalition would like to know whether all 3P Review Organizations are eligible to review all eligible devices. Additionally, the Coalition would like to know why a 510(k) Submitter cannot submit a 510(k) for the same device directly to FDA during the time frame when either the 3P Review Organization file is being voluntarily withdrawn by the 3P Review Organization or will be deleted by FDA after 180 days. This puts the developer in a precarious position and at the mercy of the 3P Review Organization to take some action. This will delay product reviews, create a disincentive to use a 3P provider and add burden to all stakeholders.

In subsection B, the Coalition has one general comment. The Coalition believes that the language in lines 401-403 assumes a particular size of a 3P Review Organization and a particular organizational structure. The Coalition believes that 3P Review Organizations need more flexibility. Some organizations will be smaller or have different structures. The robustness of the review is what matters, not the utilization of a particular organizational structure.

In subsection C, the Coalition has two comments. First, in note 2, the Coalition would like FDA to add language around the review and use of recognized standards. Recognized standards should be considered by 3P Review Organizations along with special controls and other requirements. Second, the Coalition feels that the language on lines 452-455 should be, "3P Review Organizations should request that 510(k) Submitters fully inform them of any prior communications with FDA about a device under review, including but not limited to FDA feedback obtained through the Pre-Submission program, unsuccessful marketing applications, and other interactions *relevant to the device being reviewed."* As drafted, this is too broad and open ended. Clarity is needed. Finally, the Coalition does not believe that the Requests for Feedback on Medical Device Submissions: The Pre-Submission Program and Meetings with Food and Drug Administration Staff are always relevant to this process, The FDA process is not important, the output of the review is what is important.

In subsection D, the Coalition has a few general comments. First, the Coalition believes that the 3P Review Organizations consultations with FDA, and any outputs from those interactions should be shared with the submitter. That should be made explicit in the final guidance. Additionally, the Coalition is curious to know why FDA makes it an obligation to obtain early interaction consults from FDA before reviewing a device type they have not previously reviewed. This should be optional.

In subsection E, the Coalition believes that the language around ensuring a submission is administratively complete should only take into consideration the extent that the mentioned regulations are relevant. For example, any payment of user fees to FDA is not relevant to the work of the third party reviewer.

In subsection G, the Coalition has a few comments and edits. First the Coalition believes that FDA should not mandate that the third party reviewer use FDA processes, flexibility is needed. The Coalition would also like to know to whom are 3P Review Organizations to provide copies of written communications between the 510(k) Submitter and the 3P Review Organization to. Is it FDA? If so, this isn't necessary. FDA should care about the final result, and this adds unnecessary burden to both the submitter, the 3P Review Organization, and FDA. Furthermore, the language is unclear and could be interpreted to require the Submitter to provide the 3P Review Organization with all subsequent correspondence with FDA. The Coalition believes that once a 3P Review Organization has completed its action, that any substantive interactions between the FDA and the developer are not always relevant and any mandate to supply such correspondence creates additional burden.

In subsection I, the Coalition has one general comment. In subsection (2), the Coalition feels that it is important that FDA define what a "related" submission is. As part of this, we presume that a related submission must be a submission from the same company. This should be clarified.

In subsection J, the Coalition has one question. When FDA places a 510(k) submission from a 3P Review Organization "on hold", what communications will take place with the submitter? Why isn't the submitter included in communications between the 3P Review Organization and FDA?

Requirements and Recommendations for Recognition and Rerecognition of Third Party Review Organizations

In general, the Coalition believes that this section would benefit from some definitions. "Forum shopping" is a broad, often nebulous and pejorative term. There are many reasons a submitter would pick one 3P Review Organization over another. Can a submitter pick one 3P Review Organization over another because one is timelier? Is that "forum shopping"? What about getting cost bids and going with the lower cost alternative? Is that "forum shopping"? The current language is too broad and leaves too much open to interpretation. Certainty is needed. If the agency has a specific concern, it should articulate it for all to understand.

In subsection B, the Coalition has a few comments and suggestions. First, in (1), the Coalition would like to know how 3P Review Organizations should handle instances where the reviews are going to separate parts of the business? If there is a firewall in place, is that adequate enough separation within the organization for the organization to quality as a 3P Review Organization even though different parts of a larger corporate entity are involved in both preparation and review of 510(k)s? A number of potential 3P Review Organizations are large, complex endeavors. Provision should be made for "firewalls" or other mechanisms to be used so that these organizations are not excluded from the program. Without such provisions, the number of potential and qualified 3P Review Organizations will be significantly limited.

In (2), the Coalition believes the language is too broad. The same rule against hiring or contracting with individuals who were employed in the previous 12 months by a firm who submitted a 510(k) to either FDA or a 3P Review Organization does not seem to apply to either FDA or others. As drafted, this will prevent good people from going to work for 3P Review Organizations. Also, the word "employed" is too broad, it includes anyone who worked for a large company with FDA regulated devices, even if that person had nothing to do with regulatory work. Such individuals should not be excluded. While direct conflicts should be prevented, the Coalition recommends a substantial rewrite to this section to ensure that talented people are not excluded. The success of the 3P program depends on the expertise and talent of the people.

In (3), the Coalition wonders whether the position being advanced is constitutional. As drafted, this provision seems to explicitly restrict speech contrary to the 1st Amendment. This brings to mind cases such as *Western States* in which restrictions on advertising in a similar context were struck down by the Supreme Court on 1st Amendment grounds. This case and a number of other cases call into question the constitutionality of this provision. We recommend striking this provision.

In subsection C, The Coalition has one general comment. The Coalition believes that all of the mentioned regulations, statutes, and other relevant information should be "as applicable". Many of the listed provisions are irrelevant to the work of a 3P Review Organization in a number of cases. For example, the dietary supplemental provisions are included within this list, but have no relevance to the work of a 3P Review Organization. More specificity is needed here.

In subsection E, the Coalition has one main comment. The Coalition believes that a 3P Review Organization should not publicly disclose a 510(k) submission for a device that is not currently on the market and where the intent to market the device has not been disclosed *unless one has written permission to do so.*

Leveraging the International Medical Device Regulators Forum's (IMDRF's) Requirements for the Medical Device Single Audit Program (MDSAP)

Within this section, the Coalition has one comment. In Table 1 on page 37, the Coalition believes that the chart is unclear. The skills to be an auditor are different from the skills to be a reviewer, as such the listed "equivalents" are not correct and should be updated.

Conclusion

Again, the Coalition greatly appreciates the opportunity to comment on the draft guidance.

Thank you very much for your consideration of our comments and recommendations. If you have any questions, feel free to contact me.

Best Regards,

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