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Client Alert

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2017 Year in Review: FDA Medical Device Advertising and Promotion Warning and Untitled Letters

In 2017, the U.S. Food and Drug Administration (FDA or Agency) issued a total of eight enforcement letters that cited violations related to the advertising and promotion of medical devices. Of the eight letters, seven were Warning Letters and one was an Untitled Letter. The number of letters last year represents a record low for the total number of enforcement letters issued by FDA related to medical device advertising and promotion.

Enforcement Letters	**33**	**22**	**19**	**35**	**14**	**8**

The 2017 letters were issued by a variety of FDA offices and divisions representing the Center for Devices and Radiological Health (CDRH), the Center for Biologics Evaluation and Research (CBER) (for a biologics 510(k)), and the Office of Regulatory Affairs (ORA) (before and after the 2017 Program Alignment reorganization), as follows:

CDRH Office of Compliance	1
CDRH Office of In Vitro Diagnostics and Radiological Health	1
CBER Office of Compliance and Biologics Quality	1
ORA District Offices (pre ORA reorganization)	1
ORA Field Divisions (post ORA reorganization)	4

Half of last year's letters were prompted by FDA's review of company websites, without any apparent connection to inspections. One of these was also based on FDA's review of brochures distributed at a medical conference. Two letters were prompted by inspections, and the remaining two letters were based on a combination of both inspections and website reviews. Such activity is consistent with past years and confirms that the Agency continues to proactively scrutinize device advertising and promotion, and particularly websites.

Notable Trends in 2017

The 2017 Warning and Untitled Letters targeting medical device advertising and promotion concerned four types of violations, as follows:

Promotion of an Uncleared / Unapproved Device	3
Promotion of an Uncleared / Unapproved New Intended Use	2
Promotion of Device Beyond Exemption from Premarket Notification	2
Significant Instructions for Use or Labeling Modifications Requiring Clearance or Approval	1

Three letters were issued for the promotion of an unapproved or uncleared device, two letters were issued for the promotion of a new intended use of an already cleared or approved device, two letters were issued when promotional statements about a 510(k)-exempt device exceeded the limits of the 510(k) exemption, and the final letter was issued for a change to the instructions for use of a device that FDA considered significant enough to require a new 510(k). These alleged violations are consistent with trends in enforcement letters of prior years, where the majority of FDA's device advertising and promotion letters were issued for the promotion of unapproved or uncleared devices or the promotion of a new use for an already cleared or approved device.

Of note, three of the eight enforcement letters were issued for in vitro diagnostic (IVD) devices, suggesting that the safe, effective, and appropriate use of IVDs is an important focus for FDA.

Observations and Lessons Learned from 2017 Medical Device Advertising and Promotion Enforcement Letters

The following provides key learnings from FDA's enforcement against device advertising and promotion last year, illustrated by a few examples.

Remember that changes to the labeling of a device may trigger requirements for a new clearance/approval.

- In an October 23, 2017 Warning Letter, FDA cited a company for making significant changes to the labeling of two devices without first receiving clearance from the Agency. The products at issue were in vitro diagnostic devices used for the measurement of lead in human venous blood samples. FDA alleged that the firm made a significant change to each device by adding instructions that (1) for one device, users allow the blood-treatment reagent mixture to stand for four hours at room temperature prior to analysis for venous blood samples that are shipped or rocked, and (2) for the other device, users allow samples to incubate for a minimum of 24 hours prior to analysis. An additional factor that FDA emphasized was that the company submitted the 24-hour incubation time modification as proposed labeling to the Agency while the devices' 510(k) was pending, but described the revisions as only a "minor update." In the Warning Letter, FDA stated that the modification should have been identified as a significant design change. This enforcement example serves as an important reminder that instructions for use changes alone can trigger requirements for a new 510(k), as well as prompt other modifications requiring a new 510(k) submission.
  Manufacturers should refer to FDA's October 2017 guidance, titled "Deciding When to Submit a 510(k) for a Change to an Existing Device"[1] for more information on this topic.

Do not promote devices for uses that are not approved or cleared.

- In a July 31, 2017 Warning Letter, FDA cited a company for promoting its device for a use for which it was not cleared or approved. The device was cleared for recording, viewing, and analyzing eye movements in support of identifying visual tracking impairment in human subjects; however, the company's website promoted the device for cognitive assessment/testing of concussions and head trauma, including in injured athletes and soldiers, which is a use for which the device had not been cleared. Specifically, FDA took issue with statements such as "In the clinic or at the point of injury: advanced cognitive assessment," and "Coaches and trainers need to make fast on-field decisions that might place an athlete in harm's way. The EYE-SYNC® is a mobile, objective assessment that provides clarity after an injury." The fact that the uncleared use is related to a high-profile issue (traumatic head injuries in athletes) likely created heightened sensitivity and caused FDA additional concern.

Beware promoting specific uses for a device that is permitted for a general use only.

- In a July 20, 2017 Warning Letter, FDA cited a company for promoting a device for specific indications that exceeded the general indication for the generic category of devices that are exempt from 510(k) premarket notification requirements. Although manual gastroenterology-urology surgical instruments and accessories are 510(k) exempt under 21 C.F.R. § 876.4730, FDA stated that the firm's device was not exempt because the firm was promoting the product for immobilizing the prostate in patients undergoing radiation therapy. This alleged violation is akin to promoting a device with a general use for a specific indication.

- Similarly, in a January 17, 2017 Warning Letter, FDA cited a company for promoting a device for specific intended uses, including the release of soft tissue, relaxation of muscle guarding, spasms and cramps, increasing circulation, digestive disorders, anxiety, and several others, which the Agency alleged exceeded the scope of the relevant 510(k) exemptions. The firm claimed that the device was exempt from premarket notification requirements under 21 C.F.R. § 890.5975 (therapeutic vibrator) and 21 C.F.R. § 890.5740 (powered heating pad). As the company's promotional claims provided evidence that its product was intended for specific uses that exceeded the limits of the two 510(k) exemptions, FDA determined that the device was not exempt from premarket notification requirements. The firm's problems were likely exacerbated by its failure to respond to FDA's previous inquiries about the devices' classification and its refusal of an FDA inspection.

Watch your websites – they remain a primary target for device advertising and promotion enforcement.

- Three-quarters of the letters issued last year were based, in whole or in part, on product claims made on firm websites. In many cases, FDA reviewed more than one website, including firm activities on third party websites (such as Amazon.com), to establish the intended uses of a device. The public availability and reliance on websites as a primary source of information for consumers and healthcare professionals make them a key target in FDA's surveillance of device advertising and promotion. As with all promotional communications and materials, firms should consider carefully the content of their websites to ensure compliance.

Devices promoted for use related to topics of current public health concerns may draw extra FDA scrutiny.

- Four of the letters issued in 2017 related to public health matters that received considerable media and public attention in recent years. This is not surprising, given FDA's mission as a public health agency, and it shows that FDA will take enforcement action to address violations related to current public health concerns. For example, FDA issued a December 7, 2017 Warning Letter to a company that manufactured and promoted an unapproved and uncleared in vitro diagnostic test for the identification of Zika virus antibodies. Second, the October 23, 2017 Warning Letter to the manufacturer of an in vitro diagnostic device intended to evaluate lead levels in blood samples (described above) represents another instance of FDA reacting to a public health issue of widespread concern. Finally, FDA issued two Warning Letters in 2017 that related, at least in part, to the promotion of devices for the unapproved use of assessing concussions: the July 31, 2017 Warning Letter issued for an eye tracking device (described above) and a September 5, 2017 Warning Letter issued to the manufacturer of a device cleared for the measurement of reaction time.

For your reference, we have prepared a chart that lists the eight Warning and Untitled Letters issued to medical device manufacturers for promotional violations in 2017, including summaries of the promotional violations alleged in each letter and a hyperlink to each letter. The chart is available online in a searchable PDF document here.

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King & Spalding's FDA & Life Sciences Practice Group was selected by Law360 as a "Life Sciences Practice Group of the Year" for 2017. More than 300 attorneys at the firm practice in life sciences, with a regulatory team of nearly 40 attorneys and consultants who are based in the U.S. and Europe. Our team provides practical legal counseling and technical consulting on a full array of issues involving all FDA-regulated products. In addition, our team calls upon the expertise of lawyers in several related areas within the firm, including the civil and criminal litigation group, the appellate litigation group, and the government advocacy and public policy group, which have effectively represented clients who are the targets of government initiated lawsuits and investigations. Please let us know if you have any questions.

[1] Guidance for Industry and Food and Drug Administration Staff, *Deciding When to Submit a 510(k) for a Change to an Existing Device* (October 2017), *available at* https://www.fda.gov/downloads/medicaldevices/deviceregulationandguidance/guidancedocuments/ucm514771.pdf.