LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

How Medical Device Cos. Can Limit Enforcement, Legal Risks

By **Lisa Smith, Eric Kraus and Michelle Bonn** (December 21, 2021, 6:44 PM EST)

Lisa Smith

Eric Kraus

Michelle Bonn

Regulatory compliance is key for avoiding governmental enforcement actions and litigation risk.

In this article, we examine the myriad ways in which the failure to abide by even the simplest process and procedure regulations promulgated by the U.S. Food and Drug Administration can result in significant, even devastating, financial loss to a company.

From FDA Form 483s to warning letters and product recalls, understanding the regulatory landscape is critical to ensure uninterrupted product production and sales. We discuss one case study to illustrate how regulatory violations can lead to injunctive relief, product recalls and product liability litigation. We then address best practices for strengthening compliance, as well as considerations for keeping warning letters out of evidence in product liability litigation.

Regulatory Landscape

The FDA reserves authority to inspect medical device firms for compliance with Title 21 of the Code of Federal Regulations, Section 820, known as the quality system regulation.[1] Generally, an FDA agent initiates an inspection by presenting an FDA notice of inspection — FDA Form 482 — to the firm. The FDA then uses Form 483 — called Inspectional Observations — to record objectionable conditions and submit these findings to the inspected company.

Most inspections are fairly routine and follow a prescribed method known as the quality system inspection technique. The FDA reserves a more in-depth for cause inspection process to respond to "specific information that raises questions, concerns, or problems associated with a FDA regulated firm or commodity."[2]

This information might come to the attention of FDA from any number of different sources including observations made during more routine inspection, complaints by consumers or employees, adverse reactions or suspicions of fraud.[3] For example, a labeling error, may constitute misbranding[4] of the product and might be considered a serious matter that warranted a for-cause inspection, as misinformation can lead to hazardous misuse of product.

To determine the types of compliance issues for which companies are most vulnerable, Compliance Team LLC conducted an eight-year review of the top 10 most-cited Form 483 violations,[5] which revealed striking consistency in the types of findings most commonly cited by an FDA inspector.

This review highlights the types of conduct likely to garner negative FDA attention, which could lead to potential adverse regulatory action, loss of customer goodwill, imposed penalties and legal fees.

Based on Compliance Team's analysis, over the past eight years the most frequently cited violation pertained to failures to establish and maintain procedures for implementing corrective and preventive action.[6]

Other frequently cited violations relate to complaint handling procedures[7] and requirements for the development, maintenance and implementation of procedures for medical device reporting of adverse events.[8]

Additional citations in the top 10 include references to design controls, specifically Section 820.30(a) and Section 820.30(g).[9] The FDA added design controls requirements because a six-year study revealed that approximately 44% of recalls resulted from overlooked design elements that might have averted a recall.[10]

Medical device regulations are nonprescriptive because medical devices run the gamut from very simple — tongue depressors — to very complex — replacement heart valves. The FDA therefore expects product risk to factor significantly in the degree of care needed to produce a given medical device. The FDA will not instruct a manufacturer how to build a device, but expects medical device firms to adjust control over the process and product through a quality system which is designed to evaluate, control and manage risks.

The control center in a quality system is an engaged senior management who ensure resources and attention are directed to the areas of highest risk. Some of these areas include corrective and preventive actions and design controls, production and process controls, document/records/change controls, materials controls, and facilities and equipment controls.[11]

While FDA requirements are mostly common sense, they can be administratively difficult to implement. Even though difficult, compliance is an investment, and the requirements have practical significance that ensures product safety and avoiding punitive costs.

Importantly, any product violating FDA regulations may be deemed an adulterated[12] product. This is true even when no product defect is evident and the violation relates solely to unfollowed procedures or inadequate record keeping.[13]

Case Study

Tales of violations of FDA rules and regulations that lead not only to impaired sales, but costly product liability litigation, are not apocryphal.[14] Real cases, with real consequences, have flowed from adverse findings by FDA inspectors that in many instances could have been avoided if stringent compliance procedures had been in place from the outset.

Even when noncompliance does not lead to patient harm, noncompliance allegations often find their way into personal injury complaints, and the cost of defending against these claims suggest that

investing in compliance before there are issues is money well spent.

The Medtronic SynchroMed II Implanted Drug Delivery Pump

SynchroMed II is a programmable implanted drug-delivery pump for chronic pain management.[15] The device has an extensive history of receiving warning letters from the FDA for regulatory compliance violations, eventually resulting in an injunction that, among other burdens, prevented Medtronic from manufacturing or selling the device or any of its components until the compliance violations were corrected.[16]

The collective violations were cited as supporting evidence in the complaints of a subset of at least 27 lawsuits brought from 2013 through 2021, mostly related to failure of the device and resultant medication withdrawal symptoms and return of patients' pain.[17] Medtronic has prevailed in most of the cases and the product is still on the market.[18]

However, with cost of defending these cases, including some that are ongoing, with one scheduled for jury trial in federal court in February 2023,[19] and three that were appealed to the U.S. Supreme Court, which ultimately declined to hear the cases,[20] it's clear that an ounce of prevention may have been much more cost-effective than the pound of cure.

While the product liability cases focus primarily on allegations that the devices in those cases failed to function properly and therefore harmed patients, the complaints also allege various compliance-related infractions by Medtronic that may not connect to actual patient harm.

For example, one complaint cites various violations contained in a 2006 warning letter issued by the FDA to Medtronic following a site inspection of a Medtronic facility in Minneapolis.[21]

The warning letter, liberally referenced in the complaint, asserted that the device was adulterated in violation of current good manufacturing practice requirements contained primarily in Title 21 of the Code of Federal Regulations, Subsection 820.1-820.25.[22] The complaint reiterated the specific alleged violations noted by the FDA in the warning letter, including violations related to:

- The establishment and maintenance of design procedures;
- Process validation;
- Production processes;
- Procedures for implementing corrective and preventive actions; and
- Procedures to control labeling activities.[23]

In 2007, the FDA reinspected the manufacturing plant and subsequently issued a second warning letter, again concluding that the device was adulterated in violation of CGMP, and misbranded under Medical Device Reporting regulations.[24] The complaint echoed the 2007 warning letter's additional violations related to:

- Complaint handling procedures;

- The timeliness of Medical Device Reporting reports regarding information that "reasonably suggests that a marketed device may have caused or contributed to a death or serious injury";

- The requirement that device manufacturers report certain "corrections and removals" and the maintenance of records related to these corrections and removals; [25]

In 2008, the FDA inspected another Medtronic manufacturing plant and subsequently issued the third warning letter in 2009, again concluding that the device was adulterated in violation of current good manufacturing practices.[26] Specifically, the FDA again found violations of Title 21 of the Code of Federal Regulations, Subsections 820.70(a), 820.100(a), 820.184, and 820.198(c), all of which were also recited in the complaint.[27]

In 2013, the FDA reinspected the manufacturing plant and issued a Form 483 for failing to manufacture in conformance with specifications.[28] Finally, in 2015, a permanent injunction was issued to prevent the manufacture and sale of the device until Medtronic complied with requirements for the manufacture of the devices, which took place in 2017.[29] The device and its components have also been subject to numerous recalls,[30] as many as 72 according to one plaintiff's complaint.[31]

Strengthening Compliance

The adage, "An ounce of prevention is worth a pound of cure," relates well to FDA compliance. By the time that the FDA finds violative acts, the costs for remediation will have increased substantially.

To make matters worse, bad press can create customer ill will and affect sales; corresponding litigation and correction of often systemic, highly entrenched, quality issues can be particularly expensive, especially for large organizations that need substantial revision of their processes to achieve compliance.

The FDA puts the onus of establishing policies and procedures related to product quality squarely on management. Section 820.20 makes clear that executive management has the responsibility to ensure that quality system requirements are established, maintained, properly documented and that reporting obligations are met. The thrust of this provision is that a process should be established to escalate quality system issues to management so appropriate resources can be directed to resolution.

For example, corrective and preventive actions and complaint handling, which are part of the same quality subsystem, require attention to detail to ensure procedures cover the requirements and the work is completed consistent with the quality system regulation.

While it is important to employ smart, quality-minded deputies to mind these systems, executive management may still be deemed accountable by the FDA. The same can be said for implementation of medical device reporting and recall processes, which require IT expertise to facilitate the on-time electronic submission of medical device reports via e-submitter. Even though executives may not perform these duties personally, it is important that systems be established to verify that the work is performed.

As discussed earlier, safe product begins with design controls. Depending on the product class, a design history file will be required, and all products should have a device master record, which is the recipe for how to make, test, package, store and distribute a product, which results from a defined, deliberative effort to design the product and the process to facilitate its manufacture.

Another adage comes to mind: "If it isn't documented, it didn't happen." Documented evidence of all activities pertaining to quality need to be available at FDA inspection for review.

The burden of proof is on the device manufacturer for the physical or electronic copy of evidence to show that an activity has been done. Such documentation also helps management to verify that required activities were completed as promised. The manufacturer's internal audit program should periodically monitor compliance, and report back to management.

Proactive preventive measures to control all inputs and outputs of medical device production are a smart investment. Over time these investments enable a company to achieve exemplary compliance and prevent costs related to remediation and litigation.

Plaintiffs Counsel's Use of FDA Form 483s and Warning Letters, and Evidentiary Considerations

As noted in the examples above, plaintiffs often describe in detail the history and contents of the Form 483 and warning letters issued by the FDA in their complaints filed in medical device product liability litigation.

Plaintiffs lawyers try to strengthen their cases through these FDA documents by showing that the medical device manufacturer knew or should have known that something was likely to go wrong with the product that would harm patients generally, and the plaintiff specifically.

Moreover, these violations are also used simply to show that the manufacturer disregarded FDA rules and procedures, regardless of the nexus between the alleged violation and the claimed injury; to paint the company as engaging in willful violations or misconduct, potentially resulting in punitive damages over and above product liability costs.

Furthermore, when the violation involves a reporting obligation or something related to labeling, plaintiffs will frequently claim that the defending company hid defects or failed to warn physicians and their patients of known device hazards.

Such allegations may appear in a plaintiff-crafted complaint, but findings of FDA violations may not be admitted as evidence at trial. The uncertainty about admissibility is dependent on jurisdiction, based on lack of uniformity in how courts treat documents such as FDA Form 483s or warning letters.

In 14 rulings that looked at this issue from 1999–2019,[32] seven ruled that Form 483s and/or warning letters were inadmissible.[33] However, two of these seven also reserved the right for the judge to decide at trial whether to admit parts of a warning letter depending on context, circumstances and relevancy.[34]

One court declined to address the issue,[35] but two courts — the U.S. District Court for the Western District of Kentucky in 2013 and the U.S. District Court for the Southern District of Florida in 2019 — allowed both FDA Form 483s and warning letters to be admitted as evidence.[36]

The most common basis for keeping such materials out of a trial are that they are not relevant to the actual claims or that they constitute inadmissible hearsay. For example, the relevance argument is particularly powerful where the FDA Form 483 or warning letter was issued after the incident that allegedly harmed the plaintiff or after the plaintiff had stopped taking the drug or using the device.[37]

Similarly, the FDA documentation may refer to a different drug or device, or a different version of the drug or device, than the one actually at issue, or a different facility than the one that manufactured the product that is the subject of the litigation. There may be other circumstances that strain the causal connection between the documentation and the incident.[38]

Courts may also accept the argument that the FDA 483 Forms and warning letters are inadmissible hearsay and/or, relatedly, that the prejudice they create against the manufacturer defendant outweighs their probative value.[39]

This argument stems from the fact that the FDA documentation is not a "factual finding[] from a legally authorized investigation," thus failing to fall within the purview of the public records exception to hearsay.[40]

However, there is a split among courts as to how they have ruled on this issue; some courts specifically address hearsay and mention that they would have admitted the documentation but for their irrelevance.[41]

For those documents such as FDA Form 483 letters or warning letters, that are clearly causally connected and relevant, pose a more serious threat to manufacturer defendants, and admissibility depends on the specific jurisdiction as to how a court might rule on the hearsay question.

Conclusion

Noncompliance with FDA regulations for medical device manufacturers can have consequences far beyond inspections and warnings from the FDA. Recent examples of medical device litigation demonstrate that devices manufactured with a history of regulatory violations flagged by the FDA can have consequences spanning across multiple decades through injunctions, product recalls, ongoing litigation and appeals that can continue even after the product is no longer on the market.

While courts sometimes side with manufacturers in finding FDA Form 483s and warning letters inadmissible at trial, this is not uniformly the case.In cases where such documents, issued by a governmental entity without a stake in the outcome of the litigation, are deemed admissible, they can adversely impact a manufacturing defendant because plaintiffs' lawyers will surely try to wield these as a weapon.

Understanding the FDA's priorities and the most common regulatory pitfalls, and preemptively addressing them by strengthening compliance, is a key solution that can reap long-term benefits.

Lisa L. Smith is a partner and co-leader of the life sciences and class action practices at Phillips Lytle LLP.

Eric M. Kraus is a partner and co-leader of the life sciences practice at the firm.

Michelle Bonn is CEO at Compliance Team LLC.

Phillips Lytle special counsel George Hajduczok, Compliance Team RA/QA Consulting vice president Regina Fullin and Harvard Law School student Merve Ciplak contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] This section derives its authority through federal statutes, including the Safe Medical Devices Act of 1990 (PL 101-629, 104 Stat. 4511), and Medical Device Amendments of 1976 (PL 94-295, 90 Stat. 539) and 1992 (PL 102-300, 106 Stat. 238).

[2]U.S. Food and Drug Administration, Food and Drug Administration Compliance Program Guidance Manual, Program 7382.845, at pt. III p. 8, Issued 2/2/2011, https://www.fda.gov/media/80195/download (last visited Nov. 2, 2021).

[3] Id.

[4] U.S. Food and Drug Administration, Labeling Requirements - Misbranding, https://www.fda.gov/medical-devices/general-device-labeling-requirements/labeling-requirements-misbranding (last visited Nov. 8, 2021).

[5]Compliance Team, How did the FDA Change in 2020, YouTube (Aug. 10, 2021), https://www.youtube.com/watch?v=SplP7XrOEgA (last visited Nov. 3, 2021). Inspectional observation data sets are available at U.S. Food and Drug Administration, Inspection Observations, https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/inspection-references/inspection-observations (last visited Nov. 3, 2021).

[6] 21 C.F.R. § 820.100(a).

[7] § 820.198(a).

[8] Compliance Team, supra note 6.

[9] Compliance Team, supra note 6.

[10] Medical Devices; Current Good Manufacturing Practice (CGMP) Final Rule; Quality System Regulation, 61 Fed. Reg. 52,602 (Oct. 7, 1996) in re The Safe Medical Devices Act of 1990 Pub. L. 101-629.

[11] U.S. Food and Drug Administration, Food and Drug Administration Compliance Program Guidance Manual, Program 7382.845, at pt. III p. 3, Issued 2/2/2011, https://www.fda.gov/media/80195/download (last visited Nov. 2, 2021).

[12] Adulterated drugs and devices, 21 U.S.C. § 351.

[13] Id.

[14] The authors of this article have not represented or consulted with the companies whose products are the subject of the case study used in this article. Source material comes from publicly available documents and resources.

[15] Medtronic, Synchromed™ II Intrathecal Pump, https://www.medtronic.com/us-en/healthcare-

professionals/products/neurological/drug-infusion-systems/synchromed-ii.html (last visited Nov. 4, 2021).

[16] United States of Am. vs. Medtronic Inc., No. 0:15-cv-02168, (D. Minn. Apr. 29, 2015) (consent decree), ECF No. 8; See also, Complaint at 29–31, Lloyd v. Medtronic, Inc., No. 3:20CV01156, 2020 WL 9601727 (S.D. Ill. Oct. 30, 2020).

[17] See, for example, Lloyd v. Medtronic, Inc., No. 3:20CV01156 (S.D. Ill. July 7, 2021); Sims v. Medtronic, Inc., No. 3:20-CV-02872-X, 2021 WL 2291014 (N.D. Tex. June 4, 2021); Lawrence v. Medtronic, 791 F. App'x 679 (9th Cir.), cert. denied, 141 S. Ct. 312 (2020); White v. Medtronic, Inc., 808 F. App'x 290 (6th Cir.), cert. denied, 141 S. Ct. 239 (2020); Grubbs v. Medtronic, Inc., No. 2:18-CV-01468-AKK, 2019 WL 3288263 (N.D. Ala. July 22, 2019); Warstler v. Medtronic, Inc., No. 3:16CV00385, 2017 WL 3088037 (N.D. Ohio July 20, 2017); Chiasson v. Medtronic Inc., No. CV 16-3552, 2016 WL 4191837 (E.D. La. Aug. 9, 2016); Morgan v. Medtronic, Inc., 172 F. Supp. 3d 959 (S.D. Tex. 2016); Stengel v. Medtronic Inc., No. CV-10-00318-TUC-RCC, 2015 WL 12513535 (D. Ariz. Aug. 21, 2015); Carlson v. Medtronic Inc., No. 3:13-CV-687-WHB-RHW, 2014 WL 11514911 (S.D. Miss. Aug. 28, 2014); McBride v. Medtronic, Inc., No. CIV.A. 13-377, 2013 WL 3491085 (W.D. La. July 10, 2013).

[18] See, Medtronic, Synchromed II Intrathetical Pump: ITB Therapy for Severe Spasticity, https://www.medtronic.com/us-en/patients/treatments-therapies/drug-pump-severe-spasticity/about-itb-therapy/synchromed-ii-pump.html (last visited Oct. 28, 2021).

[19] Lloyd v. Medtronic, Inc., No. 3:20CV01156 (S.D. Ill. Aug. 5, 2021) (scheduling order), ECF No. 38.

[20] See Lawrence v. Medtronic, 141 S. Ct. 312 (2020); Medtronic, Inc. v. Stengel, 573 U.S. 930 (2014); Walker v. Medtronic, Inc., 568 U.S. 928 (2012).

[21] FDA Warning Letter to Medtronic, Inc. (Aug. 29, 2006) ("2006 Warning Letter"), https://www.fdalabelcompliance.com/letters/ucm076047 (last visited Nov. 4, 2021).

[22] Id.; see also, Complaint at 12, Lloyd v. Medtronic, 2020 WL 9601727.

[23] 2006 Warning Letter; Complaint at 13–14, Lloyd v. Medtronic,2020 WL 9601727.

[24] FDA Warning Letter to Medtronic, Inc. (July 3, 2007) ("2007 Warning Letter"), https://www.fdalabelcompliance.com/letters/ucm076435 (last visited Nov. 4, 2021); Complaint at 14-15, Lloyd v. Medtronic, 2020 WL 9601727.

[25] The 2007 Warning Letter; Complaint at 15, Lloyd v. Medtronic, 2020 WL 9601727.

[26] FDA Warning Letter to Medtronic, Inc. (June 1, 2009) ("2009 Warning Letter"), https://www.fdalabelcompliance.com/letters/ucm168451 (last visited on Nov. 4, 2021); Complaint at 15, Lloyd v. Medtronic, 2020 WL 9601727.

[27] Complaint at 18, Lloyd v. Medtronic, 2020 WL 9601727.

[28] Form 483, dates of Inspection 2/14/2013 to 4/3/2013, Complaint at Ex. 7, Lloyd v. Medtronic, Inc., No. 3:20CV01156, ECF No. 29; see also, Complaint at 21, Lloyd v. Medtronic, 2020 WL 9601727.

[29] Complaint at 31-32, Lloyd v. Medtronic, 2020 WL 9601727; United States of Am. vs. Medtronic Inc., No. 0:15-cv-02168, (D. Minn. Apr. 29, 2015) (complaint), ECF No. 1.

[30] U.S. Food and Drug Administration, Medical Device Recalls, https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfRES/res.cfm?start_search=1&pnumber=P860004 (last visited Nov. 4, 2021); see also, Complaint at 11, Lloyd v. Medtronic, 2020 WL 9601727, which asserts that this device has been the subject of 72 recalls.

[31] Complaint at 39, Lloyd v. Medtronic, 2020 WL 9601727.

[32] See Godelia v. Zoll Servs., LLC, No. 16-60471-CIV, 2019 WL 3883682, at *3 (S.D. Fla. Aug. 16, 2019); In re Bard IVC Filters Prods. Liab. Litig., MDL No. 15-02641, No. CV-16-00474, 2018 WL 1109554, at *4 (D. Ariz. Mar. 1, 2018); Teixeria v. St. Jude Med. S.C., Inc., 193 F. Supp. 3d 218, 227–29 (W.D.N.Y. 2016); Ortho-McNeil-Janssen Pharms., Inc. v. State, 2014 Ark. 124, slip op. at 26, 432 S.W.3d 563, 579-80 (2014); Newman ex rel. Newman v. McNeil Consumer Healthcare, No. 10 C 1541, 2013 WL 4460011, at *18 (N.D. Ill. Mar. 29, 2013); Sadler v. Advanced Bionics, Inc., No. 3:11-CV-00450-H, 2013 WL 1311148, at *1–2 (W.D. Ky. Mar. 26, 2013); Smith v. I-Flow Corp., No. 09 C 3908, 2011 WL 12627557, at *2 (N.D. Ill. June 15, 2011); In re Seroquel Prods. Liab. Litig., No. 6:06MD1769-ORL-22DAB, 2009 WL 223140, at *5 (M.D. Fla. Jan. 30, 2009), aff'd, 601 F. Supp. 2d 1313 (M.D. Fla. 2009); In re Viagra Prods. Liab. Litig., 658 F. Supp. 2d 950, 966–67 (D. Minn. 2009); Axen v. Am. Home Prods. Corp. ex rel. Wyeth-Ayerst Lab'ys, 974 P.2d 224, 233-34 (Or. Ct. App. 1999), op. adhered to as modified on recons., 981 P.2d 340 (Or. Ct. App. 1999).

[33] See Teixeria, 193 F. Supp. 3d 218; Ortho-McNeil-Janssen Pharms., 2014 Ark. 124; Newman ex rel. Newman, 2013 WL 4460011; Smith v. I Flow Corp, 2011 WL 12627557; In re Seroquel Prods. Liab. Litig., 2009 WL 223140; In re Viagra Prods. Liab. Litig., 658 F. Supp. 2d 950; McColl, 385 Mont. 150.

[34] In re Bard IVC Filters Prods. Liab. Litig., 2018 WL 1109554, at *4; Smith v. I Flow Corp, 2011 WL 12627557, at *2.

[35] Axen, 974 P.2d at 233-34.

[36] Godelia, 2019 WL 3883682, at *3; Sadler, 2013 WL 1311148, at *2.

[37] See, e.g., Teixeria, 193 F. Supp. 3d at 227–29; Sadler, 2013 WL 1311148, at *1–2; In re Viagra Prods. Liab. Litig., 658 F. Supp. 2d at 966–67.

[38] See, e.g., In re Seroquel Prods. Liab. Litig., 2009 WL 223140, at *5; In re Viagra Prods. Liab. Litig., 658 F. Supp. 2d at 966–67.

[39] See, e.g., Ortho-McNeil-Janssen Pharms., Inc., 2014 Ark. 124, slip op. at 26, 432 S.W.3d at 579-80.

[40] Newman ex rel. Newman, 2013 WL 4460011, at *18 (quoting Fed. R. Evid. 803(8)(A)(iii)).

[41] See, e.g., In re Bard IVC Filters Prods. Liab. Litig., 2018 WL 1109554, at *4; Sadler, 2013 WL 1311148, at *2.