

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

Food and Drug Administration

[Docket No. FDA2010N0308]

Parallel Review of Medical Products

AGENCIES:

Centers for Medicare and Medicaid Services; Food and Drug Administration, HHS.

ACTION:

Notice; request for comments.

SUMMARY:

The Food and Drug Administration (FDA) and the Centers for Medicare and Medicaid Services (CMS) are considering establishing a process for overlapping evaluations of premarket, FDA-regulated medical products when the product sponsor and both agencies agree to such parallel review. This process will serve the public interest by reducing the time between FDA marketing approval or clearance decisions and CMS national coverage determinations (NCDs). The agencies are establishing a docket to receive information and comment from the public on what products would be appropriate for parallel review by the two agencies, what procedures should be developed, how a parallel review process should be implemented, and other issues related to the effective operation of the process. The agencies are also announcing their intent to create a pilot program for parallel review of medical devices. The pilot program will begin after both agencies have reviewed the public comments on this notice. A memorandum of understanding (MOU) concerning the exchange of data and information has been completed between the two agencies. See <http://www.fda.gov/AboutFDA/Partnerships&fxsp0;Collaborations/Memorandaof&fxsp0;UnderstandingMOUs/DomesticMOUs/ucm217585.htm>.

DATES:

Submit either electronic or written comments by [insert date 90 days after date of publication in the Federal Register].

ADDRESSES:

Submit electronic comments to <http://www.regulations.gov>. Submit written comments to the Division of Dockets Management (HFA305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

General questions about parallel review: Peter Beckerman, Office of Policy, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 209930002,

3017964830, e-mail: peter.beckerman@fda.hhs.gov, or Tamara Syrek Jensen, Centers for Medicare and Medicaid Services, 7500 Security Blvd., Baltimore, MD 21244, e-mail: Tamara.Syrekjensen@cms.hhs.gov.

For device sponsors interested in requesting voluntary parallel review: Markham C. Luke, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 209930002, 3017965550, e-mail: markham.luke@fda.hhs.gov.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

FDA and CMS share a common interest in improving the health of patients through the availability of safe, effective, and affordable medical products and fostering medical product innovations.

The mission of the FDA is to protect and promote the public health. It accomplishes this task, in part, by the following:

- Assuring the safety, efficacy, and quality of human drugs, biological products, and medical devices;

- Fostering innovations to make medical products safer and more effective; and

- Helping health care providers and the public get the accurate, science-based information they need to use medical products to improve public health.

The mission of CMS is to ensure effective, up-to-date Medicare coverage and to promote the continual improvement of the quality care for its beneficiaries. CMS accomplishes this mission by continuing to transform and modernize America's health care system, in part, by the following:

- Fostering accurate and predictable payments,

- Ensuring high-value health care,

- Promoting understanding of CMS programs among beneficiaries, the health care community, and the public.

Through coordinated decisions regarding medical products, FDA and CMS can affect public health in critical ways: FDA in determining the safety and effectiveness of those products and CMS in providing beneficial coverage and appropriate payment for covered items and services involving those products. Both agencies believe they should address the growing need to improve public health by speeding consumer access to and spurring the development of new, affordable, reliable, safer, and more effective medical products and services. FDA and CMS are working together to identify areas in which they can collaborate to achieve these goals and parallel review provides one such opportunity.

##### A. Innovative Medical Products are Difficult to Develop

The recent boom in new basic science discoveries has generated hope for the development of new treatments and diagnostics for serious illnesses. However,

there is concern as to whether there are adequate resources available for bringing the most innovative medical devices to market. The number of new drug and biologic applications submitted to FDA has been declining for several years for reasons not wholly clear. Inefficiencies and rising costs appear to account for only part of the reluctance to embark on new medical product development. The limited predictability of market access may also hinder investment in the development of innovative therapies and diagnostics. Reducing the time between marketing approval or clearance and obtaining third party payment (approval-to-payment time) can produce savings for sponsors and improve public health through overlapping medical review of data/evidence leading to more timely patient access to those new products.

Currently, medical product development and coverage and payment of new therapies and diagnostics generally occur in a serial manner. First, a new medical product is submitted to FDA, which determines whether it meets applicable safety and effectiveness standards for commercial marketing. Next, the company seeks coverage from the payer who in turn determines the payment rate for the product.

Timely access to innovative medical technologies has been identified as a significant issue in the delivery of high quality health care. Manufacturers of innovative medical products have said that after undergoing the FDA approval process the availability of their products to consumers is often slow because, in order to obtain coverage and payment from third-party payers, the manufacturers must go through a second review process by such payers. This is in part because the materials submitted by manufacturers for FDA review are, for various reasons, not generally made available to third-party payers prior to FDA approval or clearance. In addition, the materials submitted by manufacturers to FDA may not adequately address the issues of importance to payers, such as community or home based use outside of clinical trial protocols, generalizability of the results to target populations that may have not been studied, and the incremental clinical utility of these products compared to currently available technologies.

Although CMS is only one of many third-party payers and provides insurance benefits to select populations, the agency plays a leading role in healthcare through its coverage and payment decisions. Because many third-party payers tend to follow CMS' lead, a positive national coverage or payment decision by CMS often promotes rapid adoption of a new therapy by the medical community. However, a positive coverage decision after a long time lag following FDA approval or clearance can delay consumer access to new medical products.

## B. Differences in FDA and CMS Review

FDA premarket review and CMS national coverage determinations differ significantly. Each process operates under different statutory standards and each asks different questions to meet its respective mandates. The FDA premarket review generally assesses the safety and effectiveness of these medical products. Even within FDA's review processes, there are differences in types of evaluation depending upon the application under consideration (for example, premarket approval applications (PMAs) must meet standards different from premarket notifications (510(k)s)).

CMS serves a different function by providing health insurance to protect the nation's aged and disabled persons from the substantial burdens of illness. Under section 1862(a)(1) of the Social Security Act (the Act), CMS makes determinations regarding the coverage of specific items and services. In short,

CMS must make multiple decisions: It must decide what items and services it can and should pay for; how it should accomplish the payment; and how much to pay.

CMS' evaluation of medical products depends on the type of request. For most NCDs, CMS evaluates whether a medical product or service is reasonable and necessary to diagnose or treat an illness or injury affecting the Medicare population. This evaluation includes review of appropriate outcomes data, such as whether the product provides improved, equivalent, or complementary health outcomes in the Medicare population as compared to alternative treatments or diagnostics already covered by the program. CMS may also evaluate medical product indications that have not been approved or cleared by FDA, so-called unapproved or off-label uses.

### C. Parallel Review Opportunity To Speed Patient Access To Beneficial Medical Products

Under current practice, CMS does not routinely undertake an NCD unless it receives a complete formal external request. At times, CMS may also internally generate a request. Because local fiscal intermediaries, carriers, or Medicare Administrative Contractors are able to make decisions within their own jurisdictions, Medicare coverage and payment can occur in the absence of a NCD, such as from the initial market availability of a new technology.

CMS usually begins its national coverage decision making process for FDA-regulated medical products after they have been approved or cleared by FDA. Because FDA does not approve or clear all the marketing applications it reviews, such serial processing ensures that CMS does not expend its limited resources assessing medical products that never reach the U.S. market. In addition, the CMS NCD process is subject to strict statutory time limits (9 to 12 months from the opening to publication of the final decision) that cannot be extended if a manufacturer should encounter an unexpected delay in obtaining FDA approval or clearance. However, this serial review process has been subject to criticism because it potentially causes delay in consumer access to beneficial medical products. Overlapping evaluations by FDA and CMS for innovative products could speed consumer access to those new products by reducing the time span between marketing approval or clearance decisions and national coverage/payment determinations.

From time to time CMS finds that developers of new technology fail to recognize the differences between the regulatory requirements of FDA and CMS. They may undertake clinical studies that are designed to address FDA questions but do not adequately address CMS questions concerning the impact of the technology on Medicare beneficiary health outcomes. This omission can slow the developer's quest for Medicare coverage. We believe that a parallel review process can furnish an opportunity to educate developers regarding clinical study designs that are more likely to simultaneously address both FDA and CMS questions.

To potentially accelerate consumer access to new, particularly innovative, safe and effective medical products, FDA and CMS intend to establish a process for parallel review. Parallel review could also create incentives for venture capitalists and companies to increase their investment in innovative medical products by reducing the time to return on investment for those products eligible for parallel review.

The agencies envision parallel review as a collaborative effort in which CMS will begin its NCD-related review process to determine whether the product is

reasonable and necessary for the Medicare population while FDA is completing its premarket review. However, before developing and implementing such a process, the agencies believe that important issues must be resolved. For example, to avoid CMS reaching a coverage determination deadline before FDA has completed its review process and to minimize the possibility that CMS will begin its coverage process for a product that is subsequently not approved or cleared by FDA, the CMS process and FDA process should be carefully staged. FDA and CMS also seek comment on whether they should establish a voluntary process to allow companies to meet with both agencies to develop clinical trial protocols that would meet each agency's respective statutory standard rather than potentially conducting separate clinical studies.

This notice provides the first opportunity for the public to comment on these issues. The public will have a second opportunity to provide input should the agencies subsequently issue, as they currently intend, a joint draft guidance or other appropriate documents, describing the proposed process. The agencies envision that the decision to undertake the parallel review process with respect to a specific product will be at the request of the manufacturer and with the agreement of both agencies, thus making the process voluntary for all parties involved. FDA would make its approval or clearance determination first because CMS would not ordinarily provide coverage to a product not approved or cleared by FDA for marketing in the United States. In addition, CMS has statutory requirements (for example, CMS must issue a proposed coverage decision memorandum for comment) that make it impossible for the issuance of an NCD simultaneous with an FDA approval or clearance.

Parallel review would be a variation of the usual serial review process. Sponsors would be able to request use of this process in seeking an NCD. The regulatory standards and evidentiary standards used by FDA and CMS for decision-making would not change; under any review scenario, each agency would continue to make its decision under its respective authority and with its own standards, independent of the other. The sponsor requesting parallel review would be expected to meet the legal requirements, including data submission requirements, for both FDA premarket review or clearance and of an NCD request by CMS. Once formal procedures are developed, the agencies will work on making the data submissions efficient and nonduplicative with the intent of making parallel review less burdensome than if the sponsor went to each agency in serial fashion. Parallel review between the FDA and CMS would include only CMS coverage determination reviews and not any reviews of payment mechanisms.

By means of this notice, we are opening a public comment docket to solicit comment from the public on the parallel review process. We are interested in comments on all aspects of the process as we have explained it, including what categories of products are most appropriate for such review, the timing of parallel review, what procedures should be developed, how such a review process should be implemented, and what efficiencies could be achieved. After reviewing the public comments, FDA and CMS intend to issue a joint draft guidance describing the parallel review process and the procedures each agency would use for its implementation.

After review of the public comments on this notice, both agencies will consider a small number of requests from sponsors of innovative medical devices for parallel review on a pilot basis. (No new statutory authorities would be required to pursue such a pilot because FDA and CMS are continuing to comply with all aspects of current law.) The agencies will announce procedures for participating in the pilot at that time as well as criteria for participation. For general questions about parallel review, contact the persons listed in the

FOR FURTHER INFORMATION CONTACT section of this document. Device sponsors interested in requesting voluntary parallel review should contact the person noted as the contact listed in the FOR FURTHER INFORMATION CONTACT section of this notice.

## II. Comments

Interested persons may submit to the Division of Dockets Management (see ADDRESSES) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

To assist interested parties, we are asking for public comment on the following issues:

1. Should anyone other than the product sponsor be able to initiate a request for parallel review (for example, the FDA, CMS, an interested third party)?
2. For which classes of products would consumers, payers, or sponsors benefit most from parallel review? Why?
3. FDA and CMS may propose to limit the number of products concurrently under parallel review. How should limits be placed on the number and/or type of products concurrently under parallel review? Should CMS be permitted to review indications for which the sponsor is not seeking FDA clearance or approval under parallel review?
4. Are there disadvantages to parallel review?
5. Are there any barriers (for example, regulatory, legal, scientific) to parallel review and if so, how might they be overcome?
6. Should a voluntary process be put in place to encourage the conduct of clinical trials that are appropriately designed to support both FDA approval/clearance and CMS national coverage decisions? If so, what process should be established?
7. What criteria should the FDA and CMS use to decide whether to grant a request for parallel review?
8. At what point during FDA premarket review for prescription drugs, biologics, and medical devices, should parallel review begin in order to reduce the time between FDA marketing approval or clearance decisions and CMS national coverage decisions while avoiding the risk that CMS would initiate an NCD for a product whose premarket application the FDA subsequently does not approve or clear?
9. How should parallel review be implemented? Should the agencies use means in addition to a guidance document, such as designating agency liaisons, to educate sponsors about parallel review?
10. When, if at all, should the agencies offer joint meetings to interested sponsors during parallel review? Before parallel review begins? Before a premarket application is submitted to the FDA?

11. Should FDA and CMS have access to the same data and information about the product during parallel review? (Note: Both agencies will protect the confidentiality of proprietary information used in the parallel review process, as they currently do under their respective approval/clearance and coverage processes.)

12. It is CMS' policy to inform the public when it begins an NCD process for a particular product. However, under applicable statutes and FDA's regulations, the existence of a premarket application is considered confidential commercial information prior to approval or clearance unless the sponsor has publicly acknowledged the application. With the consent of the sponsor, should CMS make public that it has begun the NCD process, as part of parallel review, for a product still undergoing FDA premarket review? As a condition of the agencies' agreement to initiate parallel review, should a sponsor have to inform the public, or consent to the agencies informing the public, that the product will be evaluated under parallel review? If the sponsor declines to consent to disclosure, should it be permitted to request parallel review anyway, which would prevent CMS from disclosing the NCD process until after the product is approved by the FDA? How can the transparency of CMS' NCD process be reconciled with the need to retain confidentiality of certain commercial information?

13. At present, sponsors whose medical products will undergo both FDA premarket review and CMS national coverage review submit separate application packages to FDA and CMS that, in part, contain the same data, and, in part, contain different data. Keeping in mind the limited resources available to the agencies, what steps can the agencies take to minimize duplication of data submissions? Would the use of electronic submissions reduce submission burdens and facilitate data transfers? Are there other steps the agencies can take to streamline a parallel review process without modifying the regulatory standards and evidentiary requirements of both agencies? Would the transparency of CMS' NCD process subject the FDA to additional public pressure regarding marketing authorization?

14. Should the agencies convene a joint advisory committee to consider common issues needing public discussion and advice during the parallel review process?

15. What other concerns or considerations should the agencies take into account when developing a process for parallel review?

16. Once FDA and CMS have opened a parallel review should a sponsor be able to terminate or withdraw the request for parallel review? If this happens, should that information be made public?

17. Sponsors who submit a PMA or 510(k) to the FDA generally must pay a user fee. One key advantage of parallel review is to streamline the current process by allowing engagement by a sponsor with both FDA and CMS concurrently. Earlier engagement could shorten the time between FDA approval or clearance of the PMA or 510(k) and a coverage decision from CMS. Parallel review could, however, entail additional costs for the agencies (for example, if the product ultimately does not receive FDA approval or clearance). Changes to a user fee would also require legislative changes. Given these factors, should the current Medical Device User Fee be restructured to support the FDA and CMS costs of this parallel review and if so, how?

Dated: September 10, 2010.

Margaret A. Hamburg,  
Commissioner of Food and Drugs.

Dated: July 29, 2010.

Donald M. Berwick,  
Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 10????? Filed ????10; 8:45 am]BILLING CODE 416001S

[FR Doc. 2010-23252 Filed 09/16/2010 at 8:45 am; Publication Date: 09/17/2010]