

# FENWICK & WEST LLP

A LIMITED LIABILITY PARTNERSHIP  
INCLUDING PROFESSIONAL CORPORATIONS

1920 N STREET, NORTHWEST, SUITE 650  
WASHINGTON, D.C. 20036

TELEPHONE: (202) 463-6300  
FACSIMILE: (202) 463-6520

TWO PALO ALTO SQUARE  
PALO ALTO, CALIFORNIA 94306  
(415) 494-0600

SUITE 300  
100 THE EMBARCADERO  
SAN FRANCISCO, CA 94105  
(415) 281-1330

March 23, 1998

Dockets Management Branch (HFA-305)  
Food and Drug Administration  
12420 Parklawn Drive, rm. 1-23  
Rockville, MD 20850

**RE: Docket No. 97N-0477; Advance Notice of Proposed Rulemaking;  
Medical Devices; Refurbishers, Rebuilders, Reconditioners, Servicers,  
and "As is" Remarketers of Medical Devices; Review and Revision of  
Compliance Policy Guides and Regulatory Requirements; Request for  
Comments and Information**

Dear Sir or Madam:

We are submitting these comments on behalf of a manufacturer and marketer of medical devices whose products are sold by "as is" remarketers and refurbished, serviced, or repaired by independent refurbishers and servicers as well as by the manufacturer. For the sake of convenience, we shall occasionally refer to these organizations as the "Independents."

## I. INTRODUCTION

FDA is regulating original manufacturer/servicers, but not Independents, under the Quality System ("QS") regulation in 21 C.F.R. Part 820, even though the agency recognizes that Independents meet the definition of manufacturer in § 820.3(o). 62 Fed. Reg. 67,011 at 67,012 (Dec. 23, 1997). FDA is likewise regulating original manufacturer/servicers, but not manufacturer/Independents, under the premarket review provisions of the Federal Food, Drug, and Cosmetic Act (the "FDCA") and the agency's regulations.

This abdication of responsibility under the laws it administers cannot be reconciled with the fundamental premise of the FDCA, which is that premarket notification or approval, as well as reliance on postmarketing controls to remove or ban violative products from the stream of commerce, is required to protect the public health. This premise, first reflected in drug, food, and additives legislation, was applied to medical devices more than 20 years ago. As the Senate Committee on Labor and Human

0536 98 MAR 23 P 2:58

97N-0477

C21

Resources explained in its report on the Food and Drug Modernization Act of 1997 (S.Rep. No. 105-43, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. 6 (1997)):

In 1938, Congress passed the Federal Food, Drug, and Cosmetic Act, which expanded the agency's reach to the regulation of cosmetics and medical devices and, for the first time, provided the agency with the authority to review and assure the safety of a product—new drugs—prior to the marketing of that product. The 1938 statute required sponsors of new drugs to file a new drug application notifying the FDA prior to marketing a new human or animal drug. The new drug application became effective after 60 days (which could be extended to 180 days), unless the Agency found that it had insufficient information to determine whether the drug was safe for its intended use.

In the ensuing years, Congress enacted a series of statutes further expanding the FDA's regulatory reach. These included the 1944 Pitts Act, which gave the FDA the authority to regulate biological products, and the Miller Pesticide Amendments of 1954, which required FDA premarket approval for pesticides in or on raw or processed foods. The Food Additive Amendment of 1958 required premarket approval of food additives, and the Color Additive Amendments of 1960 required premarket approval of color additives in food, drugs, and cosmetics. The Drug Amendments of 1968 consolidated the premarket approval requirements for new animal drugs and feed additives. The Medical Device Amendments of 1976 [TO BE FIXED] created a device ranging from the most simple to the most complex and premarket approval for new medical devices, and the Safe Medical Devices Act of 1990 codified FDA's premarket notification program and increased the agency's postmarket enforcement capabilities.

**FDA regulation of the Independents must also recognize that similar devices bearing similar claims must receive the same treatment.** *United States v. Diapulse Corp. of Am.*, 748 F.2d 56 (2d Cir. 1984) (diathermy devices; like cases may not be treated differently; FDA must apply same scientific and legal standards to each of two competitors; FDA must apply its scientific conclusions evenhandedly and may not grant to one person the right to do that which is denied to another similarly situated); *International Rehabilitative Sciences, Inc. v. Kessler*, No SA-93-CA-0242 (Mar. 19, 1994) (muscle stimulators; Equal Access to Justice Act decision summarizing earlier findings of unexplained and seemingly inexplicable differences in treatment by FDA where one manufacturer's devices were found to be substantially equivalent and another manufacturer's devices were found to be not substantially equivalent). *Accord, United States v. Undetermined Quantities of An Article of Drug... "Exachol,"* 716 F. Supp. 787

(S.D.N.Y. 1989) (FDA must apply regulatory policy with an even hand; product falling under policy may not be treated differently than other products falling under policy).

**More to the point, the agency may not decline to enforce the FDCA, whether by regulation, policy, or practice, as it applies to an entire class of regulated articles and entities.** *Hoffman-LaRoche, Inc. v. Weinberger*, 425 F. Supp. 890 (D.D.C. 1975); *American Public Health Association v. Veneman*, 349 F. Supp. 1311 (D.D.C. 1972). In *Hoffman-LaRoche*, a pioneer drug manufacturer whose NDA-approved Librium products were being copied by a generic manufacturer challenged an FDA policy permitting marketing of a “me-too” drug without an approved ANDA. FDA argued that its “compliance resources [were] limited” and had to be concentrated primarily in those areas where there existed a potential health problem. *Id.* at 892. According to the agency, it directed its compliance activities toward those drug products which had been found ineffective rather than toward those which had been found effective. In FDA’s view, “for those drugs that the NAS/NRC ... found effective” and that were “widely recognized as safe and effective” and for which a “bioavailability or special manufacturing problem” was not known or suspected, the “need to police their distribution was minimal.” *Id.*

The court flatly rejected these arguments. It held (*id.* at 894):

[T]he FDA's policy of permitting new drugs to be marketed without an approved [NDA] contravenes the clear statutory requirement of preclearance . . .

\* \* \* \*

Further, the action of the FDA is permitting such marketing of large classes of me-too drugs violates its own regulations.

\* \* \* \*

[T]he argument that the FDA lacks the administrative resources to insure [sic] compliance with [the requirement of preclearance] cannot be permitted to postpone to some indefinite future date the implementation of the required preclearance.

The teaching of *Hoffman-LaRoche* is clear: FDA may not adopt regulations, policies, or practices permitting violations of the FDCA, including its medical device provisions, or FDA's implementing regulations.

**Continued abdication by FDA of its statutory responsibilities would constitute an abuse of discretion, arbitrary and capricious action, and conduct otherwise not in accordance with law under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, as well as a denial of equal protection under the Due**

whether original manufacturer/servicers or manufacturer/independents provide the service or do the refurbishing.

## II. OVERVIEW OF MEDICAL DEVICE REQUIREMENTS

With exceptions for certain medical devices first marketed before May 28, 1976, and setting aside reclassification, prior to their commercial sale in the United States, medical devices must be cleared by the FDA under the 510(k) process, exempted from the requirement of 510(k) clearance, or approved by FDA under the PMA process. Premarket regulation of a medical device typically begins under the 510(k) process. This process requires that new product introductions be preceded by FDA clearance of a 510(k) containing information which establishes a new product as “substantially equivalent” to a legally marketed Class I or II medical device or to a legally marketed Class III device that does not itself require an approved PMA prior to marketing (“Predicate Device”). A 510(k) must contain information to support a claim of “substantial equivalence,” and this information may include laboratory test results or the results of clinical studies of the device in humans. FDA may determine that a new product is not “substantially equivalent” to a Predicate Device or that additional information is needed before a “substantial equivalence” determination can be made.

The range of nonclinical or clinical data required to be included in a 510(k) varies depending on the nature of the new product or product modification. If a company is unable to establish to FDA’s satisfaction that a new product is “substantially equivalent” to a Predicate Device, FDA approval of a PMA for the product is required prior to market entry.

A PMA must be supported by valid scientific evidence that typically includes extensive data, including data from preclinical testing and human clinical trials to demonstrate the safety and effectiveness of the device. The testing and studies must be conducted in accordance with FDA-mandated good laboratory and good clinical practice requirements, including a full or abbreviated investigational device exemption, informed

consent, and institutional review board approval. FDA ordinarily requires the performance of two independent, statistically significant human clinical trials that demonstrate the safety and effectiveness of the device in order to obtain FDA approval of the PMA. The PMA must also contain the results of all relevant bench tests, laboratory and animal studies, a complete description of the device and its components, and a detailed description of the methods, facilities and controls used to manufacture the device. In addition, the submission must include the proposed labeling and promotional labeling. Finally, the sponsor of the PMA must pass preapproval inspections conducted by FDA to determine compliance with good clinical practice and quality system including good manufacturing practice requirements.

Even if 510(k) clearance or PMA approval is obtained, this clearance or approval can be withdrawn by FDA due to a failure to comply with regulatory requirements or the occurrence of unforeseen problems following initial clearance or approval. Modifications to existing 510(k)-cleared devices, including changes in design, material, or manufacturing process that could significantly affect safety or effectiveness, require submission and clearance of new 510(k)s as do significant changes in labeling, *e.g.*, a change in indications for use. Modifications to a device that is the subject of an approved PMA, its labeling, or manufacturing process ordinarily require approval by FDA of PMA supplements or new PMAs. Supplements to a PMA typically require the submission of similar information as is required for an initial PMA, except that the supplement is generally limited to that information needed to support the proposed change from the product covered by the original PMA.

The FDCA requires that medical devices be manufactured in accordance with the FDA's QS regulation, which includes but is not limited to FDA's current good manufacturing practice ("GMP") requirements. This regulation requires, among other things, that (i) the manufacturing process be regulated, controlled and documented by the use of written procedures, and (ii) the ability to produce devices which meet the manufacturer's specifications be validated by extensive and detailed testing of every aspect of the process. The regulation also requires (i) pre-production design controls, (ii) purchasing controls, (iii) investigation of any deficiencies in the manufacturing process or in the products produced, (iv) verification that servicing meets specified requirements and analysis of service reports, and (v) detailed record-keeping including the maintenance of service records.

Other provisions of the FDCA require establishment registration and product listing, medical device reporting, reports of corrections and removals, and labeling that is truthful, accurate, and non-misleading and that does not otherwise misbrand (and that does not adulterate) a device; forbid adulteration and misbranding; impose special requirements on "electronic products;" authorize FDA to conduct warrantless inspections of manufacturing facilities to evaluate and enforce compliance with QS including GMP requirements; and provide severe administrative, civil, and criminal sanctions and penalties

for violating or causing the violation of applicable requirements under the statute or the agency's implementing regulations.

In short, the FDCA and FDA impose an extensive set of pre- and postmarketing requirements on medical device companies beginning with preclinical testing and continuing through clinical testing, manufacture, labeling, marketing, distribution, sale, installation, and servicing.

### **III. DEFINITIONS OF AND APPLICATION OF REQUIREMENTS TO "AS IS" REMARKETERS, REFURBISHERS, AND SERVICERS**

#### **A. "As Is" Remarketers--Definition and Requirements**

The definition of "as is" remarketers should be revised to state that the operational condition of the device may or may not be unknown. An "as is" remarketer, after all, may or may not know the operational condition of a device but in any case is selling the device "as is." We are unaware of any of any specific examples of "actual problems with the safety and/or performance of remarketed devices that are the result of remarketing." 62 Fed. Reg. 67,011 at 67,013. But, "as is" remarketers should be required to register and list, so that FDA can quickly locate and inspect them should the need arise, *e.g.*, should questions arise as to whether the person is engaged in more than merely "remarketing" activities. Such remarketers should also be required to obtain 510(k) clearance as first time marketers (21 C.F.R. § 807.81(a)(2)), unless exempt under § 807.85(b)(2), as well as comply with the requirements identified in the advance notice of proposed rulemaking, 62 Fed. Reg. at 67,012. If 510(k) clearance is not required, "as is" remarketers must be compelled to disclose to their customers, in writing, that the operational condition of the remarketed device is not known (assuming it is not) and must be determined by the user prior to patient exposure, and that the device may require refurbishment or service in order for it to perform all the functions for which it is designed and to meet the manufacturer's fitness for use specifications.

#### **B. Refurbishers and Servicers - Definitions**

These definitions presume, without discussion and without any citation to, much less an analysis of, supporting information, that refurbishers or servicers "do not significantly change a finished device's performance or safety specifications, or intended use." 62 Fed. Reg. at 67,012. We are not independently aware of any factual basis for the presumptions, nor do we know of any legally defensible basis for making unsupported presumptions and then declining to apply the law based on them. The foundation of the FDCA, after all, is that device safety and effectiveness, whether comparable (510(k)) or in the first instance (PMA) must be proved, and that the activities of persons who manipulate approved products (as well as unapproved ones) must be validated. *See United States v. Baxter Healthcare Corp.*, 901 F.2d 1401 (7<sup>th</sup> Cir. 1990). One might just as well presume that all finished devices are safe and effective and meet their fitness for use specifications

and decline to regulate the devices, their manufacture or their manufacturers. That, too, would run afoul of the law.

### 1. Refurbishers

The definition should be revised to delineate the activities that must be undertaken to refurbish a device. Such activities include stripping a device into its component parts or sub-assemblies; checking their suitability for reuse; replacing the device's components or sub-assemblies not suitable for reuse; assembling the reclaimed or replacement components or sub-assemblies; and testing the assembled device against the original (or, perhaps, revised) release criteria. On this last point, the definition of refurbisher should be revised to capture the requirement of return to the manufacturer's fitness for use specifications, because the phrase "in good repair and performing all the functions for which it is designed" (62 Fed. Reg. at 67,012) is vague. Alternatively, refurbishers should be required to disclosure to their prospective purchasers and purchasers that the refurbished device may not meet the manufacturer's fitness for use specifications, and therefore, that the device may not perform as if it were the new, finished device. In any case, a similar disclosure should be required if the refurbisher does not perform preventive maintenance procedures. Finally, if FDA chooses to retain in the definition the presumptions that refurbishers do not significantly change a finished device's performance or safety specifications or intended use, the agency should define by text and example what does and does not constitute a significant change.

### 2. Servicers

The definition is adequate except for its incorporation of the presumptions discussed above. If they are retained, FDA should define by text and example what does and does not constitute a significant change.

### C. Refurbishers and Servicers -- Requirements

With limited exceptions, the full panoply of requirements under the FDCA logically and legally apply to, and should therefore be applied by FDA to, refurbishers and servicers, beginning with registration and listing, continuing through premarket notification or premarket approval (for refurbishers), QS including GMP requirements, and postmarketing reporting and other postmarketing obligations.

Refurbishers (and, possibly, servicers) engage in activities (*e.g.*, manufacturing, preparing, assembling, or processing a device, followed by commercial distribution) that require registration and listing under 21 C.F.R. § 807.20. Servicers that do not engage in activities requiring registration and listing should be required to register and list, for purposes of facilitating enforcement of the FDCA beginning with inspections to determine compliance with QS including GMP requirements. If a refurbisher or servicer is a first

time marketer, then 510(k) clearance is required under § 807.81(a)(2), unless the exemption in § 807.85(b)(2) is satisfied.

To the extent that refurbishers or servicers engage in **operations** or types of **activities** covered by the QS regulation, the regulation applies and FDA should apply it. According to § 820.1(a)(1), Subparts B, D, E, F, G, H, J, K, L, M, and N help ensure that finished medical devices “are safe and effective and otherwise in compliance with” the FDCA.\* Law and logic thus dictate that FDA apply these provisions to a refurbisher or servicer when the refurbisher or servicer engages in a covered operation or activity. The need to ensure device safety and effectiveness and compliance with the FDCA exists irrespective of who engages in the operation in question.

The foundation of the QS Regulation in particular and quality systems theory in general is that its application will result in better, safer, more effective and more reliable finished medical devices. Each requirement in the regulation is pertinent to achieving these goals. Accordingly, the logical and legal foundation of FDA’s QS including GMP regulation is that the servicing requirements in Subpart N (as an example) must contribute in some definable way to addressing a safety concern, and--critical to the issue here for FDA--that concern necessarily exists without regard to who does the servicing. Indeed, the safety concern is greater when the manufacturer does not do the servicing, because the manufacturer, unlike the refurbisher or servicer, has exquisitely detailed knowledge of the device, having designed, developed, and produced it and the procedures for servicing it.

In relation to postmarketing obligations, refurbishers and servicers, like “as is” remarketers, are governed by and should be subjected to the requirements identified in the advance notice of proposed rulemaking, 62 Fed. Reg. at 67,012.

#### D. Specific Examples of Actual Problems

Specific examples of actual problems with the safety or performance of refurbished or serviced devices are not required as a predicate for regulation of refurbishers or servicers, but several such examples follow.

---

\* Only subparts B, G, H, J, K and M are listed in the advance notice of proposed rulemaking (62 Fed. Reg. at 67,013), but subparts D, E, F, L, and N of the QS regulation also apply to refurbishers or servicers. Thus, QS obligations applicable to refurbishers or servicers include the following: (a) establish and maintain a quality system including audits, management review, adequate resources to comply with QS requirements, and adequate numbers of trained personnel; (b) document controls; (c) purchasing controls; (d) identification procedures; (e) production and process controls; (f) acceptance activities; (g) procedures for installation and servicing activities; (h) corrective and preventive action systems; (i) complaint handling systems; (j) calibration; (k) contamination control during servicing and installation; (l) release for use of devices which do not conform to the device specifications when the refurbisher or servicer finishes the installation or servicing; and (m) record-keeping.

1. A hospital's gamma camera had bonded optics. A servicer attempted to replace a phototube with optical grease and to fabricate a means to hold the tube as it was no longer bonded. The result was an artifact appearing as gantry rotated.
2. A work station for a gamma camera was serviced by a servicer which replaced bins, power supplies, and specific device boards. After these replacements, the camera manufacturer had to be called in to adjust the replaced parts to get the device up and running.
3. Gamma camera boards and a monitor were replaced by a servicer. The monitor lasted approximately two weeks before it had to be replaced by the camera manufacturer, which also had to make repeated adjustments necessitated by deficiencies in the servicer's replacement of the boards.
4. A lithotripter sold and delivered to a customer by the manufacturer was installed by the manufacturer and then serviced by it without incident for four years. The customer then retained a servicer, which serviced the lithotripter for some twenty months, at which time a fire ignited in the lithotripter while in use.
5. A servicer substituted incompatible x-ray tubes in CT systems. As a result, several of the customer's units could not operate in accordance with the manufacturer's specifications or performance standards in Subpart J.
6. A high voltage diagnostic x-ray generator displayed an error indicating that the actual KV did not meet the KV requested. The customer called in the manufacturer, because the servicer had been unable to solve the problem. The manufacturer discovered that the main power cable was loose at the connection to a terminal, causing the cable to overheat and a jumper connection to burn open. The manufacturer made the necessary repairs, and the error was cured.
7. A servicer did the cryogen fills for a hospital's MRI, until the servicer quenched the magnet on a routine fill, after which the hospital decided to have the manufacturer resume filling operations.
8. A display option was locking up with input/output errors, following work done on the option by a servicer. The customer called in the manufacturer, which determined that the servicer has installed the wrong I/O board for the software version of the display option.

#### IV. CONCLUSION

FDA must revise the definitions of "as is" remarketer, refurbisher and servicer as indicated; apply to each of them, without delay, the provisions of the FDCA and the agency's regulations governing their activities and operations; revise the regulations to require registration and listing of "as is" remarketers and servicers whose activities do not now require registration; and require appropriate disclosures by "as is" remarketers and refurbishers of the limits of their products. There is no legal or policy justification for any other result. Quite the contrary, the decided FDA cases, the APA, the constitutional Equal Protection (Due Process) Clause, and sound public policy, including the need for a level playing field and common sense, require that FDA regulate "as is" remarketers, refurbishers, and servicers in complete accord with the laws it administers.

Respectfully submitted,  
FENWICK & WEST LLP

By:   
Michael M. Landa

**FENWICK & WEST LLP**  
A LIMITED LIABILITY PARTNERSHIP  
INCLUDING PROFESSIONAL CORPORATIONS  
1920 N STREET, NORTHWEST, SUITE 650  
WASHINGTON, D.C. 20036

Round TRIP  
1 copy to be  
stamped + returned  
to us.

**First Class Mail**  
**First Class Mail**

Dockets Management Branch (HFA-305)  
Food and Drug Administration  
12420 Parklawn Drive, rm. 1-23  
Rockville, MD 20850

RE: Docket No. 97N-0477

301-443-7542

