

For Immediate Release
Thursday, April 30, 2009

Grassley calls on FDA to explain letting device maker off the hook

WASHINGTON – Senator Chuck Grassley is asking the Food and Drug Administration to explain how it justifies its decision not to hold the manufacturer accountable for marketing a heart valve device without FDA clearance.

“Even though this heart valve device was eventually cleared by the FDA, the agency needs to implement better processes for making sure those devices are appropriately cleared before they’re used in patients,” Grassley said. “An ad-hoc no harm, no foul attitude by the FDA doesn’t inspire a lot of confidence in the agency’s commitment to rigorous and even-handed clearance processes.”

The text of Grassley’s letter to the Acting Commissioner of the FDA is below. A copy of the article in *heartwire* is posted with this news release at <http://grassley.senate.gov> and <http://finance.senate.gov>.

April 29, 2009

Joshua Sharfstein, MD
Acting Commissioner
U.S. Food and Drug Administration
5600 Fishers Lane
Rockville, MD 20857

Dear Dr. Sharfstein:

As Ranking Member of the United States Senate Committee on Finance (Committee), I have a responsibility to the more than 80 million Americans who receive health care coverage under the Medicare and Medicaid programs to oversee the proper administration of these programs and ensure that taxpayer dollars are appropriately spent on safe and effective drugs and devices.

On December 18, 2008, I wrote to the Food and Drug Administration (FDA/Agency) regarding troubling allegations that the Myxo ETlogix 5100 Ring, an annuloplasty ring used in heart valve repair manufactured by Edwards Lifesciences (Edwards), had not been approved and/or cleared for marketing by the FDA. Yet, the ring was implanted in an unknown number of patients at Northwestern Memorial Hospital in Chicago, IL, despite allegedly lacking clearance or approval from the FDA.

I appreciate the Agency’s response to my inquiries regarding that matter. At the time of FDA’s March 4, 2009 response, the Agency was reviewing Edwards’ October 2008 510(k) submission for the Myxo ETlogix ring, which has been renamed the dETlogix Annuloplasty

(dETlogix) Ring. I was recently informed that the dETlogix ring was cleared by the FDA for marketing on April 10, 2009.

I read with great interest the April 14, 2009 *Heartwire* article regarding FDA's decision to clear the dETlogix ring. According to that article, the FDA concluded that Edwards made "the wrong decision when it marketed its product, but not a punishable one." In FDA's March 4, 2009 response to my letter, the Agency also stated that "a 510(k) holder may make a modification to a device without filing a new 510(k) after concluding that the change does not significantly affect the safety or effectiveness of the device or constitute a major change in the intended use of the device." Further, the letter noted that "no formal reporting by the 510(k) holder to the Agency is required if the sponsor concluded that a given change does not require a new 510(k). Therefore, the Agency does not have the opportunity to evaluate that decision in advance to determine if it was appropriate."

It appears to me that the FDA has created a system that makes it easier to ask forgiveness than it is to get permission. How can the Agency adequately ensure the safety of patients who use medical devices when it allows manufacturers to determine when a new 510(k) submission is necessary without oversight from the FDA?

The American public relies on the FDA, not the manufacturers of the product, to determine if a device is reasonably safe and effective for use. That determination includes whether or not a device has been modified to the extent that it would require new clearance by the Agency.

The dETlogix ring may now be cleared by the FDA, but the fact remains that for more than two years patients at Northwestern Memorial Hospital were being implanted with that device **before** a 510(k) was submitted to the Agency. Accordingly, I am troubled by what appears to be a "no harm, no foul" attitude taken by the FDA. The FDA has acknowledged that the dETlogix ring is a "significant risk device" that was not cleared or approved and thus should have been studied under an investigational device exemption (IDE). However, it was not studied under an IDE. So, I wonder where does that leave all of the patients who were not informed that the device being implanted in them was experimental?

Accordingly, I request that the FDA respond to the following questions by no later than May 13, 2009:

1. The Agency says that sponsors are "encouraged to contact the Agency if they have questions regarding the appropriateness of a 510(k)." If there are no disincentives for making the wrong determination, why would manufacturers seek advance input from the Agency or submit a new 510(k) rather than wait for the FDA to request one?
2. Did the FDA review any data on the patients who already had the device implanted prior to clearance by the FDA for marketing? If not, why not?

3. Has the FDA required the company to take specific actions to prevent wrong determinations from occurring again in the future? If so, please describe what actions are being required of the company.
4. Has the FDA requested the company notify all patients implanted with the dETlogix ring before it was cleared by the FDA that they had received an experimental device? If not, why not?
5. According to FDA's guidance, manufacturers are only required to maintain documentation of their analysis on whether or not a modification to their device requires the filing of a new 510(k) and to make that documentation available to the FDA during an inspection. Why are manufacturers not required to submit that documentation to the Agency at the time that the determination is made so that the Agency is on notice and has a file of all modifications made to a device?
6. According to the *Heartwire* article, Edwards maintained in-house documentation of its determination that the dETlogix ring did not require a new 510(k), and did not submit the documentation until FDA asked for that documentation last year during FDA's investigation of the matter.
 - a. If allegations regarding the dETlogix ring had not been brought to the FDA's attention, at what point in time might the FDA have discovered that a wrong determination had been made during a routine inspection of the manufacturer?
 - b. How comprehensive is FDA's review of a manufacturer's analysis during a routine inspection?
 - c. Does the FDA always request such documentation for review during each inspection? If not, how frequently does the FDA review such documentation?
 - d. Does the Agency maintain any database of all modifications made to devices cleared and/or approved by the Agency even if the Agency does not conduct a comprehensive review of all of the modifications? If not, why not? And how does FDA track what modifications have been made to each device?
7. Please describe in detail any steps the FDA plans or is planning to take to improve its oversight of manufacturer determinations on when to submit a 510(k) for a modification to an existing device.

Thank you for your attention to this important matter.

Sincerely,
Charles E. Grassley
Ranking Member