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FDA Cracks Down on ClinicalTrials.gov Reporting Failures

May 4, 2021By McKenzie E. Cato & Michelle L. Butler —

On April 28, FDA issued its first Notice of Noncompliance for failure to submit required clinical trial results information to ClinicalTrials.gov. The notice was given to Acceleron Pharma, Inc., for failure to submit the required information following completion of a clinical trial evaluating the safety and effectiveness of the drug dalantercept in combination with axitinib in patients with advanced renal cell carcinoma (see FDA press release announcing the Notice of Noncompliance here).

The ClinicalTrials.gov database is a public database of clinical studies administered by the U.S. National Library of Medicine. Section 402(j) of the Public Health Service Act (PHS Act) (42 U.S.C. § 282(j)), enacted via section 801 of the FDA Amendments Act of 2007 (FDAAA), requires that the "responsible party" of an "applicable clinical trial" submit for posting on ClinicalTrials.gov certain required information, including the study title, study design, start date and estimated completion date, outcome measures, recruitment information, study site locations, and results.

The "responsible party" is the sponsor or principal investigator of the trial. An "applicable clinical trial" is generally defined to mean any clinical trial (other than a device feasibility trial or a phase I drug trial) to collect data to support an FDA premarket submission, such as a New Drug Application or 510(k) premarket notification.

The results from a completed clinical trial must be submitted for posting in the database no later than one year after the "completion date" of the trial, which is defined to mean "the date that the final subject was examined or received an intervention for the purposes of final collection of data for the primary outcome." 42 C.F.R. §§ 11.10, 11.44(a). The implementing regulations provide an alternative option for delayed submission of results information if the responsible party submits a certification that a premarket submission "has been filed or will be filed within 1 year" of the reporting deadline. *Id.* § 11.44(b)(1). If eligible, the responsible party can delay submission of results information until up to 30 calendar days of (i) the FDA approval or clearance date, (ii) the date that FDA ends the review cycle without approving or clearing the product, or (iii) the date that the submission is withdrawn. However, submission of results information cannot exceed 2 years from the date the certification is submitted, even if FDA has not yet reached a decision on the application. *Id.* § 11.44(b)(2).

The PHS Act grants the Secretary of Health and Human Services (HHS) the authority to issue a notice of noncompliance to a responsible party for failure to submit clinical trial information as required, but states that the responsible party should be allowed 30 days to correct the

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noncompliance and submit the required information. 42 U.S.C. § 282(j)(5)(A)(iii). The failure to submit clinical trial information to ClinicalTrials.gov as required is also a prohibited act under section 301(jj)(2) of the Federal Food, Drug, and Cosmetic Act (FDC Act). This violation is subject to potential civil monetary penalties of up to $10,000 for each day the violation continues.

The ClinicalTrials.gov database was launched more than 10 years ago in 2008. However, FDA historically had not enforced the ClinicalTrials.gov reporting requirements, due in part to HHS' long delay in issuing implementing regulations. HHS issued implementing regulations in 2016, almost 10 years after enactment of FDAAA and nearly 6 years after the deadline imposed on HHS (see our blog post here).

In March 2020, an investigative journalist and Peter Lurie, former FDA associate commissioner and president of the Center for Science in the Public Interest, challenged FDA's failure to engage in enforcement action (see our blog post here). The District Court for the Southern District of New York found that FDA's obligation to issue a notice of noncompliance only arises after FDA determines that clinical trial information has not been submitted, but that determination is within FDA's discretion and FDA had never made such a determination. Nevertheless, in August 2020, FDA issued a guidance document titled Civil Money Penalties Relating to the ClinicalTrials.gov Data Bank putting study sponsors and principal investigators on notice that the Agency intended to begin enforcement of ClinicalTrials.gov reporting requirements.

The April 28th Notice of Noncompliance to Acceleron is noteworthy because it is the first ever issued by the Agency. The notice alerts Acceleron of "potential noncompliance with the requirement to submit clinical trial results." The notice references an earlier July 2020 letter, a "Pre-Notice of Noncompliance," in which FDA requested that Acceleron review its records and submit all required results information promptly. As described by FDA, the July 2020 Pre-Notice stated that FDA would conduct further review after 30 calendar days and might take regulatory action.

The April 28th Notice gives Acceleron 30 days to submit the required results information. The Notice threatens the possibility of civil monetary penalties if Acceleron fails to submit the required information. As stated in the Notice, in addition to civil monetary penalties, violations may also result in other regulatory action, such as injunction and/or criminal prosecution.

Companies are now on notice that FDA is starting to enforce ClinicalTrials.gov reporting requirements. Now that FDA has finally developed its process for assessing noncompliance and issuing notices to responsible parties, we can expect to see additional notices posted in the near future.