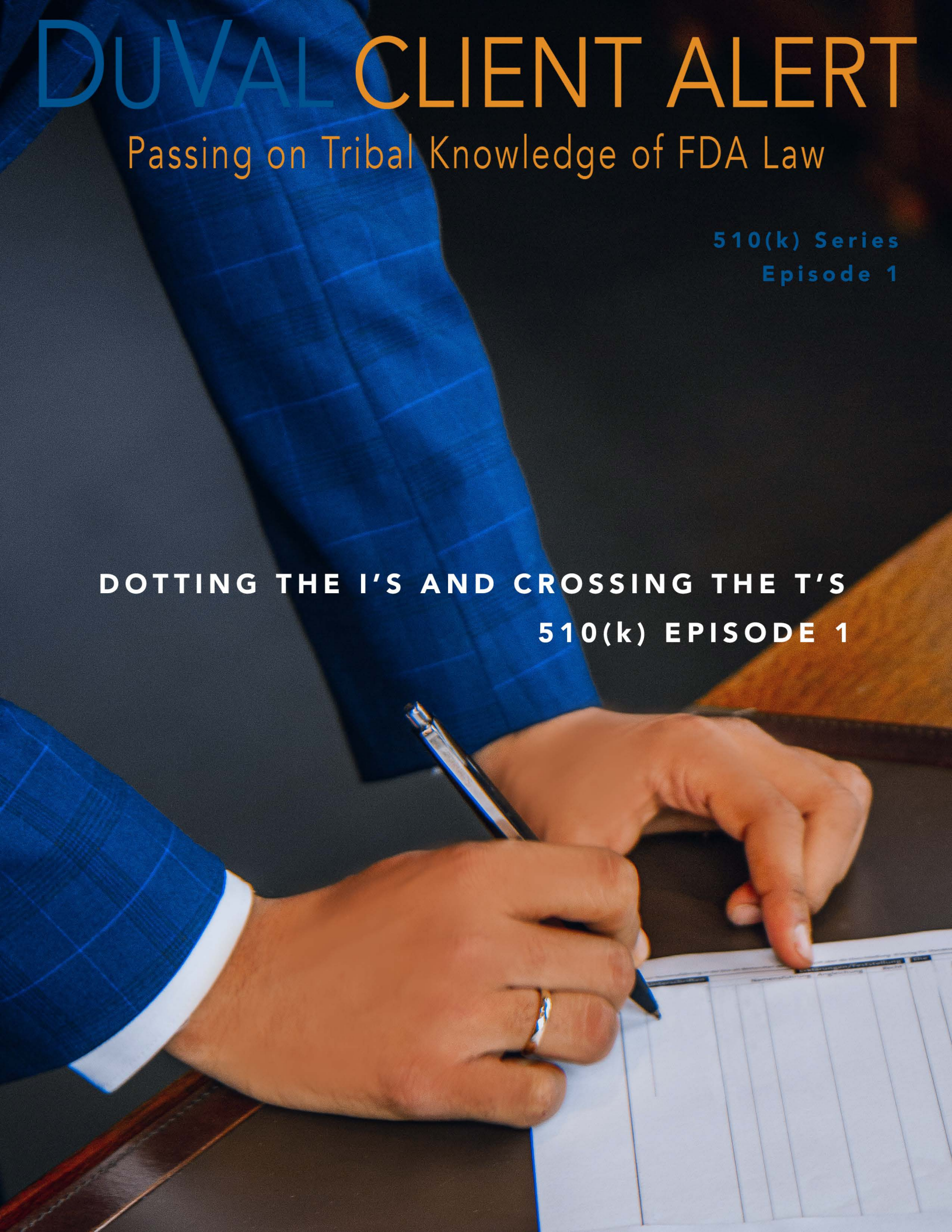
DuVal Client Alert

Passing on Tribal Knowledge of FDA Law

510(k) Series
Episode 1



DOTTING THE I'S AND CROSSING THE T'S

510(k) EPISODE 1

Dotting the I's and Crossing the T's

Withstanding the 510(k) Acceptance Review

Important Notice: Are you using the new Refuse to Accept checklist (issued August 4, 2015)?

This is the first in a series of Client Alerts on drafting and filing strategies for 510(k) submissions born out of our experience counseling clients on how to ensure your 510(k) is an advocacy document which will garner the clearance you seek. We will share insights from our negotiations with the Agency on such matters as multiple (and split) predicates and whether a device has the 1) same intended use, 2) technological characteristics, or 3) raises different questions of safety and effectiveness. We share what not to do when depicting your device in a submission and how to persuade FDA to your position. We also discuss the quantum and quality of data that should be submitted for clearance and where to push back on the Agency and how.

You can find additional episodes of this series at: duvalfdalaw.com

EXECUTIVE SUMMARY

Will your 510(k) submission withstand acceptance review? Acceptance review is not the point where you are through the front door of FDA and being asked whether your device is substantially equivalent. Instead, you are at the front door and asking whether you have dotted the i's and crossed the t's in your submission. Acceptance review is only about deciding whether your submission is complete.

This **Client Alert** discusses FDA's acceptance review as outlined in its **updated** guidance entitled, "Refuse to Accept Policy for 510(k)s"[1] ("RTA Policy").[2] Acceptance review is one of two parts of a 510(k) review. Before a 510(k) submission undergoes substantive review (i.e., for a substantial equivalence determination), it first goes through an administrative acceptance review under the RTA Policy. An acceptance review is abbreviated and supposed to be non-substantive. FDA makes sure all the information it needs to conduct a full substantive review is present. The FDA reviewer reviews the submission to determine if it meets a minimum threshold of acceptability before it is allowed to go to a substantive review. In an acceptance review the FDA reviewer verifies the information in the 510(k) submission against a Refuse to Accept ("RTA") checklist.

Acceptance review is meant to be an objective process for assessing the completeness of the submission, not the quality of the data provided in the submission. Completing the RTA checklist is a process of seeing whether elements are "present" or "not present," and not for determining whether the content is sufficient for those elements.
If the submission meets the minimum threshold of acceptability (i.e., contains all of the required elements per the RTA checklist), it may proceed to substantive review. If it does not, the submission is designated as "RTA" and does not proceed to substantive review until the information for the missing elements are submitted.

Although FDA is not issuing as many RTAs as it did in the early years of the program, RTAs have not become a remote possibility. Presently, about one in three 510(k) applications are still not accepted on their first acceptance review cycle.[3] Acceptance review is generally not a make-or-

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[1] FDA, *Refuse to Accept Policy for 510(k)s, Guidance for Industry and Food and Drug Administration Staff* (Issued September 13, 2019), at https://www.fda.gov/media/83888/download.

[2] *If you are already using the RTA checklist, be sure that you are using the most current version. The new RTA Policy guidance replaces a previous guidance from 2012, and it contains updated RTA checklists that clarify the content needed for withstanding acceptance review.*

[3] FDA, *FDA's Role* at https://www.fda.gov/about-fda/what-we-do#mission

break moment for a 510(k) submission, but it is a process that can unnecessarily delay substantive review and ultimately clearance. There is no limit to the number of RTA designations you may receive, and if you have more than one RTA designation, you could be unnecessarily extending your expected timeline for clearance.

How Acceptance Review Works

Once a 510(k) has been submitted, FDA will generally inform the submitter within 15 calendar days of receipt whether the submission passes acceptance review. If the submission passes, the submission proceeds to substantive review. If not, the submitter is notified electronically that the submission has not been accepted, and the submitter is provided with a copy of the FDA reviewer's RTA checklist indicating which items are missing. The submitter can then interactively interact with the FDA reviewer about the missing elements and submit the missing information as supplements under the same 510(k) number.

Once a supplement has been submitted, the submission once again undergoes acceptance review. This process iterates for as long as the submission is incomplete.

Acceptance Review Basics

Review the RTA checklist while you are drafting the 510(k) - While it is a best practice to review the RTA checklist prior to submitting a 510(k), it is an even better practice to consult it while drafting a 510(k). The RTA checklist tells you, at the minimum, what needs to be present in your 510(k) for it to withstand acceptance review.

Objectively review the RTA checklist prior to submitting your 510(k) - Objectively reviewing the RTA checklist prior to submitting your 510(k) helps ensure that (1) the elements are present, and (2) someone who is not as familiar with the 510(k) can also identify those elements. When it is possible, it helps to have someone do this part who is not intimately familiar with the 510(k) package, so you obtain a more objective assessment of what is potentially missing. This helps ensure that the RTA elements are readily identifiable for the reviewer who is new to the 510(k) package.

Streamline the FDA reviewer's review by including a completed RTA Checklist - Submitting a completed RTA checklist allows a reviewer assessing the RTA elements to quickly hone in and verify these elements are present. Ideally, a completed RTA checklist should reference locations within your 510(k) where the RTA elements can be found, as well as include rationale for the elements that do not apply to the 510(k). It is important to note that including an RTA checklist with such rationale can be very important, as the RTA Policy states that "a submission should not be accepted and should receive an RTA designation if one or more items noted as RTA items in the checklist are not present and no explanation is provided for the omission(s)."

 Be sure that the **most recent version** for the RTA checklist is included!

The user fee must be paid, and an eCopy must be submitted prior to Acceptance Review - Acceptance review will not begin until the user fee for the submission has been paid, and the eCopy requirements for the submission have been met. However, submitting missing information as supplements under the original 510(k) number do not require a new user fee, but must comply with the eCopy requirements.

FDA should notify you about acceptance review within 15 days of Receipt - Generally, a notification should be received within 15 days of receipt that 1) the 510(k) was accepted for substantive review, 2) the 510(k) was designated RTA, or rarely, 3) the 510(k) has not undergone acceptance review. For that last type, FDA may fail or choose to not complete acceptance review within the 15-day acceptance period. In such instances, the submitter is notified that acceptance review was not completed and the submission is undergoing substantive review. In any case, if you have not heard anything about your submission at the end of the 15-day acceptance period, you should contact CDRH-Division of Industry and Consumer Education (DICE).4

Responses to RTA designations must be received within 180 days - A submission that is designated RTA is placed on RTA Hold. Failure to respond to an RTA Hold within 180 days of notification will result in the submission to be considered withdrawn, and a new 510(k) and user fee is required if the submitter wishes to pursue clearance.

Acceptance Review affects your review clock - Acceptance review alters the 90-day 510(k) review clock for the purposes of the MDUFA performance goal which requires that FDA make 510(k) determinations within 90 days. Upon receipt of a 510(k) submission, FDA has 15 days to complete the acceptance review. If the submission is accepted (or FDA fails to perform the acceptance review), then the submission proceeds to

substantive review and the clock is running for the 90-day performance goal. If the submission is designated RTA, then the clock does not start until enough information is submitted for an acceptance designation.

RTA Holds can last up to 180 days, so in theory an RTA iteration (RTA Hold, Response, and subsequent Acceptance Review) could last up the entire 180 days. In reality, RTA iterations generally take a few days to a couple weeks depending on the nature of the missing information. Regardless of whether an iteration takes a few days or a couple weeks, if there are multiple iterations, these can delay the review to clear your device for marketing.

Acceptance Review can be an interactive process, to an extent - During acceptance review, the reviewer may interactively communicate with the submitter about the submission. This provides an opportunity for the submitter to clarify an element in the submission that the reviewer questions is missing. However, for RTA elements that are not present, the submitter must submit this missing information by supplements or amendments to the 510(k); it cannot be done during an interactive process.

There are RTA checklists for Traditional, Abbreviated and Special 510(k)s - There are three separate checklists that are used for acceptance review, depending on the type of 510(k). Each checklist points out the necessary elements and content that constitutes a complete submission for that type of 510(k). Watch out for common RTA elements. Although any element can result in an RTA designation, there are some elements that are frequently the cause of an RTA designation. These elements include:

- **Incomplete administrative information.** Be sure to identify all prior submissions for the same device, or alternatively indicate that there

were no prior submissions for the subject device. This information should be provided on the CDRH Premarket Review Submission Coversheet (Form FDA 3514) and the cover letter accompanying the submission.

- **Insufficient 510(k) Summary.** Be sure to contain all of the elements of the 510(k) Summary per 21 CFR 807.93.
- **Inconsistent indications for use.** Be sure that indications for use are consistent between the 510(k) Summary and the Indications for Use form
- (Form FDA 3881).
- **Missing standards forms.** Be sure that you include Standards Forms (Form FDA 3654) for standards that are listed in the CDRH Premarket Review Submission Coversheet (Form FDA 3514).

It is important to note that utilizing the RTA checklist, which requires double-checking these elements, will prevent these omissions.

CONCLUSION

Although acceptance review is generally not a make-or-break moment for a 510(k) submission, it is a process that can unnecessarily delay clearance. There is no limit to the number of RTA designations you can receive. If you have more than one RTA designation, you could negatively affect your expected timeline for clearance. At the very least, you will have unnecessarily expended company efforts and resources submitting supplements to your submission, and ultimately, you will have delayed the review for clearance of your device.

Need Assistance with Your 510(k)?

Our firm routinely engages with clients regarding medical device submissions, including advising on regulatory strategy, counseling on regulatory and FDA matters, and providing general assistance with 510(k) submissions and Pre-Submissions. Watch for the next Client Alert in our series on 510(k) submissions. If you have any questions or would like more information about how we can help you with your 510(k), please contact us at duval@duvafdalaw.com or by phone at (612) 338-7170.

DuVal & Associates
Drug, Device and Food Law

DuVal & Associates is a boutique law firm located in Minneapolis, Minnesota that specializes in FDA regulations for products at all stages of the product life cycle. Our clientele includes companies that market and manufacture medical devices, pharmaceuticals, biologics, nutritional supplements and foods. Our clients range in size from Global Fortune 500 companies to small start-ups. As one of the only dedicated FDA regulatory law firms in the United States, our mission and absolute focus is providing our clients appropriately aggressive, yet compliant, guidance on any FDA related matter. We pride ourselves not only on our collective legal and business acumen, but also on being responsive to our client's needs and efficient with their resources. DuVal & Associates understands the corporate interaction between departments like regulatory affairs, marketing, sales, legal, quality, and clinical, etc. As former industry managers in the drug and device spaces, we have been in your shoes. Our firm has extensive experience with government bodies. We understand what it takes to develop and commercialize a product and bring it successfully to the market and manage its life cycle. Impractical or bad advice can result in delays or not allow for optimal results; while practical, timely advice can help companies succeed.

CALL ON US FOR ASSISTANCE WITH YOUR REGULATORY NEEDS

For more information, visit our website at www.duvalfdalaw.com or call Mark DuVal today for a consult at 612.338.7170 x102.