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CHAPTER 9—FEDERAL FOOD, DRUG, AND COSMETIC ACT

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SUBCHAPTER I—SHORT TITLE

§301. Short title

This chapter may be cited as the Federal Food, Drug, and Cosmetic Act.

(June 25, 1938, ch. 675, §1, 52 Stat. 1040.)

Statutory Notes and Related Subsidiaries

Effective Date; Postponement in Certain Cases

Act June 23, 1939, ch. 242, §§1, 2, 53 Stat. 853, 854, provided that:

"[Sec. 1] (a) The effective date of the following provisions of the Federal Food, Drug, and Cosmetic Act is hereby postponed until January 1, 1940: Sections 402(c) [342(c) of this title]; 403(e)(1) [343(e)(1) of this title]; 403(g), (h), (i), (j), and (k) [343(g) to (k) of this title]; 501(a), (4) [351(a)(4) of this title]; 502(b), (d), (e), (f), (g), and (h) [352(b), (d) to (h) of this title]; 601(e) [361(e) of this title]; and 602(b) [362(b) of this title].

"(b) The Secretary of Agriculture shall promulgate regulations further postponing to July 1, 1940[,] the effective date of the provisions of sections 403(e)(1) [343(e)(1) of this title]; 403(g), (h), (i), (j), and (k) [343(g) to (k)]; 502(b), (d), (e), (f), (g), and (h) [352(b), (d) to (h) of this title]; and 602(b) [362(b) of this title] of such Act with respect to lithographed labeling which was manufactured prior to February 1, 1939, and to containers bearing labeling which, prior to February 1, 1939, was lithographed, etched, stamped, pressed, printed, fused or blown on or in such containers, where compliance with such provisions would be unduly burdensome by reason of causing the loss of valuable stocks of such labeling or containers, and where such postponement would not prevent the public interest being adequately served: Provided, That in no case shall such regulations apply to labeling which would not have complied with the requirements of the Food and Drugs Act of June 30, 1906, as amended.

"Sec. 2. (a) The provisions of section 8 [section 10 of this title], paragraph fifth, under the heading 'In the case of food:', of the Food and Drugs Act of June 30, 1906, as amended, and regulations promulgated thereunder, and all

other provisions of such Act to the extent that they may relate to the enforcement of such section 8 [section 10 of this title] and of such regulations, shall remain in force until January 1, 1940.

"(b) The provisions of such Act of June 30, 1906, as amended, [sections 1 to 5, 7 to 15, and 372a of this title] to the extent that they impose, or authorize the imposition of, any requirement imposed by section 403(k) of the Federal Food, Drug, and Cosmetic Act [section 343(k) of this title], shall remain in force until January 1, 1940.

"(c) Notwithstanding the provisions of section 1 of this Act, such section shall not apply—

"(1) to the provisions of section 502(d) and (e) of the Federal Food, Drug, and Cosmetic Act [352(d), (e) of this title], insofar as such provisions relate to any substance named in section 8 [section 10 of this title], paragraph second, under the heading 'In the case of drugs:', of the Food and Drugs Act of June 30, 1906, as amended, or a derivative of any such substance; or

"(2) to the provisions of section 502(b), (d), (e), (f), (g), and (h) of the Federal Food, Drug, and Cosmetic Act [352(b), (d) to (h) of this title], insofar as such provisions relate to drugs to which section 505 [355 of this title] of such Act applies."

Effective Date

Act June 25, 1938, ch. 675, §1002(a), formerly §902(a), 52 Stat. 1059; renumbered §1002(a), Pub. L. 111–31, div. A, title I, §101(b)(2), June 22, 2009, 123 Stat. 1784, provided that: "This Act [enacting this chapter and repealing sections 1 to 5 and 7 to 15 of this title], shall take effect twelve months after the date of its enactment [June 25, 1938]. The Federal Food and Drugs Act of June 30, 1906, as amended (U.S.C., 1934 ed., title 21, secs. 1–15), shall remain in force until such effective date, and, except as otherwise provided in this subsection, is hereby repealed effective upon such date: *Provided*, That the provisions of section 701 [section 371 of this title] shall become effective on the enactment of this Act, and thereafter the Secretary is authorized hereby to (1) conduct hearings and to promulgate regulations which shall become effective on or after the effective date of this Act as the Secretary shall direct, and (2) designate prior to the effective date of this Act food having common or usual names and exempt such food from the requirements of clause (2) of section 403(i) [section 343(i) of this title] for a reasonable time to permit the formulation, promulgation, and effective application of definitions and standards of identity therefor as provided by section 401 [section 341 of this title]: *Provided further*, That sections 502(j), 505, and 601(a) [sections 352(j), 355, 361(a), respectively of this title], and all other provisions of this Act to the extent that they may relate to the enforcement of such sections, shall take effect on the date of the enactment of this Act, except that in the case of a cosmetic to which the proviso of section 601(a) [section 361(a) of this title], relates, such cosmetic shall not, prior to the ninetieth day after such date of enactment, be deemed adulterated by reason of the failure of its label to bear the legend prescribed in such proviso: *Provided further*, That the Act of March 4, 1923 (U.S.C., 1934 ed., title 21, sec. 6 [section 321a of this title]; 42 Stat. 1500, ch. 268), defining butter and providing a standard therefor; the Act of July 24, 1919 (U.S.C., 1934 ed., title 21, sec. 10 [section 321b of this title]; 41 Stat. 271, ch. 26], defining wrapped meats as in package form; and the amendment to the Food and Drugs Act, section 10A, approved August 27, 1935 (U.S.C. 1934 ed., Sup. III, title 21, sec. 14a [section 372a of this title]) shall remain in force and effect and be applicable to the provisions of this Act."

Short Title of 2021 Amendment

Pub. L. 117–11, §1, Apr. 23, 2021, 135 Stat. 262, provided that: "This Act [amending section 321 and enacting provisions set out as a note under section 321 of this title] may be cited as the 'Food Allergy Safety, Treatment, Education, and Research Act of 2021' or the 'FASTER Act of 2021'."

Pub. L. 116–304, §1, Jan. 5, 2021, 134 Stat. 4915, provided that: "This Act [amending sections 321 and 381 of this title] may be cited as the 'Safeguarding Therapeutics Act'."

Pub. L. 116–290, §1, Jan. 5, 2021, 134 Stat. 4889, provided that: "This Act [amending section 355 of this title and enacting provisions set out as a note under section 355 of this title] may be cited as the 'Orange Book Transparency Act of 2020'."

Short Title of 2018 Amendment

Pub. L. 115–271, §1(a), Oct. 24, 2018, 132 Stat. 3894, provided that: "This Act [see Tables for classification] may be cited as the 'Substance Use–Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act' or the 'SUPPORT for Patients and Communities Act'."

Pub. L. 115–271, title III, §3011, Oct. 24, 2018, 132 Stat. 3935, provided that: "This chapter [chapter 2 (§§3011–3014) of subtitle A of title III of Pub. L. 115–271, enacting sections 360bbb–8d and 384f of this title, amending sections 331 and 381 of this title, and enacting provisions set out as a note under section 331 of this title] may be cited as the 'Stop Counterfeit Drugs by Regulating and Enhancing Enforcement Now Act' or the 'SCREEN Act'."

Pub. L. 115–271, title III, §3021, Oct. 24, 2018, 132 Stat. 3938, provided that: "This chapter [chapter 3 (§§3021, 3022) of subtitle A of title III of Pub. L. 115–271, enacting section 384g of this title and amending sections 331, 335a, and 381 of this title] may be cited as the 'Stop Illicit Drug Importation Act of 2018'."

Pub. L. 115–271, title III, §3031, Oct. 24, 2018, 132 Stat. 3940, provided that: "This chapter [chapter 4 (§§3031, 3032) of subtitle A of title III of Pub. L. 115–271, amending section 355–1 of this title] may be cited as the 'Securing Opioids and Unused Narcotics with Deliberate Disposal and Packaging Act of 2018' or the 'SOUND Disposal and Packaging Act'."

Pub. L. 115–234, §1, Aug. 14, 2018, 132 Stat. 2427, provided that: "This Act [amending sections 348, 352, 360b, 360ccc, 360ccc–1, 379j–11 to 379j–13, 379–21, 379j–22, and 2102 of this title, enacting provisions set out as notes under this section and sections 348, 352, 360b, 360ccc–1, 379j–11 to 379j–13, 379j–21, and 379j–22 of this title, and repealing provisions set out as notes under sections 379j–12, 379j–13, 379j–21, and 379j–22 of this title] may be cited as the 'Animal Drug and Animal Generic Drug User Fee Amendments of 2018'."

Pub. L. 115–234, title I, §101(a), Aug. 14, 2018, 132 Stat. 2428, provided that: "This title [amending sections 379j–11 to 379j–13 of this title, enacting provisions set out as notes under sections 379j–11 to 379j–13 of this title, and repealing provisions set out as notes under sections 379j–12 and 379j–13 of this title] may be cited as the 'Animal Drug User Fee Amendments of 2018'."

Pub. L. 115–234, title II, §201(a), Aug. 14, 2018, 132 Stat. 2432, provided that: "This title [amending sections 379j–21 and 379j–22 of this title, enacting provisions set out as notes under sections 379j–21 and 379j–22 of this title, and repealing provisions set out as notes under sections 379j–21 and 379j–22 of this title] may be cited as the 'Animal Generic Drug User Fee Amendments of 2018'."

Pub. L. 115–176, §1, May 30, 2018, 132 Stat. 1372, provided that: "This Act [enacting section 360bbb–0a of this title and provisions set out as a note under section 360bbb–0a of this title] may be cited as the 'Trickett Wendler, Frank Mongiello, Jordan McLinn, and Matthew Bellina Right to Try Act of 2017'."

Short Title of 2017 Amendment

Pub. L. 115–52, §1, Aug. 18, 2017, 131 Stat. 1005, provided that: "This Act [see Tables for classification] may be cited as the 'FDA Reauthorization Act of 2017'."

Pub. L. 115–52, title I, §101(a), Aug. 18, 2017, 131 Stat. 1006, provided that: "This title [amending sections 379h, 379h–2, and 379j–12 of this title, enacting provisions set out as notes under sections 379g and 379h–2 of this title, and repealing provisions set out as notes under sections 379g and 379h–2 of this title] may be cited as the 'Prescription Drug User Fee Amendments of 2017'."

Pub. L. 115–52, title II, §201(a), Aug. 18, 2017, 131 Stat. 1013, provided that: "This title [amending sections 360d, 360e, 360m, 379d–3, 379i, 379j, 379j–1, and 379k–1 of this title, enacting provisions set out as notes under sections 379i and 379j–1 of this title, and repealing provisions set out as a note under section 379i of this title] may be cited as the 'Medical Device User Fee Amendments of 2017'."

Pub. L. 115–52, title III, §301(a), Aug. 18, 2017, 131 Stat. 1020, provided that: "This title [amending sections 379j–41 to 379j–43 of this title, enacting provisions set out as notes under sections 379j–41 and 379j–43 of this title, and repealing provisions set out as notes under sections 379j–41 and 379j–43 of this title] may be cited as the 'Generic Drug User Fee Amendments of 2017'."

Pub. L. 115–52, title IV, §401(a), Aug. 18, 2017, 131 Stat. 1028, provided that: "This title [amending sections 379j–51 to 379j–53 of this title, enacting provisions set out as notes under sections 379j–51 and 379j–53 of this title, and repealing provisions set out as notes under sections 379j–51 and 379j–53 of this title] may be cited as the 'Biosimilar User Fee Amendments of 2017'."

Short Title of 2016 Amendment

Pub. L. 114–229, §1, Sept. 30, 2016, 130 Stat. 943, provided that: "This Act [amending section 360ff of this title and enacting provisions set out as a note under section 360ff of this title] may be cited as the 'Advancing Hope Act of 2016'."

Pub. L. 114–146, §1, Apr. 19, 2016, 130 Stat. 357, provided that: "This Act [amending section 360n of this title] may be cited as the 'Adding Zika Virus to the FDA Priority Review Voucher Program Act'."

Short Title of 2015 Amendment

Pub. L. 114–114, §1, Dec. 28, 2015, 129 Stat. 3129, provided that: "This Act [amending section 331 of this title and enacting provisions set out as notes under section 331 of this title] may be cited as the 'Microbead-Free Waters Act of 2015'."

Pub. L. 114–89, §1, Nov. 25, 2015, 129 Stat. 698, provided that: "This Act [amending sections 355, 360b, 360ccc to 360ccc–2, 811, 823, and 953 of this title, section 156 of Title 35, Patents, and section 262 of Title 42, The Public

Health and Welfare] may be cited as the 'Improving Regulatory Transparency for New Medical Therapies Act'."

Short Title of 2014 Amendment

Pub. L. 113–233, §1, Dec. 16, 2014, 128 Stat. 2127, provided that: "This Act [amending section 360n of this title] may be cited as the 'Adding Ebola to the FDA Priority Review Voucher Program Act'."

Pub. L. 113–195, §1, Nov. 26, 2014, 128 Stat. 2035, provided that: "This Act [enacting part I of subchapter V of this chapter and provisions set out as a note under section 360fff of this title] may be cited as the 'Sunscreen Innovation Act'."

Short Title of 2013 Amendment

Pub. L. 113–54, §1, Nov. 27, 2013, 127 Stat. 587, provided that: "This Act [enacting part H of subchapter V and subpart 9 of part C of subchapter VII of this chapter and sections 353a–1 and 353b of this title, amending sections 331, 333, 352 to 353a, 353b, 353c, and 360eee–1 of this title, and enacting provisions set out as notes under this section and sections 331, 333, and 353 of this title] may be cited as the 'Drug Quality and Security Act'."

Pub. L. 113–54, title I, §101, Nov. 27, 2013, 127 Stat. 587, provided that: "This Act [probably means "This title", enacting subpart 9 of part C of subchapter VII of this chapter and sections 353a–1 and 353b of this title, amending sections 331, 352, 353a, 353b, and 353c of this title, and enacting provisions set out as notes under this section and section 331 of this title] may be cited as the 'Compounding Quality Act'."

Pub. L. 113–54, title II, §201, Nov. 27, 2013, 127 Stat. 599, provided that: "This title [enacting part H of subchapter V of this chapter, amending sections 331, 333, 352, 353, and 360eee–1 of this title, and enacting provisions set out as notes under sections 331, 333, and 353 of this title] may be cited as the 'Drug Supply Chain Security Act'."

Pub. L. 113–14, §1, June 13, 2013, 127 Stat. 451, provided that: "This Act [amending sections 379j–11 to 379j–13, 379j–21, and 379j–22 of this title, enacting provisions set out as notes under this section and sections 379j–11 to 379j–13, 379j–21, and 379j–22 of this title, and repealing provisions set out as notes under sections 379j–11, 379j–21, and 379j–22 of this title] may be cited as the 'Animal Drug and Animal Generic Drug User Fee Reauthorization Act of 2013'."

Pub. L. 113–14, title I, §101(a), June 13, 2013, 127 Stat. 451, provided that: "This title [amending sections 379j–11 to 379j–13 of this title, enacting provisions set out as notes under sections 379j–11 to 379j–13 of this title, and repealing provisions set out as notes under section 379j–11 of this title] may be cited as the 'Animal Drug User Fee Amendments of 2013'."

Pub. L. 113–14, title II, §201(a), June 13, 2013, 127 Stat. 464, provided that: "This title [amending sections 379j–21 and 379j–22 of this title, enacting provisions set out as notes under sections 379j–21 and 379j–22 of this title, and repealing provisions set out as notes under sections 379j–21 and 379j–22 of this title] may be cited as the 'Animal Generic Drug User Fee Amendments of 2013'."

Short Title of 2012 Amendment

Pub. L. 112–193, §1, Oct. 5, 2012, 126 Stat. 1443, provided that: "This Act [amending sections 352, 379j, and 379j–42 of this title and enacting provisions set out as a note under section 379j–42 of this title] may be cited as the 'FDA User Fee Corrections Act of 2012'."

Pub. L. 112–144, §1, July 9, 2012, 126 Stat. 993, provided that: "This Act [see Tables for classification] may be cited as the 'Food and Drug Administration Safety and Innovation Act'."

Pub. L. 112–144, title I, §101(a), July 9, 2012, 126 Stat. 996, provided that: "This title [amending sections 379g, 379h, and 379h–2 of this title, enacting provisions set out as notes under sections 379g and 379h–2 of this title, and repealing provisions set out as notes under sections 379g and 379h–2 of this title] may be cited as the 'Prescription Drug User Fee Amendments of 2012'."

Pub. L. 112–144, title II, §201(a), July 9, 2012, 126 Stat. 1002, provided that: "This title [enacting section 379d–3 of this title, amending sections 360e, 379i, 379j, and 379j–1 of this title, enacting provisions set out as notes under section 379i of this title, and repealing provisions set out as notes under section 379i of this title] may be cited as the 'Medical Device User Fee Amendments of 2012'."

Pub. L. 112–144, title III, §301(a), July 9, 2012, 126 Stat. 1008, provided that: "This title [enacting sections 379d–4 and 379j–41 to 379j–43 of this title, amending sections 352 and 379d–3 of this title, and enacting provisions set out as notes under sections 379j–41 and 379j–43 of this title] may be cited as the 'Generic Drug User Fee Amendments of 2012'."

Pub. L. 112–144, title IV, §401(a), July 9, 2012, 126 Stat. 1026, provided that: "This title [enacting sections 379j–51 to 379j–53 of this title, amending sections 379d–4 and 379g of this title, and enacting provisions set out as notes under sections 379g, 379j–51, and 379j–53 of this title] may be cited as the 'Biosimilar User Fee Act of 2012'."

Short Title of 2009 Amendment

Pub. L. 111–31, div. A, §1(a), June 22, 2009, 123 Stat. 1776, provided that: "This division [enacting subchapter IX of this chapter, amending sections 321, 331, 333, 334, 355, 360m, 372 to 374, 375, 379a, 381, 391 to 393, 394 to 399a, and 679 of this title and sections 1333, 1334, 4402, 4406, and 4408 of Title 15, Commerce and Trade, enacting provisions set out as notes under sections 331, 333, 387, and 387c of this title and sections 1333 and 4402 of Title 15, and amending provisions set out as notes under this section and section 392 of this title] may be cited as the 'Family Smoking Prevention and Tobacco Control Act'."

Short Title of 2008 Amendment

Pub. L. 110–316, title I, §101(a), Aug. 14, 2008, 122 Stat. 3509, provided that: "This title [enacting section 379j–13 of this title, amending sections 360b, 379j–11, and 379j–12 of this title, and enacting provisions set out as notes under sections 360b and 379j–11 of this title] may be cited as the 'Animal Drug User Fee Amendments of 2008'."

Pub. L. 110–316, title II, §201(a), Aug. 14, 2008, 122 Stat. 3515, provided that: "This title [enacting sections 379j–21 and 379j–22 of this title, amending sections 379k, 379l, and 379o of this title, and enacting provisions set out as notes under sections 379j–21 and 379j–22 of this title] may be cited as the 'Animal Generic Drug User Fee Act of 2008'."

Short Title of 2007 Amendment

Pub. L. 110–85, §1, Sept. 27, 2007, 121 Stat. 823, provided that: "This Act [enacting part I of subchapter VII of this chapter, chapter 26 of this title, sections 350f, 353b, 355–1, 355d, 355e, 360a, 360e–1, 360n, 360bbb–5, 360bbb–6, 379d–1, 379d–2, 379h–1, 379h–2, 379j–1, and 399a of this title, and section 247d–5a of Title 42, The Public Health and Welfare, amending sections 321, 331, 333, 334, 352, 355, 355a, 355c, 360, 360e, 360i, 360j, 360l, 360m, 360ee, 374, 379g, 379h, 379i, 379j, 379j–11, 379l, 381, and 393a of this title and sections 247d–3b, 262, 282, 283, 283a–2, 283a–3, 284m, 285g–10, 288–6, and 290b of Title 42, enacting provisions set out as notes under this section and sections 331, 350f, 352, 355, 355a, 355c, 360j, 379g, 379h, 379h–2, 379i, and 2110 of this title and section 282 of Title 42, and amending provisions set out as notes under section 284m of Title 42] may be cited as the 'Food and Drug Administration Amendments Act of 2007'."

Pub. L. 110–85, title I, §101(a), Sept. 27, 2007, 121 Stat. 825, provided that: "This title [enacting sections 379h–1 and 379h–2 of this title, amending sections 379g, 379h, and 379j–11 of this title, and enacting provisions set out as notes under sections 379g, 379h, and 379h–2 of this title] may be cited as the 'Prescription Drug User Fee Amendments of 2007'."

Pub. L. 110–85, title II, §201(a), Sept. 27, 2007, 121 Stat. 842, provided that: "This title [enacting section 379j–1 of this title, amending sections 333, 360, 360i, 360m, 374, 379i, and 379j of this title, and enacting provisions set out as notes under section 379i of this title] may be cited as the 'Medical Device User Fee Amendments of 2007'."

Pub. L. 110–85, title III, §301, Sept. 27, 2007, 121 Stat. 859, provided that: "This title [enacting section 360e–1 of this title, amending sections 360j, 360l, and 393a of this title and section 282 of Title 42, The Public Health and Welfare, enacting provisions set out as notes under section 360j of this title and section 282 of Title 42, and amending provisions set out as a note under section 284m of Title 42] may be cited as the 'Pediatric Medical Device Safety and Improvement Act of 2007'."

Pub. L. 110–85, title IV, §401, Sept. 27, 2007, 121 Stat. 866, provided that: "This title [enacting section 355d of this title, amending section 355c of this title, and enacting provisions set out as a note under section 355c of this title] may be cited as the 'Pediatric Research Equity Act of 2007'."

Pub. L. 110–85, title V, §501, Sept. 27, 2007, 121 Stat. 876, provided that: "This title [amending section 355a of this title and sections 284m, 285g–10, 288–6, and 290b of Title 42, The Public Health and Welfare, enacting provisions set out as a note under section 355a of this title, and amending provisions set out as a note under section 284m of Title 42] may be cited as the 'Best Pharmaceuticals for Children Act of 2007'."

Short Title of 2006 Amendment

Pub. L. 109–462, §1, Dec. 22, 2006, 120 Stat. 3469, provided that: "This Act [enacting sections 379aa and 379aa–1 of this title, amending sections 331, 343, 352, and 381 of this title, and enacting provisions set out as notes under sections 331, 343, 352, 379aa, and 381 of this title] may be cited as the 'Dietary Supplement and Nonprescription Drug Consumer Protection Act'."

Short Title of 2005 Amendments

Pub. L. 109–59, title VII, §7201, Aug. 10, 2005, 119 Stat. 1911, provided that: "This subtitle [subtitle B (§§7201–7204) of title VII of Pub. L. 109–59, enacting section 350e of this title, amending sections 331, 342, and 373 of this title and section 5701 of Title 49, Transportation, omitting sections 5702 to 5714 of Title 49, and enacting

provisions set out as a note under section 331 of this title] may be cited as the 'Sanitary Food Transportation Act of 2005'."

Pub. L. 109–43, §1, Aug. 1, 2005, 119 Stat. 439, provided that: "This Act [amending sections 352 and 379j of this title, enacting provisions set out as a note under section 352 of this title, and amending provisions set out as notes under sections 352 and 379i of this title] may be cited as the 'Medical Device User Fee Stabilization Act of 2005'."

Short Title of 2004 Amendments

Pub. L. 108–282, title I, §101, Aug. 2, 2004, 118 Stat. 891, provided that: "This title [enacting sections 360ccc to 360ccc–2 of this title, amending sections 321, 331, 352, 353, 354, and 360b of this title, enacting provisions set out as notes under sections 360ccc and 393 of this title, and amending provisions set out as a note under section 360b of this title] may be cited as the 'Minor Use and Minor Species Animal Health Act of 2004'."

Pub. L. 108–282, title II, §201, Aug. 2, 2004, 118 Stat. 905, provided that: "This title [enacting section 374a of this title and section 242r of Title 42, The Public Health and Welfare, amending sections 321, 343, and 343–1 of this title, and enacting provisions set out as notes under sections 321 and 343 of this title and sections 243 and 300d–2 of Title 42] may be cited as the 'Food Allergen Labeling and Consumer Protection Act of 2004'."

Pub. L. 108–214, §1, Apr. 1, 2004, 118 Stat. 572, provided that: "This Act [amending sections 331, 352, 360, 360e, 374, 379i, and 379j of this title and provisions set out as notes under sections 352, 360l, and 379j of this title] may be cited as the 'Medical Devices Technical Corrections Act'."

Short Title of 2003 Amendments

Pub. L. 108–155, §1, Dec. 3, 2003, 117 Stat. 1936, provided that: "This Act [enacting section 355c of this title, amending sections 355, 355a, and 355b of this title and sections 262 and 284m of Title 42, The Public Health and Welfare, enacting provisions set out as a note under section 355c of this title, and amending provisions set out as notes under section 355a of this title and section 284m of Title 42] may be cited as the 'Pediatric Research Equity Act of 2003'."

Pub. L. 108–130, §1, Nov. 18, 2003, 117 Stat. 1361, provided that: "This Act [enacting sections 379j–11 and 379j–12 of this title and provisions set out as notes under section 379j–11 of this title] may be cited as the 'Animal Drug User Fee Act of 2003'."

Short Title of 2002 Amendments

Pub. L. 107–281, §1, Nov. 6, 2002, 116 Stat. 1992, provided that: "This Act [amending sections 360cc and 360ee of this title and enacting provisions set out as a note under section 360ee of this title] may be cited as the 'Rare Diseases Orphan Product Development Act of 2002'."

Pub. L. 107–250, §1(a), Oct. 26, 2002, 116 Stat. 1588, provided that: "This Act [enacting sections 379i and 379j of this title and section 289g–3 of Title 42, The Public Health and Welfare, amending sections 321, 331, 333, 335a, 352, 353, 360, 360c, 360e, 360m, and 374 of this title, and enacting provisions set out as notes under sections 352, 360e, 360j, 360l, 379i, and 379j of this title and section 289g–3 of Title 42] may be cited as the 'Medical Device User Fee and Modernization Act of 2002'."

Pub. L. 107–188, title V, §501, June 12, 2002, 116 Stat. 687, provided that: "This subtitle [subtitle A (§§501–509) of title V of Pub. L. 107–188, amending sections 356b, 379g, and 379h of this title and enacting provisions set out as notes under sections 356b and 379g of this title] may be cited as the 'Prescription Drug User Fee Amendments of 2002'."

Pub. L. 107–109, §1, Jan. 4, 2002, 115 Stat. 1408, provided that: "This Act [enacting sections 355b and 393a of this title and section 284m of Title 42, The Public Health and Welfare, amending sections 321, 355, 355a, and 379h of this title and sections 282, 284k, 284l, 285a–2, and 290b of Title 42, and enacting provisions set out as notes under sections 355 and 355a of this title and sections 284m and 289 of Title 42] may be cited as the 'Best Pharmaceuticals for Children Act'."

Short Title of 2000 Amendment

Pub. L. 106–387, §1(a) [title VII, §745(a)], Oct. 28, 2000, 114 Stat. 1549, 1549A-35, provided that: "This section [enacting section 384 of this title, amending sections 331, 333, and 381 of this title, and enacting provisions set out as a note under section 384 of this title] may be cited as the 'Medicine Equity and Drug Safety Act of 2000'."

Pub. L. 106–387, §1(a) [title VII, §746(a)], Oct. 28, 2000, 114 Stat. 1549, 1549A-40, provided that: "This section [amending section 381 of this title and enacting provisions set out as a note under section 381 of this title] may be cited as the 'Prescription Drug Import Fairness Act of 2000'."

Short Title of 1998 Amendment

Pub. L. 105–324, §1, Oct. 30, 1998, 112 Stat. 3035, provided that: "This Act [amending sections 321 and 346a of this title] may be cited as the 'Antimicrobial Regulation Technical Corrections Act of 1998'."

Short Title of 1997 Amendment

Pub. L. 105–115, §1(a), Nov. 21, 1997, 111 Stat. 2296, provided that: "This Act [enacting sections 343–3, 353a, 355a, 356 to 356c, 360m, 360aaa to 360aaa–6, 360bbb to 360bbb–2, 379k, 379l, 379o, 379r, 379s, 379v, 396, and 397 of this title and sections 247b–8 and 299a–3 of Title 42, The Public Health and Welfare, amending sections 321, 331, 334, 335a, 343, 348, 351 to 353, 355, 360, 360b to 360e, 360g, 360i, 360j, 360l, 360aa to 360cc, 360ee, 371, 374, 379a, 379g, 379h, 381 to 383, 393, and 802 of this title, section 45C of Title 26, Internal Revenue Code, section 156 of Title 35, Patents, section 8126 of Title 38, Veterans' Benefits, and sections 262, 263a, and 282 of Title 42, repealing sections 356 and 357 of this title, and enacting provisions set out as notes under sections 321, 348, 351, 352, 353a, 355 to 356b, 360i, 360l, 360m, 360aaa, 371, 379g, 379h, 379k, and 393 of this title and sections 247b–8 and 282 of Title 42] may be cited as the 'Food and Drug Administration Modernization Act of 1997'."

Short Title of 1996 Amendments

Pub. L. 104–250, §1(a), Oct. 9, 1996, 110 Stat. 3151, provided that: "This Act [enacting section 354 of this title, amending sections 331, 353, and 360b of this title, and enacting provisions set out as notes under section 360b of this title] may be cited as the 'Animal Drug Availability Act of 1996'."

Pub. L. 104–170, title IV, §401(a), Aug. 3, 1996, 110 Stat. 1513, provided that: "This title [amending sections 321, 331, 333, 342, and 346a of this title] may be cited as the 'Food Quality Protection Act of 1996'."

[Another "Food Quality Protection Act of 1996", was enacted by Pub. L. 104–170, §1, 110 Stat. 1489, which is set out as a note under section 136 of Title 7, Agriculture.]

Pub. L. 104–134, title II, §2101(a), Apr. 26, 1996, 110 Stat. 1321–313, provided that: "This chapter [chapter 1A (§§2101–2105) of title II of Pub. L. 104–134, enacting section 382 of this title and amending sections 331 and 381 of this title and section 262 of Title 42, The Public Health and Welfare] may be cited as the 'FDA Export Reform and Enhancement Act of 1996'."

Short Title of 1994 Amendments

Pub. L. 103–417, §1(a), Oct. 25, 1994, 108 Stat. 4325, provided that: "This Act [enacting sections 343–2 and 350b of this title and section 287c–11 of Title 42, The Public Health and Welfare, amending sections 321, 331, 342, 343, and 350 of this title and section 281 of Title 42, and enacting provisions set out as notes under sections 321 and 343 of this title] may be cited as the 'Dietary Supplement Health and Education Act of 1994'."

Pub. L. 103–396, §1, Oct. 22, 1994, 108 Stat. 4153, provided that: "This Act [amending sections 331, 343–1, 360b, and 371 of this title and enacting provisions set out as notes under section 360b of this title] may be cited as the 'Animal Medicinal Drug Use Clarification Act of 1994'."

Short Title of 1993 Amendment

Pub. L. 103–80, §1, Aug. 13, 1993, 107 Stat. 773, provided that: "This Act [amending sections 321, 331 to 333, 334, 335b, 341 to 343, 346a, 350a, 352, 355 to 358, 360b to 360e, 360i, 360cc, 360hh to 360ss, 361, 371, 372, 373, 374, 376, 379e, and 381 of this title and section 263b of Title 42, The Public Health and Welfare, and enacting provisions set out as a note under section 343 of this title] may be cited as the 'Nutrition Labeling and Education Act Amendments of 1993'."

Short Title of 1992 Amendments

Pub. L. 102–571, title I, §101(a), Oct. 29, 1992, 106 Stat. 4491, provided that: "This title [enacting sections 379g and 379h of this title, transferring sections 372a, 376, and 379c of this title to sections 376, 379e and 379f, respectively, of this title, amending sections 321, 331, 342, 343, 346a, 351, 352, 360j, 361, 362, 453, 601, and 1033 of this title, enacting provisions set out as notes under section 379g of this title, and amending provisions set out as notes under sections 343 and 343–1 of this title] may be cited as the 'Prescription Drug User Fee Act of 1992'."

Pub. L. 102–571, title II, §201, Oct. 29, 1992, 106 Stat. 4500, provided that: "This title [enacting provisions set out as notes under sections 343 and 393 of this title and amending provisions set out as notes under sections 343 and 343–1 of this title] may be cited as the 'Dietary Supplement Act of 1992'."

Pub. L. 102–353, §1(a), Aug. 26, 1992, 106 Stat. 941, provided that: "This Act [amending sections 333, 353, and 381 of this title and enacting provisions set out as a note under section 353 of this title] may be cited as the 'Prescription Drug Amendments of 1992'."

Pub. L. 102–300, §1(a), June 16, 1992, 106 Stat. 238, provided that: "This Act [amending sections 321, 331, 334, 346a, 352, 353, 356, 357, 360c, 360d, 360g to 360i, 360l, 360mm, 371 to 372a, 376, and 381 of this title and section

262 of Title 42, The Public Health and Welfare and enacting and amending provisions set out as notes under section 360i of this title] may be cited as the 'Medical Device Amendments of 1992'."

Pub. L. 102–282, §1(a), May 13, 1992, 106 Stat. 149, provided that: "This Act [enacting sections 335a to 335c of this title, amending sections 321, 336, 337, and 355 of this title, and enacting provisions set out as notes under section 335a of this title] may be cited as the 'Generic Drug Enforcement Act of 1992'."

Short Title of 1990 Amendments

Pub. L. 101–635, §1(a), Nov. 28, 1990, 104 Stat. 4583, provided that: "This Act [enacting sections 379b to 379d and 394 of this title] may be cited as the 'Food and Drug Administration Revitalization Act'."

Pub. L. 101–629, §1(a), Nov. 28, 1990, 104 Stat. 4511, provided that: "This Act [enacting sections 360l and 383 of this title, amending sections 321, 333, 351, 353, and 360c to 360j of this title and sections 263b to 263n of Title 42, The Public Health and Welfare, redesignating sections 263b to 263n of Title 42 as sections 360gg to 360ss of this title, repealing section 263b of Title 42, and enacting provisions set out as notes under sections 333, 360c, 360i, 360j, 360hh and 383 of this title] may be cited as the 'Safe Medical Devices Act of 1990'."

Pub. L. 101–535, §1(a), Nov. 8, 1990, 104 Stat. 2353, provided that: "This Act [enacting section 343–1 of this title, amending sections 321, 337, 343, 345, and 371 of this title, and enacting provisions set out as notes under sections 343 and 343–1 of this title] may be cited as the 'Nutrition Labeling and Education Act of 1990'."

Short Title of 1988 Amendments

Pub. L. 100–670, §1(a), Nov. 16, 1988, 102 Stat. 3971, provided that: "This Act [amending sections 321, 353, and 360b of this title, section 2201 of Title 28, Judiciary and Judicial Procedure, and sections 156 and 271 of Title 35, Patents, and enacting provisions set out as notes under section 360b of this title] may be cited as the 'Generic Animal Drug and Patent Term Restoration Act'."

Pub. L. 100–607, title V, §501, Nov. 4, 1988, 102 Stat. 3120, provided that: "This title [enacting section 393 of this title, amending sections 5315 and 5316 of Title 5, Government Organization and Employees, and enacting provisions set out as notes under section 393 of this title] may be cited as the 'Food and Drug Administration Act of 1988'."

Pub. L. 100–293, §1(a), Apr. 22, 1988, 102 Stat. 95, provided that: "This Act [amending sections 331, 333, 353, and 381 of this title and enacting provisions set out as notes under section 353 of this title] may be cited as the 'Prescription Drug Marketing Act of 1987'."

Pub. L. 100–290, §1, Apr. 18, 1988, 102 Stat. 90, provided that: "This Act [amending sections 360bb and 360ee of this title, enacting provisions set out as a note under section 360aa of this title, and amending provisions set out as a note under section 236 of Title 42, The Public Health and Welfare] may be cited as the 'Orphan Drug Amendments of 1988'."

Short Title of 1986 Amendment

Pub. L. 99–660, title I, §101(a), Nov. 14, 1986, 100 Stat. 3743, provided that: "This title [enacting section 382 of this title, amending sections 241 and 262 of Title 42, The Public Health and Welfare, and enacting provisions set out as notes under section 333 of this title and section 262 of Title 42] may be cited as the 'Drug Export Amendments Act of 1986'."

Short Title of 1985 Amendment

Pub. L. 99–91, §1, Aug. 15, 1985, 99 Stat. 387, provided that: "This Act [amending sections 360aa to 360cc, and 360ee of this title, and sections 295g–1 and 6022 of Title 42, The Public Health and Welfare, and enacting provisions set out as notes under section 360aa of this title and section 236 of Title 42] may be cited as the 'Orphan Drug Amendments of 1985'."

Short Title of 1984 Amendment

Pub. L. 98–417, §1, Sept. 24, 1984, 98 Stat. 1585, provided: "That this Act [enacting section 156 of Title 35, Patents, amending sections 355 and 360cc of this title, sections 68b, 68c, and 70b of Title 15, Commerce and Trade, section 2201 of Title 28, Judiciary and Judicial Procedure, and sections 271 and 282 of Title 35, and enacting provisions set out as notes under section 355 of this title and section 68b of Title 15] may be cited as the 'Drug Price Competition and Patent Term Restoration Act of 1984'."

Short Title of 1983 Amendments

Pub. L. 98–22, §1, Apr. 22, 1983, 97 Stat. 173, provided: "That this Act [amending provisions set out as a note under section 348 of this title] may be cited as the 'Saccharin Study and Labeling Act Amendment of 1983'."

Pub. L. 97–414, §1(a), Jan. 4, 1983, 96 Stat. 2049, provided that: "This Act [enacting part B of subchapter V of chapter 9 of this title, section 44H of Title 26, Internal Revenue Code, section 155 of Title 35, Patents, and sections 236, 255, and 298b–4 of Title 42, The Public Health and Welfare, amending sections 1274, 1472, 2055, 2060, 2064, 2068, and 2080 of Title 15, Commerce and Trade, section 904 of this title, sections 280C and 6096 of Title 26, and sections 209, 231, 242k, 242m, 243, 254c, 254j, 254m, 254o, 254p, 256, 294j, 295g–1, 295g–4, 295h, 295h–1a, 297–1, 300, 300a–1, 300a–3, 300b, 300e–1, 300m, 300n–5, 300q–2, 300u–5, 300w–3, 300x–1, 300x–4, 300y–11, 4577, and 4588 of Title 42, enacting provisions set out as notes under section 360aa of this title, section 44H of Title 26, and sections 241, 255, 287i, and 300x–1 of Title 42, and repealing provisions set out as a note under section 300t–11 of Title 42] may be cited as the 'Orphan Drug Act'."

Short Title of 1981 Amendment

Pub. L. 97–42, §1, Aug. 14, 1981, 95 Stat. 946, provided: "That this Act [amending provisions set out as a note under section 348 of this title] may be cited as the 'Saccharin Study and Labeling Act Amendment of 1981'."

Short Title of 1980 Amendment

Pub. L. 96–359, §1, Sept. 26, 1980, 94 Stat. 1190, provided: "That this Act [enacting section 350a of this title, amending sections 321, 331, 374, 830, 841 to 843, and 873 of this title, and enacting a provision set out as a note under section 350a of this title] may be cited as the 'Infant Formula Act of 1980'."

Short Title of 1977 Amendment

Pub. L. 95–203, §1, Nov. 23, 1977, 91 Stat. 1451, provided that: "This Act [enacting section 343a of this title, amending sections 321 and 343 of this title, enacting provisions set out as notes under sections 343 and 348 of this title, and amending provisions set out as notes under sections 218 and 289l–1 of Title 42, The Public Health and Welfare] may be cited as the 'Saccharin Study and Labeling Act'."

Short Title of 1976 Amendment

Pub. L. 94–295, §1(a), May 28, 1976, 90 Stat. 539, provided that: "This Act [enacting sections 360c to 360k, 379, and 379a of this title and section 3512 of Title 42, The Public Health and Welfare, and amending sections 321, 331, 334, 351, 352, 358, 360, 374, 379e, and 381 of this title and section 55 of Title 15, Commerce and Trade] may be cited as the 'Medical Device Amendments of 1976'."

Short Title of 1972 Amendment

Pub. L. 92–387, §1, Aug. 16, 1972, 86 Stat. 559, provided that: "This Act [amending sections 331, 335, and 360 of this title and enacting provisions set out as notes under section 360 of this title] may be cited as the 'Drug Listing Act of 1972'."

Short Title of 1968 Amendments

Pub. L. 90–602, §1, Oct. 18, 1968, 82 Stat. 1173, provided that: "This Act [enacting provisions now comprising part C (§§360hh–360ss) of subchapter III of this chapter and provisions set out as notes under section 360hh of this title] may be cited as the 'Radiation Control for Health and Safety Act of 1968'."

Pub. L. 90–399, §1, July 13, 1968, 82 Stat. 342, provided: "That this Act [enacting section 360b of this title, amending sections 321, 331, 342, 351, 352, 357, 381, and 392 of this title, and enacting provisions set out as a note under section 360b of this title] may be cited as the 'Animal Drug Amendments of 1968'."

Short Title of 1965 Amendment

Pub. L. 89–74, §1, July 15, 1965, 79 Stat. 226, provided: "That this Act [amending sections 321, 331, 333, 334, 360, and 372 of this title and section 1114 of Title 18, Crimes and Criminal Procedure, and enacting provisions set out as notes under sections 321 and 352 of this title] may be cited as the 'Drug Abuse Control Amendments of 1965'."

Short Title of 1962 Amendment

Pub. L. 87–781, §1, Oct. 10, 1962, 76 Stat. 780, provided in part that such Act [enacting sections 358 to 360 of this title, amending sections 321, 331, 332, 348, 351 to 353, 355, 357, 372, 374, 379e, and 381 of this title, and enacting provisions set out as notes under sections 321, 331, 332, 352, 355, 358, 360, and 374 of this title] may be cited as the 'Drug Amendments of 1962'."

Short Title of 1960 Amendment

Pub. L. 86–618, §1, July 12, 1960, 74 Stat. 397, provided: "That this Act [amending sections 321, 331, 333, 342, 346, 351, 352, 361, 362, 371, and 379e of this title, repealing sections 354 and 364 of this title, and enacting notes set out under this section] may be cited as the 'Color Additive Amendments of 1960'."

Short Title of 1958 Amendment

Pub. L. 85–929, §1, Sept. 6, 1958, 72 Stat. 1784, provided: "That this Act [amending sections 321, 331, 342, 346, 348 of this title and section 210 of Title 42, The Public Health and Welfare, and enacting provisions set out as notes under sections 321, 342, and 451 of this title] may be cited as the 'Food Additives Amendment of 1958'."

Severability

Pub. L. 113–54, title I, §106(b), Nov. 27, 2013, 127 Stat. 598, provided that: "If any provision of this Act [see Short Title of 2013 Amendment note above] (including the amendments made by this Act) is declared unconstitutional, or the applicability of this Act (including the amendments made by this Act) to any person or circumstance is held invalid, the constitutionality of the remainder of this Act (including the amendments made by this Act) and the applicability thereof to other persons and circumstances shall not be affected."

Pub. L. 110–85, title XI, §1105, Sept. 27, 2007, 121 Stat. 975, provided that: "If any provision of this Act [see Short Title of 2007 Amendment note above], an amendment made [by] this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstances shall not be affected thereby."

Hazardous Substances

Federal Hazardous Substances Act as not modifying this chapter, see Pub. L. 86–613, §18, July 12, 1960, 74 Stat. 380, set out as an Effect Upon Federal and State Laws note under section 1261 of Title 15, Commerce and Trade.

SUBCHAPTER II—DEFINITIONS

§321. Definitions; generally

For the purposes of this chapter—

(a)(1) The term "State", except as used in the last sentence of section 372(a) of this title, means any State or Territory of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(2) The term "Territory" means any Territory or possession of the United States, including the District of Columbia, and excluding the Commonwealth of Puerto Rico and the Canal Zone.

(b) The term "interstate commerce" means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body.

(c) The term "Department" means Department of Health and Human Services.

(d) The term "Secretary" means the Secretary of Health and Human Services.

(e) The term "person" includes individual, partnership, corporation, and association.

(f) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

(g)(1) The term "drug" means (A) articles recognized in the official United States Pharmacopoeia,[1] official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clause (A), (B), or (C). A food or dietary supplement for which a claim, subject to sections 343(r)(1)(B) and 343(r)(3) of this title or sections 343(r)(1)(B) and 343(r)(5)(D) of this title, is made in accordance with the requirements of section 343(r) of this title is not a drug solely because the label or the labeling contains such a claim. A food, dietary ingredient, or dietary supplement for which a truthful and not misleading statement is made in accordance with section 343(r)(6) of this title is not a drug under clause (C) solely because the label or the labeling contains such a statement.

(2) The term "counterfeit drug" means a drug which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, or device, or any likeness thereof, of a drug manufacturer, processor, packer, or distributor other than the person or persons who in fact manufactured, processed, packed, or distributed such drug and which thereby falsely purports or is represented to be the product of, or to have been packed or distributed by, such other drug manufacturer, processor, packer, or distributor.

(h)(1) The term "device" (except when used in paragraph (n) of this section and in sections 331(i), 343(f), 352(c), and 362(c) of this title) means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, which is—

(A) recognized in the official National Formulary, or the United States Pharmacopeia, or any supplement to them,

(B) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or

(C) intended to affect the structure or any function of the body of man or other animals, and

which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of its primary intended purposes. The term "device" does not include software functions excluded pursuant to section 360j(o) of this title.

(2) The term "counterfeit device" means a device which, or the container, packaging, or labeling of which, without authorization, bears a trademark, trade name, or other identifying mark or imprint, or any likeness thereof, or is manufactured using a design, of a device manufacturer, processor, packer, or distributor other than the person or persons who in fact manufactured, processed, packed, or distributed such device and which thereby falsely purports or is represented to be the product of, or to have been packed or distributed by, such other device manufacturer, processor, packer, or distributor.

(i) The term "cosmetic" means (1) articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such articles; except that such term shall not include soap.

(j) The term "official compendium" means the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, official National Formulary, or any supplement to any of them.

(k) The term "label" means a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

(l) The term "immediate container" does not include package liners.

(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

(n) If an article is alleged to be misbranded because the labeling or advertising is misleading, then in determining whether the labeling or advertising is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling or advertising fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling or advertising relates under the conditions of use prescribed in the labeling or advertising thereof or under such conditions of use as are customary or usual.

(o) The representation of a drug, in its labeling, as an antiseptic shall be considered to be a representation that it is a germicide, except in the case of a drug purporting to be, or represented as, an antiseptic for inhibitory use as a wet dressing, ointment, dusting powder, or such other use as involves prolonged contact with the body.

(p) The term "new drug" means—

(1) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof, except that such a drug not so recognized shall not be deemed to be a "new drug" if at any time prior to June 25, 1938, it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use; or

(2) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug, as a result of investigations to determine its safety and effectiveness for use under such conditions, has become so recognized, but which has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions.

(q)(1)(A) Except as provided in clause (B), the term "pesticide chemical" means any substance that is a pesticide within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136 et seq.], including all active and inert ingredients of such pesticide. Notwithstanding any other provision of law, the term "pesticide" within such meaning includes ethylene oxide and propylene oxide when such substances are applied on food.

(B) In the case of the use, with respect to food, of a substance described in clause (A) to prevent, destroy, repel, or mitigate microorganisms (including bacteria, viruses, fungi, protozoa, algae, and slime), the following applies for purposes of clause (A):

(i) The definition in such clause for the term "pesticide chemical" does not include the substance if the substance is applied for such use on food, or the substance is included for such use in water that comes into contact with the food, in the preparing, packing, or holding of the food for commercial purposes. The substance is not excluded under this subclause from such definition if the substance is ethylene oxide or propylene oxide, and is applied for such use on food. The substance is not so excluded if the substance is applied for such use on a raw agricultural commodity, or the substance is included for such use in water that comes into contact with the commodity, as follows:

(I) The substance is applied in the field.

(II) The substance is applied at a treatment facility where raw agricultural commodities are the only food treated, and the treatment is in a manner that does not change the status of the food as a raw agricultural commodity (including treatment through washing, waxing, fumigating, and packing such commodities in such manner).

(III) The substance is applied during the transportation of such commodity between the field and such a treatment facility.

(ii) The definition in such clause for the term "pesticide chemical" does not include the substance if the substance is a food contact substance as defined in section 348(h)(6) of this title, and any of the following circumstances exist: The substance is included for such use in an object that has a food contact surface but is not intended to have an ongoing effect on any portion of the object; the substance is included for such use in an object that has a food contact surface and is intended to have an ongoing effect on a portion of the object but not on the food contact surface; or the substance is included for such use in or is applied for such use on food packaging (without regard to whether the substance is intended to have an ongoing effect on any portion of the packaging). The food contact substance is not excluded under this subclause from such definition if any of the following circumstances exist: The substance is applied for such use on a semipermanent or permanent food contact surface (other than being applied on food packaging); or the substance is included for such use in an object that has a semipermanent or permanent food contact surface (other than being included in food packaging) and the substance is intended to have an ongoing effect on the food contact surface.

With respect to the definition of the term "pesticide" that is applicable to the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136 et seq.], this clause does not exclude any substance from such definition.

(2) The term "pesticide chemical residue" means a residue in or on raw agricultural commodity or processed food of—

(A) a pesticide chemical; or

(B) any other added substance that is present on or in the commodity or food primarily as a result of the metabolism or other degradation of a pesticide chemical.

(3) Notwithstanding subparagraphs (1) and (2), the Administrator may by regulation except a substance from the definition of "pesticide chemical" or "pesticide chemical residue" if—

(A) its occurrence as a residue on or in a raw agricultural commodity or processed food is attributable primarily to natural causes or to human activities not involving the use of any substances for a pesticidal purpose in the production, storage, processing, or transportation of any raw agricultural commodity or processed food; and

(B) the Administrator, after consultation with the Secretary, determines that the substance more appropriately should be regulated under one or more provisions of this chapter other than sections 342(a)(2)(B) and 346a of this title.

(r) The term "raw agricultural commodity" means any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form prior to marketing.

(s) The term "food additive" means any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food (including any substance intended for use in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting, or holding food; and including any source of radiation intended for any such use), if such substance is not generally recognized, among experts qualified by scientific training and experience to evaluate its safety, as having been adequately shown through scientific procedures (or, in the case of a substance used in food prior to January 1, 1958, through either scientific procedures or experience based on common use in food) to be safe under the conditions of its intended use; except that such term does not include—

(1) a pesticide chemical residue in or on a raw agricultural commodity or processed food; or

(2) a pesticide chemical; or

(3) a color additive; or

(4) any substance used in accordance with a sanction or approval granted prior to September 6, 1958, pursuant to this chapter, the Poultry Products Inspection Act [21 U.S.C. 451 et seq.] or the Meat Inspection Act of March 4, 1907, as amended and extended [21 U.S.C. 601 et seq.];

(5) a new animal drug; or

(6) an ingredient described in paragraph (ff) in, or intended for use in, a dietary supplement.

(t)(1) The term "color additive" means a material which—

(A) is a dye, pigment, or other substance made by a process of synthesis or similar artifice, or extracted, isolated, or otherwise derived, with or without intermediate or final change of identity, from a vegetable, animal, mineral, or other source, and

(B) when added or applied to a food, drug, or cosmetic, or to the human body or any part thereof, is capable (alone or through reaction with other substance) of imparting color thereto;

except that such term does not include any material which the Secretary, by regulation, determines is used (or intended to be used) solely for a purpose or purposes other than coloring.

(2) The term "color" includes black, white, and intermediate grays.

(3) Nothing in subparagraph (1) of this paragraph shall be construed to apply to any pesticide chemical, soil or plant nutrient, or other agricultural chemical solely because of its effect in aiding, retarding, or otherwise affecting, directly or indirectly, the growth or other natural physiological processes of produce of the soil and thereby affecting its color, whether before or after harvest.

(u) The term "safe" as used in paragraph (s) of this section and in sections 348, 360b, 360ccc, and 379e of this title, has reference to the health of man or animal.

(v) The term "new animal drug" means any drug intended for use for animals other than man, including any drug intended for use in animal feed but not including such animal feed,—

(1) the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of animal drugs,

as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof; except that such a drug not so recognized shall not be deemed to be a "new animal drug" if at any time prior to June 25, 1938, it was subject to the Food and Drug Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use; or

(2) the composition of which is such that such drug, as a result of investigations to determine its safety and effectiveness for use under such conditions, has become so recognized but which has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions.

Provided that any drug intended for minor use or use in a minor species that is not the subject of a final regulation published by the Secretary through notice and comment rulemaking finding that the criteria of paragraphs (1) and (2) have not been met (or that the exception to the criterion in paragraph (1) has been met) is a new animal drug.

(w) The term "animal feed", as used in paragraph (w) [2] of this section, in section 360b of this title, and in provisions of this chapter referring to such paragraph or section, means an article which is intended for use for food for animals other than man and which is intended for use as a substantial source of nutrients in the diet of the animal, and is not limited to a mixture intended to be the sole ration of the animal.

(x) The term "informal hearing" means a hearing which is not subject to section 554, 556, or 557 of title 5 and which provides for the following:

(1) The presiding officer in the hearing shall be designated by the Secretary from officers and employees of the Department who have not participated in any action of the Secretary which is the subject of the hearing and who are not directly responsible to an officer or employee of the Department who has participated in any such action.

(2) Each party to the hearing shall have the right at all times to be advised and accompanied by an attorney.

(3) Before the hearing, each party to the hearing shall be given reasonable notice of the matters to be considered at the hearing, including a comprehensive statement of the basis for the action taken or proposed by the Secretary which is the subject of the hearing and a general summary of the information which will be presented by the Secretary at the hearing in support of such action.

(4) At the hearing the parties to the hearing shall have the right to hear a full and complete statement of the action of the Secretary which is the subject of the hearing together with the information and reasons supporting such action, to conduct reasonable questioning, and to present any oral or written information relevant to such action.

(5) The presiding officer in such hearing shall prepare a written report of the hearing to which shall be attached all written material presented at the hearing. The participants in the hearing shall be given the opportunity to review and correct or supplement the presiding officer's report of the hearing.

(6) The Secretary may require the hearing to be transcribed. A party to the hearing shall have the right to have the hearing transcribed at his expense. Any transcription of a hearing shall be included in the presiding officer's report of the hearing.

(y) The term "saccharin" includes calcium saccharin, sodium saccharin, and ammonium saccharin.

(z) The term "infant formula" means a food which purports to be or is represented for special dietary use solely as a food for infants by reason of its simulation of human milk or its suitability as a complete or partial substitute for human milk.

(aa) The term "abbreviated drug application" means an application submitted under section 355(j) of this title for the approval of a drug that relies on the approved application of another drug with the same active ingredient to establish safety and efficacy, and—

(1) in the case of section 335a of this title, includes a supplement to such an application for a different or additional use of the drug but does not include a supplement to such an application for other than a different or additional use of the drug, and

(2) in the case of sections 335b and 335c of this title, includes any supplement to such an application.

(bb) The term "knowingly" or "knew" means that a person, with respect to information—

(1) has actual knowledge of the information, or
(2) acts in deliberate ignorance or reckless disregard of the truth or falsity of the information.

(cc) For purposes of section 335a of this title, the term "high managerial agent"—
(1) means—
(A) an officer or director of a corporation or an association,
(B) a partner of a partnership, or
(C) any employee or other agent of a corporation, association, or partnership,

having duties such that the conduct of such officer, director, partner, employee, or agent may fairly be assumed to represent the policy of the corporation, association, or partnership, and
(2) includes persons having management responsibility for—
(A) submissions to the Food and Drug Administration regarding the development or approval of any drug product,
(B) production, quality assurance, or quality control of any drug product, or
(C) research and development of any drug product.

(dd) For purposes of sections 335a and 335b of this title, the term "drug product" means a drug subject to regulation under section 355, 360b, or 382 of this title or under section 262 of title 42.
(ee) The term "Commissioner" means the Commissioner of Food and Drugs.
(ff) The term "dietary supplement"—
(1) means a product (other than tobacco) intended to supplement the diet that bears or contains one or more of the following dietary ingredients:
(A) a vitamin;
(B) a mineral;
(C) an herb or other botanical;
(D) an amino acid;
(E) a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or
(F) a concentrate, metabolite, constituent, extract, or combination of any ingredient described in clause (A), (B), (C), (D), or (E);

(2) means a product that—
(A)(i) is intended for ingestion in a form described in section 350(c)(1)(B)(i) of this title; or
(ii) complies with section 350(c)(1)(B)(ii) of this title;
(B) is not represented for use as a conventional food or as a sole item of a meal or the diet; and
(C) is labeled as a dietary supplement; and

(3) does—
(A) include an article that is approved as a new drug under section 355 of this title or licensed as a biologic under section 262 of title 42 and was, prior to such approval, certification, or license, marketed as a dietary supplement or as a food unless the Secretary has issued a regulation, after notice and comment, finding that the article, when used as or in a dietary supplement under the conditions of use and dosages set forth in the labeling for such dietary supplement, is unlawful under section 342(f) of this title; and
(B) not include—
(i) an article that is approved as a new drug under section 355 of this title, certified as an antibiotic under section 357 of this title, or licensed as a biologic under section 262 of title 42, or
(ii) an article authorized for investigation as a new drug, antibiotic, or biological for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public,

which was not before such approval, certification, licensing, or authorization marketed as a dietary supplement or as a food unless the Secretary, in the Secretary's discretion, has issued a regulation, after

notice and comment, finding that the article would be lawful under this chapter.[3]

Except for purposes of paragraph (g) and section 350f of this title, a dietary supplement shall be deemed to be a food within the meaning of this chapter.

(gg) The term "processed food" means any food other than a raw agricultural commodity and includes any raw agricultural commodity that has been subject to processing, such as canning, cooking, freezing, dehydration, or milling.

(hh) The term "Administrator" means the Administrator of the United States Environmental Protection Agency.

(ii) The term "compounded positron emission tomography drug"—

(1) means a drug that—

(A) exhibits spontaneous disintegration of unstable nuclei by the emission of positrons and is used for the purpose of providing dual photon positron emission tomographic diagnostic images; and

(B) has been compounded by or on the order of a practitioner who is licensed by a State to compound or order compounding for a drug described in subparagraph (A), and is compounded in accordance with that State's law, for a patient or for research, teaching, or quality control; and

(2) includes any nonradioactive reagent, reagent kit, ingredient, nuclide generator, accelerator, target material, electronic synthesizer, or other apparatus or computer program to be used in the preparation of such a drug.

(jj) The term "antibiotic drug" means any drug (except drugs for use in animals other than humans) composed wholly or partly of any kind of penicillin, streptomycin, chlortetracycline, chloramphenicol, bacitracin, or any other drug intended for human use containing any quantity of any chemical substance which is produced by a micro-organism and which has the capacity to inhibit or destroy micro-organisms in dilute solution (including a chemically synthesized equivalent of any such substance) or any derivative thereof.

(kk) PRIORITY SUPPLEMENT.—The term "priority supplement" means a drug application referred to in section 101(4) of the Food and Drug Administration Modernization Act of 1997 (111 Stat. 2298).

(ll)(1) The term "single-use device" means a device that is intended for one use, or on a single patient during a single procedure.

(2)(A) The term "reprocessed", with respect to a single-use device, means an original device that has previously been used on a patient and has been subjected to additional processing and manufacturing for the purpose of an additional single use on a patient. The subsequent processing and manufacture of a reprocessed single-use device shall result in a device that is reprocessed within the meaning of this definition.

(B) A single-use device that meets the definition under clause (A) shall be considered a reprocessed device without regard to any description of the device used by the manufacturer of the device or other persons, including a description that uses the term "recycled" rather than the term "reprocessed".

(3) The term "original device" means a new, unused single-use device.

(mm)(1) The term "critical reprocessed single-use device" means a reprocessed single-use device that is intended to contact normally sterile tissue or body spaces during use.

(2) The term "semi-critical reprocessed single-use device" means a reprocessed single-use device that is intended to contact intact mucous membranes and not penetrate normally sterile areas of the body.

(nn) The term "major species" means cattle, horses, swine, chickens, turkeys, dogs, and cats, except that the Secretary may add species to this definition by regulation.

(oo) The term "minor species" means animals other than humans that are not major species.

(pp) The term "minor use" means the intended use of a drug in a major species for an indication that occurs infrequently and in only a small number of animals or in limited geographical areas and in only a small number of animals annually.

(qq) The term "major food allergen" means any of the following:

(1) Milk, egg, fish (e.g., bass, flounder, or cod), Crustacean shellfish (e.g., crab, lobster, or shrimp), tree nuts (e.g., almonds, pecans, or walnuts), wheat, peanuts, and soybeans.

(2) A food ingredient that contains protein derived from a food specified in paragraph (1), except the following:

(A) Any highly refined oil derived from a food specified in paragraph (1) and any ingredient derived from such highly refined oil.

(B) A food ingredient that is exempt under paragraph (6) or (7) of section 343(w) of this title.

(rr)(1) The term "tobacco product" means any product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product (except for raw materials other than tobacco used in manufacturing a component, part, or accessory of a tobacco product).

(2) The term "tobacco product" does not mean an article that is a drug under subsection (g)(1), a device under subsection (h), or a combination product described in section 353(g) of this title.

(3) The products described in paragraph (2) shall be subject to subchapter V of this chapter.

(4) A tobacco product shall not be marketed in combination with any other article or product regulated under this chapter (including a drug, biologic, food, cosmetic, medical device, or a dietary supplement).

(June 25, 1938, ch. 675, §201, 52 Stat. 1040; July 22, 1954, ch. 559, §1, 68 Stat. 511; Pub. L. 85–929, §2, Sept. 6, 1958, 72 Stat. 1784; Pub. L. 86–618, title I, §101, July 12, 1960, 74 Stat. 397; Pub. L. 87–781, title I, §102(a), title III, §307(a), Oct. 10, 1962, 76 Stat. 781, 796; Pub. L. 89–74, §§3(a), 9(b), July 15, 1965, 79 Stat. 227, 234; Pub. L. 90–399, §102, July 13, 1968, 82 Stat. 351; Pub. L. 90–639, §§1, 4(a), Oct. 24, 1968, 82 Stat. 1361, 1362; Pub. L. 91–513, title II, §701(a), (g), Oct. 27, 1970, 84 Stat. 1281, 1282; Pub. L. 92–516, §3(3), Oct. 21, 1972, 86 Stat. 998; Pub. L. 94–278, title V, §502(a)(2)(A), Apr. 22, 1976, 90 Stat. 411; Pub. L. 94–295, §3(a)(1)(A), (2), May 28, 1976, 90 Stat. 575; Pub. L. 95–203, §4(b)(3), Nov. 23, 1977, 91 Stat. 1453; Pub. L. 96–359, §3, Sept. 26, 1980, 94 Stat. 1193; Pub. L. 100–670, title I, §107(a)(1), Nov. 16, 1988, 102 Stat. 3984; Pub. L. 101–535, §5(b), Nov. 8, 1990, 104 Stat. 2362; Pub. L. 101–629, §16(b), Nov. 28, 1990, 104 Stat. 4526; Pub. L. 102–282, §6, May 13, 1992, 106 Stat. 161; Pub. L. 102–300, §6(a), (b), June 16, 1992, 106 Stat. 240; Pub. L. 102–571, title I, §107(1), Oct. 29, 1992, 106 Stat. 4499; Pub. L. 103–80, §§3(b), (dd)(1), 4(b), Aug. 13, 1993, 107 Stat. 775, 779; Pub. L. 103–417, §§3(a), (b), 10(a), Oct. 25, 1994, 108 Stat. 4327, 4332; Pub. L. 104–170, title IV, §402, Aug. 3, 1996, 110 Stat. 1513; Pub. L. 105–115, title I, §§121(a), 125(b)(2)(A), (e), Nov. 21, 1997, 111 Stat. 2320, 2325, 2327; Pub. L. 105–324, §2(a), (c), Oct. 30, 1998, 112 Stat. 3035, 3037; Pub. L. 107–109, §5(b)(1), Jan. 4, 2002, 115 Stat. 1413; Pub. L. 107–250, title III, §302(d), Oct. 26, 2002, 116 Stat. 1619; Pub. L. 108–282, title I, §102(b)(1), (5)(A), (B), title II, §203(c)(1), Aug. 2, 2004, 118 Stat. 891, 902, 908; Pub. L. 110–85, title X, §1005(c), Sept. 27, 2007, 121 Stat. 968; Pub. L. 111–31, div. A, title I, §101(a), June 22, 2009, 123 Stat. 1783; Pub. L. 114–255, div. A, title III, §3060(d), Dec. 13, 2016, 130 Stat. 1133; Pub. L. 116–304, §2(b), Jan. 5, 2021, 134 Stat. 4916; Pub. L. 117–11, §2(a), Apr. 23, 2021, 135 Stat. 262.)

Amendment of Subsection (qq)(1)

Pub. L. 117–11, §2, Apr. 23, 2021, 135 Stat. 262, provided that, applicable to any food that is introduced or delivered for introduction into interstate commerce on or after Jan. 1, 2023, subsection (qq)(1) of this section is amended by striking "and soybeans" and inserting "soybeans, and sesame". See 2021 Amendment note below.

Editorial Notes

References in Text

The Food and Drugs Act of June 30, 1906, as amended, referred to in par. (p)(1), and the Food and Drug Act of June 30, 1906, as amended, referred to in par. (v)(1), is act June 30, 1906, ch. 3915, 34 Stat. 768, which was classified to subchapter I (§1 et seq.) of chapter 1 of this title, was repealed (except for section 14a which was transferred to section 376 of this title) by act June 25, 1938, ch. 675, §1002(a), formerly §902(a), 52 Stat. 1059; renumbered §1002(a), Pub. L. 111–31, div. A, title I, §101(b)(2), June 22, 2009, 123 Stat. 1784, and is covered by this chapter.

The Federal Insecticide, Fungicide, and Rodenticide Act, referred to in par. (q)(1), is act June 25, 1947, ch. 125, as amended generally by Pub. L. 92–516, Oct. 21, 1972, 86 Stat. 973, which is classified generally to subchapter II (§136 et seq.) of chapter 6 of Title 7, Agriculture. For complete classification of this Act to the Code, see Short Title note set out under section 136 of Title 7 and Tables.

The Poultry Products Inspection Act, referred to in par. (s)(4), is Pub. L. 85–172, Aug. 28, 1957, 71 Stat. 441, as amended, which is classified generally to chapter 10 (§451 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 451 of this title and Tables.

The Meat Inspection Act of March 4, 1907, as amended and extended, referred to in par. (s)(4), is act Mar. 4, 1907, ch. 2907, titles I to IV, as added Dec. 15, 1967, Pub. L. 90–201, 81 Stat. 584, which are classified generally to subchapters I to IV (§601 et seq.) of chapter 12 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 601 of this title and Tables.

Section 101(4) of the Food and Drug Administration Modernization Act of 1997, referred to in par. (kk), is section 101(4) of Pub. L. 105–115, which is set out as a note under section 379g of this title.

AMENDMENTS

2021—Par. (h). Pub. L. 116–304 redesignated introductory provisions as subpar. (1) and former subpars. (1) to (3) as cls. (A) to (C), respectively, of subpar. (1) and added subpar. (2).

Subsec. (qq)(1). Pub. L. 117–11 substituted "soybeans, and sesame" for "and soybeans".

2016—Par. (h). Pub. L. 114–255 inserted at end of concluding provisions "The term 'device' does not include software functions excluded pursuant to section 360j(o) of this title."

2009—Par. (rr). Pub. L. 111–31 added par. (rr).

2007—Par. (ff). Pub. L. 110–85 substituted "paragraph (g) and section 350f of this title" for "paragraph (g)" in concluding provisions.

2004–Par. (u). Pub. L. 108–282, §102(b)(5)(A), substituted "360b, 360ccc" for "360b".

Par. (v). Pub. L. 108–282, §102(b)(5)(B), inserted concluding provisions.

Pars. (nn) to (pp). Pub. L. 108–282, §102(b)(1), added pars. (nn) to (pp).

Par. (qq). Pub. L. 108–282, §203(c)(1), added par. (qq).

2002—Par. (kk). Pub. L. 107–109 added par. (kk).

Pars. (ll), (mm). Pub. L. 107–250 added pars. (ll) and (mm).

1998—Par. (q)(1). Pub. L. 105–324, §2(a), added subpar. (1) and struck out former subpar. (1) which read as follows: "The term 'pesticide chemical' means any substance that is a pesticide within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act, including all active and inert ingredients of such pesticide."

Par. (q)(3). Pub. L. 105–324, §2(c), substituted "subparagraphs (1) and (2)" for "paragraphs (1) and (2)" in introductory provisions.

1997—Par. (aa). Pub. L. 105–115, §125(b)(2)(A), struck out "or 357" after "section 355(j)".

Par. (dd). Pub. L. 105–115, §125(b)(2)(A), struck out "357," after "section 355,".

Par. (ff)(3)(A). Pub. L. 105–115, §125(b)(2)(A), struck out ", certified as an antibiotic under section 357 of this title," before "or licensed as a biologic".

Par. (ii). Pub. L. 105–115, §121(a), added par. (ii).

Par. (jj). Pub. L. 105–115, §125(e), added par. (jj).

1996—Par. (q). Pub. L. 104–170, §402(a), amended par. (q) generally. Prior to amendment, par. (q) read as follows: "The term 'pesticide chemical' means any substance which, alone, in chemical combination or in formulation with one or more other substances, is 'a pesticide' within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act as now in force or as hereafter amended, and which is used in the production, storage, or transportation of raw agricultural commodities."

Par. (s)(1), (2). Pub. L. 104–170, §402(b), amended subpars. (1) and (2) generally. Prior to amendment, subpars. (1) and (2) read as follows:

"(1) a pesticide chemical in or on a raw agricultural commodity; or

"(2) a pesticide chemical to the extent that it is intended for use or is used in the production, storage, or transportation of any raw agricultural commodity; or".

Pars. (gg), (hh). Pub. L. 104–170, §402(c), added pars. (gg) and (hh).

1994—Par. (g)(1). Pub. L. 103–417, §10(a), amended last sentence generally. Prior to amendment, last sentence read as follows: "A food for which a claim, subject to sections 343(r)(1)(B) and 343(r)(3) of this title or sections 343(r)(1)(B) and 343(r)(5)(D) of this title, is made in accordance with the requirements of section 343(r) of this title is not a drug under clause (B) solely because the label or labeling contains such a claim."

Par. (s)(6). Pub. L. 103–417, §3(b), added subpar. (6).

Par. (ff). Pub. L. 103–417, §3(a), added par. (ff).

1993—Pars. (c), (d). Pub. L. 103–80, §3(dd)(1), substituted "Health and Human Services" for "Agriculture".

Par. (h). Pub. L. 103–80, §4(b), amended directory language of Pub. L. 102–300, §6(a)(1). See 1992 amendment note below.

Pars. (v) to (ff). Pub. L. 103–80, §3(b), redesignated pars. (w) to (ff) as (v) to (ee), respectively.

1992—Pars. (c), (d). Pub. L. 102–300, §6(b)(1), which directed the substitution of "Health and Human Services" for "Health, Education, and Welfare", could not be executed because such words did not appear in the original statutory text. See 1993 Amendment note above and Transfer of Functions notes below.

Par. (h). Pub. L. 102–300, §6(a)(1), as amended by Pub. L. 103–80, §4(b), substituted "its primary" for "any of its principal" in two places in concluding provisions.

Par. (u). Pub. L. 102–571 substituted "379e" for "376".

Par. (y)(1). Pub. L. 102–300, §6(b)(2), struck out "of Health, Education, and Welfare" after "employees of the Department".

Pars. (bb) to (ee). Pub. L. 102–282 added pars. (bb) to (ee).

Par. (ff). Pub. L. 102–300, §6(a)(2), added par. (ff).

1990—Par. (g)(1). Pub. L. 101–629, §16(b)(1), struck out "; but does not include devices or their components, parts, or accessories" after "clause (A), (B), or (C)".

Pub. L. 101–535 inserted at end "A food for which a claim, subject to sections 343(r)(1)(B) and 343(r)(3) of this title or sections 343(r)(1)(B) and 343(r)(5)(D) of this title, is made in accordance with the requirements of section 343(r) of this title is not a drug under clause (B) solely because the label or labeling contains such a claim."

Par. (h)(3). Pub. L. 101–629, §16(b)(2), which directed the amendment of subpar. (3) by substituting "its primary" for "any of its principal", could not be executed because "any of its principal" did not appear in subpar. (3).

1988—Par. (w)(3). Pub. L. 100–670 struck out subpar. (3) which read as follows: "which drug is composed wholly or partly of any kind of penicillin, streptomycin, chlortetracycline, chloramphenicol, or bacitracin, or any derivative thereof, except when there is in effect a published order of the Secretary declaring such drug not to be a new animal drug on the grounds that (A) the requirement of certification of batches of such drug, as provided for in section 360b(n) of this title, is not necessary to insure that the objectives specified in paragraph (3) thereof are achieved and (B) that neither subparagraph (1) nor (2) of this paragraph (w) applies to such drug."

1980—Par. (aa). Pub. L. 96–359 added par. (aa).

1977—Par. (z). Pub. L. 95–203 added par. (z).

1976—Par. (h). Pub. L. 94–295, §3(a)(1)(A), expanded definition of "device" to include implements, machines, implants, in vitro reagents, and other similar or related articles, added recognition in the National Formulary or the United States Pharmacopeia, or any supplement to the Formulary or Pharmacopeia, to the enumeration of conditions under which a device may qualify for inclusion under this chapter, and inserted requirements that a device be one which does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

Par. (n). Pub. L. 94–278 inserted "or advertising" after "labeling" wherever appearing.

Par. (y). Pub. L. 94–295, §3(a)(2), added par. (y).

1972—Par. (q). Pub. L. 92–516 substituted reference to pesticide for reference to economic poison.

1970—Par. (a)(2). Pub. L. 91–513, §701(g), struck out reference to sections 321, 331(i), 331(p), 331(q), 332, 333, 334, 337, 360, 360a, 372, 373, 374, and 375 of this title as they apply to depressant or stimulant drugs.

Par. (v). Pub. L. 91–513, §701(a), struck out par. (v) which defined "depressant or stimulant drug".

1968—Par. (a)(2). Pub. L. 90–639, §4(a), extended provisions to cover depressant and stimulant drugs, the containers thereof, and equipment used in manufacturing, compounding, or processing such drugs, to the Canal Zone.

Par. (p). Pub. L. 90–399, §102(a), (b), inserted "(except a new animal drug or an animal feed bearing or containing a new animal drug)" after "Any drug" in subpars. (1) and (2), respectively.

Par. (s)(5). Pub. L. 90–399, §102(c), added subpar. (5).

Par. (u). Pub. L. 90–399, §102(d), inserted reference to section 360b of this title.

Par. (v)(3). Pub. L. 90–639, §1, inserted reference to lysergic acid diethylamide.

Pars. (w), (x). Pub. L. 90–399, §102(e), added pars. (w) and (x).

1965—Par. (g). Pub. L. 89–74, §9(b), designated existing provisions as subpar. (1), redesignated cls. (1) to (4) thereof as (A) to (D), substituted "(A), (B), or (C)" for "(1), (2), or (3)" and added subpar. (2).

Par. (v). Pub. L. 89–74, §3(a), added par. (v).

1962—Par. (a). Pub. L. 87–781, §307(a), designated existing provisions as subpar. (2), inserted "Commonwealth of Puerto Rico and the", and added subpar. (1).

Par. (p)(1). Pub. L. 87–781, §102(a)(1), inserted "and effectiveness" after "to evaluate the safety", and "and effective" after "as safe".

Par. (p)(2). Pub. L. 87–781, §102(a)(2), inserted "and effectiveness" after "safety".

1960—Par. (s). Pub. L. 86–618, §101(a), excluded color additives from definition of "food additive".

Par. (t). Pub. L. 86–618, §101(c), added par. (t). Former par. (t) redesignated (u).

Par. (u). Pub. L. 86–618, §101(b), redesignated par. (t) as (u) and inserted reference to section 376 of this title.
1958—Pars. (s), (t). Pub. L. 85–929 added pars. (s) and (t).
1954—Pars. (q), (r). Act July 22, 1954, added pars. (q) and (r).

Statutory Notes and Related Subsidiaries

Effective Date of 2021 Amendment

Pub. L. 117–11, §2(b), Apr. 23, 2021, 135 Stat. 262, provided that: "The amendment made by subsection (a) [amending this section] shall apply to any food that is introduced or delivered for introduction into interstate commerce on or after January 1, 2023."

Effective Date of 2004 Amendment

Pub. L. 108–282, title II, §203(d), Aug. 2, 2004, 118 Stat. 908, provided that: "The amendments made by this section [amending this section and sections 343 and 343–1 of this title] shall apply to any food that is labeled on or after January 1, 2006."

Effective Date of 1997 Amendment

Pub. L. 105–115, title V, §501, Nov. 21, 1997, 111 Stat. 2380, provided that: "Except as otherwise provided in this Act [see Short Title of 1997 Amendment note set out under section 301 of this title], this Act and the amendments made by this Act, other than the provisions of and the amendments made by sections 111, 121, 125, and 307 [enacting section 355a of this title, amending this section and sections 331, 335a, 351, 352, 360, 360j, 360aa to 360cc, 360ee, 374, 379g, 381, and 382 of this title, section 45C of Title 26, Internal Revenue Code, section 156 of Title 35, Patents, and section 8126 of Title 38, Veterans' Benefits, repealing sections 356 and 357 of this title, and enacting provisions set out as notes under sections 351 and 355 of this title], shall take effect 90 days after the date of enactment of this Act [Nov. 21, 1997]."

Effective Date of 1990 Amendment

Amendment by Pub. L. 101–535 effective six months after the date of the promulgation of final regulations to implement section 343(r) of this title, or if such regulations are not promulgated, the date proposed regulations are to be considered as such final regulations (Nov. 8, 1992), with exception for persons marketing food the brand name of which contains a term defined by the Secretary under section 343(r)(2)(A)(i) of this title, see section 10(a) of Pub. L. 101–535, set out as a note under section 343 of this title.

Effective Date of 1976 Amendment

Amendment by Pub. L. 94–278 effective 180 days after Apr. 22, 1976, see section 502(c) of Pub. L. 94–278, set out as a note under section 334 of this title.

Effective Date of 1972 Amendment

Amendment by Pub. L. 92–516 effective at the close of Oct. 21, 1972, except if regulations are necessary for the implementation of any provision that becomes effective on Oct. 21, 1972, and continuation in effect of subchapter I of chapter 6 of Title 7, and regulations thereunder, relating to the control of economic poisons, as in existence prior to Oct. 21, 1972, until superseded by provisions of Pub. L. 92–516, and regulations thereunder, see section 4 of Pub. L. 92–516, set out as an Effective Date note under section 136 of Title 7, Agriculture.

Effective Date of 1970 Amendment

Amendment by Pub. L. 91–513 effective on first day of seventh calendar month that begins after Oct. 26, 1970, see section 704 of Pub. L. 91–513, set out as an Effective Date note under section 801 of this title.

Effective Date of 1968 Amendments; Transitional Provisions

Pub. L. 90–639, §6, Oct. 24, 1968, 82 Stat. 1362, provided that: "The amendments made by this Act [amending this section, sections 331, 333, 334, and 360a of this title, and provisions set out as a note under section 289a of Title 42, The Public Health and Welfare] shall apply only with respect to violations of the Federal Food, Drug, and Cosmetic Act [this chapter] committed after the date of the enactment of this Act [Oct. 24, 1968]."

Amendment by Pub. L. 90–399 effective on first day of thirteenth calendar month after July 13, 1968, except that in the case of a drug (other than one subject to section 360b(n) of this title) intended for use in animals other than man which, on Oct. 9, 1962, was commercially used or sold in the United States, was not a new drug as defined in par. (p) of this section then in force, and was not covered by an effective application under section 355 of this title,

the words "effectiveness" and "effective" contained in par. (v) of this section not applicable to such drug when intended solely for use under conditions prescribed, recommended, or suggested in labeling with respect to such drug on that day, see section 108(a), (b)(3) of Pub. L. 90–399, as amended, set out as an Effective Date and Transitional Provisions note under section 360b of this title.

Effective Date of 1965 Amendment

Pub. L. 89–74, §11, July 15, 1965, 79 Stat. 235, provided that: "The foregoing provisions of this Act [see Short Title of 1965 Amendment note set out under section 301 of this title] shall take effect on the first day of the seventh calendar month [Feb. 1, 1966] following the month in which this Act is enacted [July 15, 1965]; except that (1) the Secretary shall permit persons, owning or operating any establishment engaged in manufacturing, preparing, propagating, compounding, processing, wholesaling, jobbing, or distributing any depressant or stimulant drug, as referred to in the amendments made by section 4 of this Act to section 510 of the Federal Food, Drug, and Cosmetic Act [section 360 of this title], to register their name, places of business, and establishments, and other information prescribed by such amendments, with the Secretary prior to such effective date, and (2) sections 201(v) and 511(g) of the Federal Food, Drug, and Cosmetic Act, as added by this act [par. (v) of this section and par. (g) of section 360a of this title], and the provisions of sections 8 [amending section 372 of this title and section 1114 of Title 18, Crimes and Criminal Procedure] and 10 [set out as a note under this section] shall take effect upon the date of enactment of this Act [July 15, 1965]."

Effective Date of 1962 Amendment

Pub. L. 87–781, title I, §107, Oct. 10, 1962, 76 Stat. 788, provided that:

"(a) Except as otherwise provided in this section, the amendments made by the foregoing sections of this part A [amending this section and sections 331, 332, 348, 351 to 353, 355, 357, 379e of this title, and enacting provisions set out as a note under section 355 of this title] shall take effect on the date of enactment of this Act [Oct. 10, 1962].

"(b) The amendments made by sections 101, 103, 105, and 106 of this part A [amending sections 331, 332, 351, 352, 355, and 357 of this title] shall, with respect to any drug, take effect on the first day of the seventh calendar month following the month in which this Act is enacted [Oct. 1962].

"(c)(1) As used in this subsection, the term 'enactment date' means the date of enactment of this Act; and the term 'basic Act' means the Federal Food, Drug, and Cosmetic Act [this chapter].

"(2) An application filed pursuant to section 505(b) of the basic Act [section 355(b) of this title] which was 'effective' within the meaning of that Act on the day immediately preceding the enactment date shall be deemed as of the enactment date, to be an application 'approved' by the Secretary within the meaning of the basic Act as amended by this Act.

"(3) In the case of any drug with respect to which an application filed under section 505(b) of the basic Act is deemed to be an approved application on the enactment date by virtue of paragraph (2) of this subsection—

"(A) the amendments made by this Act to section 201(p), and to subsections (b) and (d) of section 505, of the basic Act [par. (p) of this section, and subsecs. (b) and (d) of section 355 of this title], insofar as such amendments relate to the effectiveness of drugs, shall not, so long as approval of such application is not withdrawn or suspended pursuant to section 505(e) of that Act [section 355(e) of this title], apply to such drug when intended solely for use under conditions prescribed, recommended, or suggested in labeling covered by such approved application, but shall apply to any changed use, or conditions of use, prescribed, recommended, or suggested in its labeling, including such conditions of use as are the subject of an amendment or supplement to such application pending on, or filed after, the enactment date; and

"(B) clause (3) of the first sentence of section 505(e) of the basic Act, as amended by this Act [section 355(e) of this title], shall not apply to such drug when intended solely for use under conditions prescribed, recommended, or suggested in labeling covered by such approved application (except with respect to such use, or conditions of use, as are the subject of an amendment or supplement to such approved application, which amendment or supplement has been approved after the enactment date under section 505 of the basic Act as amended by this Act [section 355 of this title]) until whichever of the following first occurs: (i) the expiration of the two-year period beginning with the enactment date; (ii) the effective date of an order under section 505(e) of the basic Act [section 355(e) of this title], other than clause (3) of the first sentence of such section 505(e) [section 355(e) of this title], withdrawing or suspending the approval of such application.

"(4) In the case of any drug which, on the day immediately preceding the enactment date, (A) was commercially used or sold in the United States, (B) was not a new drug as defined by section 201(p) of the basic Act as then in force [par. (p) of this section], and (C) was not covered by an effective application under section 505 of that Act [section 355 of this title], the amendments to section 201(p) [par. (p) of this section] made by this Act shall not

apply to such drug when intended solely for use under conditions prescribed, recommended, or suggested in labeling with respect to such drug on that day."

Effective Date of 1960 Amendment

Amendment by Pub. L. 86–618 effective July 12, 1960, subject to provisions of section 203 of Pub. L. 86–618, see section 202 of Pub. L. 86–618, set out as a note under section 379e of this title.

Effective Date of 1958 Amendment

Amendment by Pub. L. 85–929 effective Sept. 6, 1958, see section 6(a) of Pub. L. 85–929, set out as a note under section 342 of this title.

Effective Date of 1954 Amendment

For effective date of amendment by act July 22, 1954, see section 5 of that act, set out as a note under section 342 of this title.

Construction of Amendments by Pub. L. 102–282

Amendment by Pub. L. 102–282 not to preclude any other civil, criminal, or administrative remedy provided under Federal or State law, including any private right of action against any person for the same action subject to any action or civil penalty under an amendment made by Pub. L. 102–282, see section 7 of Pub. L. 102–282, set out as a note under section 335a of this title.

Construction of Amendments by Pub. L. 101–535

Amendments by Pub. L. 101–535 not to be construed to alter authority of Secretary of Health and Human Services and Secretary of Agriculture under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), the Federal Meat Inspection Act (21 U.S.C. 601 et seq.), the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), and the Egg Products Inspection Act (21 U.S.C. 1031 et seq.), see section 9 of Pub. L. 101–535, set out as a note under section 343 of this title.

Savings Provision

Pub. L. 91–513, title II, §702, Oct. 27, 1970, 84 Stat. 1283, as amended by Pub. L. 93–481, §2, Oct. 26, 1974, 88 Stat. 1455, provided that:

"(a) Prosecutions for any violation of law occurring prior to the effective date [see Effective Date of 1970 Amendment note above] of section 701 [repealing section 360a of this title, and amending sections 321, 331, 333, 334, 360, 372, and 381 of this title, sections 1114 and 1952 of Title 18, Crimes and Criminal Procedure, and section 242 of Title 42, The Public Health and Welfare] shall not be affected by the repeals or amendments made by such section, or abated by reason thereof.

"(b) Civil seizures or forfeitures and injunctive proceedings commenced prior to the effective date of section 701 shall not be affected by the repeals or amendments made by such section, or abated by reason thereof.

"(c) All administrative proceedings pending before the Bureau of Narcotics and Dangerous Drugs [now the Drug Enforcement Administration] on the date of enactment of this Act [Oct. 27, 1970] shall be continued and brought to final determination in accord with laws and regulations in effect prior to such date of enactment. Where a drug is finally determined under such proceedings to be a depressant or stimulant drug, as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act [par. (v) of this section], such drug shall automatically be controlled under this title [subchapter I of chapter 13 of this title] by the Attorney General without further proceedings and listed in the appropriate schedule after he has obtained the recommendation of the Secretary. Any drug with respect to which such a final determination has been made prior to the date of enactment of this Act which is not listed in section 202 [section 812 of this title] within schedules I through V shall automatically be controlled under this title [subchapter I of chapter 13 of this title] by the Attorney General without further proceedings, and be listed in the appropriate schedule, after he has obtained the recommendations of the Secretary.

"(d) Notwithstanding subsection (a) of this section or section 1103 [of Pub. L. 91–513, set out as a note under sections 171 to 174 of this title], section 4202 of title 18, United States Code, shall apply to any individual convicted under any of the laws repealed by this title or title III [subchapter I or subchapter II of chapter 13 of this title] without regard to the terms of any sentence imposed on such individual under such law."

Transfer of Functions

Secretary and Department of Health, Education, and Welfare redesignated Secretary and Department of Health and Human Services by Pub. L. 96–88, title V, §509(b), Oct. 17, 1979, 93 Stat. 695, which is classified to section 3508(b) of Title 20, Education.

Functions of Secretary of Health, Education, and Welfare [now Health and Human Services] under Federal Food, Drug, and Cosmetic Act, to the extent such functions related to administration and enforcement of the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471 et seq.), transferred to Consumer Product Safety Commission by section 2079 of Title 15, Commerce and Trade.

Regulation of Tobacco

Pub. L. 105–115, title IV, §422, Nov. 21, 1997, 111 Stat. 2380, provided that: "Nothing in this Act [see Short Title of 1997 Amendment note set out under section 301 of this title] or the amendments made by this Act shall be construed to affect the question of whether the Secretary of Health and Human Services has any authority to regulate any tobacco product, tobacco ingredient, or tobacco additive. Such authority, if any, shall be exercised under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.] as in effect on the day before the date of the enactment of this Act [Nov. 21, 1997]."

Congressional Findings Relating to Pub. L. 103–417

Pub. L. 103–417, §2, Oct. 25, 1994, 108 Stat. 4325, provided that: "Congress finds that—

"(1) improving the health status of United States citizens ranks at the top of the national priorities of the Federal Government;

"(2) the importance of nutrition and the benefits of dietary supplements to health promotion and disease prevention have been documented increasingly in scientific studies;

"(3)(A) there is a link between the ingestion of certain nutrients or dietary supplements and the prevention of chronic diseases such as cancer, heart disease, and osteoporosis; and

"(B) clinical research has shown that several chronic diseases can be prevented simply with a healthful diet, such as a diet that is low in fat, saturated fat, cholesterol, and sodium, with a high proportion of plant-based foods;

"(4) healthful diets may mitigate the need for expensive medical procedures, such as coronary bypass surgery or angioplasty;

"(5) preventive health measures, including education, good nutrition, and appropriate use of safe nutritional supplements will limit the incidence of chronic diseases, and reduce long-term health care expenditures;

"(6)(A) promotion of good health and healthy lifestyles improves and extends lives while reducing health care expenditures; and

"(B) reduction in health care expenditures is of paramount importance to the future of the country and the economic well-being of the country;

"(7) there is a growing need for emphasis on the dissemination of information linking nutrition and long-term good health;

"(8) consumers should be empowered to make choices about preventive health care programs based on data from scientific studies of health benefits related to particular dietary supplements;

"(9) national surveys have revealed that almost 50 percent of the 260,000,000 Americans regularly consume dietary supplements of vitamins, minerals, or herbs as a means of improving their nutrition;

"(10) studies indicate that consumers are placing increased reliance on the use of nontraditional health care providers to avoid the excessive costs of traditional medical services and to obtain more holistic consideration of their needs;

"(11) the United States will spend over $1,000,000,000,000 on health care in 1994, which is about 12 percent of the Gross National Product of the United States, and this amount and percentage will continue to increase unless significant efforts are undertaken to reverse the increase;

"(12)(A) the nutritional supplement industry is an integral part of the economy of the United States;

"(B) the industry consistently projects a positive trade balance; and

"(C) the estimated 600 dietary supplement manufacturers in the United States produce approximately 4,000 products, with total annual sales of such products alone reaching at least $4,000,000,000;

"(13) although the Federal Government should take swift action against products that are unsafe or adulterated, the Federal Government should not take any actions to impose unreasonable regulatory barriers limiting or slowing the flow of safe products and accurate information to consumers;

"(14) dietary supplements are safe within a broad range of intake, and safety problems with the supplements are relatively rare; and

"(15)(A) legislative action that protects the right of access of consumers to safe dietary supplements is necessary in order to promote wellness; and

"(B) a rational Federal framework must be established to supersede the current ad hoc, patchwork regulatory policy on dietary supplements."

Dissemination of Information Regarding the Dangers of Drug Abuse

Pub. L. 90–639, §5, Oct. 24, 1968, 82 Stat. 1362, provided that: "It is the sense of the Congress that, because of the inadequate knowledge on the part of the people of the United States of the substantial adverse effects of misuse of depressant and stimulant drugs, and of other drugs liable to abuse, on the individual, his family, and the community, the highest priority should be given to Federal programs to disseminate information which may be used to educate the public, particularly young persons, regarding the dangers of drug abuse."

Congressional Findings and Declaration of Policy

Pub. L. 89–74, §2, July 15, 1965, 79 Stat. 226, provided that: "The Congress hereby finds and declares that there is a widespread illicit traffic in depressant and stimulant drugs moving in or otherwise affecting interstate commerce; that the use of such drugs, when not under the supervision of a licensed practitioner, often endangers safety on the highways (without distinction of interstate and intrastate traffic thereon) and otherwise has become a threat to the public health and safety, making additional regulation of such drugs necessary regardless of the intrastate or interstate origin of such drugs; that in order to make regulation and protection of interstate commerce in such drugs effective, regulation of intrastate commerce is also necessary because, among other things, such drugs, when held for illicit sale, often do not bear labeling showing their place of origin and because in the form in which they are so held or in which they are consumed a determination of their place of origin is often extremely difficult or impossible; and that regulation of interstate commerce without the regulation of intrastate commerce in such drugs, as provided in this Act [see Short Title of 1965 Amendment note set out under section 301 of this title], would discriminate against and adversely affect interstate commerce in such drugs."

Effect of Drug Abuse Control Amendments of 1965 on State Laws

Pub. L. 89–74, §10, July 15, 1965, 79 Stat. 235, provided that:

"(a) Nothing in this Act [enacting section 360a of this title, amending sections 321, 331, 333, 334, 360, and 372 of this title and section 1114 of Title 18, Crimes and Criminal Procedure, and enacting provisions set out as notes under sections 321, 352, and 360a of this title] shall be construed as authorizing the manufacture, compounding, processing, possession, sale, delivery, or other disposal of any drug in any State in contravention of the laws of such State.

"(b) No provision of this Act nor any amendment made by it shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision or amendment operates to the exclusion of any State law on the same subject matter, unless there is a direct and positive conflict between such provision or amendment and such State law so that the two cannot be reconciled or consistently stand together.

"(c) No amendment made by this Act shall be construed to prevent the enforcement in the courts of any State of any statute of such State prescribing any criminal penalty for any act made criminal by any such amendment."

Effect of Drug Amendments of 1962 on State Laws

Pub. L. 87–781, title II, §202, Oct. 10, 1962, 76 Stat. 793, provided that: "Nothing in the amendments made by this Act [enacting sections 358 to 360, amending sections 321, 331, 332, 348, 351 to 353, 355, 357, 372, 374, 379e, and 381 of this title, and enacting provisions set out as notes under sections 321, 331, 332, 352, 355, 360, and 374 of this title] to the Federal Food, Drug, and Cosmetic Act [this chapter] shall be construed as invalidating any provision of State law which would be valid in the absence of such amendments unless there is a direct and positive conflict between such amendments and such provision of State law."

Definitions

Pub. L. 105–115, §2, Nov. 21, 1997, 111 Stat. 2297, provided that: "In this Act [see Short Title of 1997 Amendment note set out under section 301 of this title], the terms 'drug', 'device', 'food', and 'dietary supplement' have the meaning given such terms in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321)."

Executive Documents

Transfer of Functions

Functions of Secretary of Health, Education, and Welfare [now Health and Human Services] under Drug Abuse Control Amendments of 1965 [see Short Title of 1965 Amendment note set out under section 301 of this title] transferred to Attorney General except function of regulating counterfeiting of those drugs which are not "depressant or stimulant" drugs, see section 2 of Reorg. Plan No. 1 of 1968, set out in the Appendix to Title 5, Government Organization and Employees.

Functions of Federal Security Administrator transferred to Secretary of Health, Education, and Welfare and all agencies of Federal Security Agency transferred to Department of Health, Education, and Welfare by section 5 of Reorg. Plan No. 1 of 1953, set out in the Appendix to Title 5, Government Organization and Employees. Federal Security Agency and office of Administrator abolished by section 8 of Reorg. Plan No. 1 of 1953.

Food and Drug Administration in Department of Agriculture and its functions, except those functions relating to administration of Insecticide Act of 1910 and Naval Stores Act, transferred to Federal Security Agency, to be administered under direction and supervision of Federal Security Administrator, by Reorg. Plan No. IV of 1940, set out in the Appendix to Title 5.

[1] *So in original. Probably should be "Pharmacopeia,".*

[2] *So in original. Probably should be paragraph "(y)".*

[3] *So in original. Provision probably should be set flush with subpar. (B).*

§321a. "Butter" defined

For the purposes of the Food and Drug Act of June 30, 1906 (Thirty-fourth Statutes at Large, page 768) "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter, and containing not less than 80 per centum by weight of milk fat, all tolerances having been allowed for.

(Mar. 4, 1923, ch. 268, 42 Stat. 1500.)

Editorial Notes

References in Text

The Food and Drug Act of June 30, 1906, referred to in text, is act June 30, 1906, ch. 3915, 34 Stat. 768, which was classified to subchapter I (§1 et seq.) of chapter 1 of this title, was repealed (except for section 14a which was transferred to section 376 of this title) by act June 25, 1938, ch. 675, §1002(a), formerly §902(a), 52 Stat. 1059; renumbered §1002(a), Pub. L. 111–31, div. A, title I, §101(b)(2), June 22, 2009, 123 Stat. 1784, and is covered by this chapter.

Codification

Section, which was not enacted as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter, was formerly classified to section 6 of this title. Section 1002(a) of act June 25, 1938, set out as an Effective Date note under section 301 of this title, provided that this section should remain in force and effect and be applicable to the provisions of this chapter.

§321b. "Package" defined

The word "package" where it occurs the second and last time in the act entitled "An act to amend section 8 of an act entitled, 'An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes,' " approved March 3, 1913, shall include and shall be construed to include wrapped meats inclosed in papers or other materials as prepared by the manufacturers thereof for sale.

(July 24, 1919, ch. 26, 41 Stat. 271.)

Editorial Notes

References in Text

An act approved March 3, 1913, referred to in text, is act Mar. 3, 1913, ch. 117, 37 Stat. 732, which amended section 10 of this title. For complete classification of this Act to the Code, see Tables.

"An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes", referred to in text, is act June 30, 1906, ch. 3915, 34 Stat. 768, which was classified to subchapter I (§1 et seq.) of chapter 1 of this title, was repealed (except for section 14a which was transferred to section 376 of this title) by act June 25, 1938, ch. 675, §1002(a), formerly §902(a), 52 Stat. 1059; renumbered §1002(a), Pub. L. 111–31, div. A, title I, §101(b)(2), June 22, 2009, 123 Stat. 1784, and is covered by this chapter.

Codification

Section, which was not enacted as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter, was formerly classified to the last sentence of paragraph third of section 10 of this title. Section 1002(a) of act June 25, 1938, set out as an Effective Date note under section 301 of this title, provided that this section should remain in force and effect and be applicable to the provisions of this chapter.

§321c. Nonfat dry milk; "milk" defined

For the purposes of the Federal Food, Drug, and Cosmetic Act of June 26, 1938, (ch. 675, sec. 1, 52 Stat. 1040) [21 U.S.C. 301 et seq.] nonfat dry milk is the product resulting from the removal of fat and water from milk, and contains the lactose, milk proteins, and milk minerals in the same relative proportions as in the fresh milk from which made. It contains not over 5 per centum by weight of moisture. The fat content is not over 1½ per centum by weight unless otherwise indicated.

The term "milk", when used herein, means sweet milk of cows.

(Mar. 2, 1944, ch. 77, 58 Stat. 108; July 2, 1956, ch. 495, 70 Stat. 486.)

Editorial Notes

References in Text

The Federal Food, Drug, and Cosmetic Act of June 26, 1938 (ch. 675, sec. 1, 52 Stat. 1040), referred to in text, probably means act June 25, 1938, ch. 675, 52 Stat. 1040, as amended, which is classified generally to this chapter (§301 et seq.). For complete classification of this Act to the Code, see section 301 of this title and Tables.

Codification

Section was not enacted as a part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter, but was made applicable thereto.

Amendments

1956—Act July 2, 1956, substituted "nonfat dry milk" for "nonfat dry milk solids or defatted milk solids".

§321d. Market names for catfish and ginseng

(a) Catfish labeling

(1) In general

Notwithstanding any other provision of law, for purposes of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.)—

(A) the term "catfish" may only be considered to be a common or usual name (or part thereof) for fish classified within the family Ictaluridae; and

(B) only labeling or advertising for fish classified within that family may include the term "catfish".

(2) Omitted

(b) Ginseng labeling

(1) In general

Notwithstanding any other provision of law, for purposes of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.)—

(A) the term "ginseng" may only be considered to be a common or usual name (or part thereof) for any herb or herbal ingredient derived from a plant classified within the genus Panax; and

(B) only labeling or advertising for herbs or herbal ingredients classified within that genus may include the term "ginseng".

(2) Omitted

(Pub. L. 107–171, title X, §10806, May 13, 2002, 116 Stat. 526.)

Editorial Notes

References in Text

The Federal Food, Drug, and Cosmetic Act, referred to in subsecs. (a)(1), (b)(1), is act June 25, 1938, ch. 675, 52 Stat. 1040, as amended, which is classified generally to this chapter. For complete classification of this Act to the Code, see section 301 of this title and Tables.

Codification

Section is comprised of section 10806 of Pub. L. 107–171. Subsecs. (a)(2) and (b)(2) of section 10806 of Pub. L. 107–171 amended section 343 of this title.

Section was enacted as part of the Farm Security and Rural Investment Act of 2002, and not as part of Federal Food, Drug, and Cosmetic Act which comprises this chapter.

SUBCHAPTER III—PROHIBITED ACTS AND PENALTIES

§331. Prohibited acts

The following acts and the causing thereof are prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, tobacco product, or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

(d) The introduction or delivery for introduction into interstate commerce of any article in violation of section 344, 350d, 355, or 360bbb–3 of this title.

(e) The refusal to permit access to or copying of any record as required by section 350a, 350c, 350f(j), 350e, 354, 360bbb–3, 373, 374(a), 379aa, or 379aa–1 of this title; or the failure to establish or maintain any record, or make any report, required under section 350a, 350c(b), 350f, 350e, 354, 355(i) or (k), 360b(a)(4)(C), 360b(j), (l) or (m), 360ccc–1(i), 360e(f), 360i, 360bbb–3, 379aa, 379aa–1, 387i, or 387t of this title or the refusal to permit access to or verification or copying of any such required record; or the violation of any recordkeeping requirement under section 2223 [1] of this title (except when such violation is committed by a farm).

(f) The refusal to permit entry or inspection as authorized by section 374 of this title.

(g) The manufacture within any Territory of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded.

(h) The giving of a guaranty or undertaking referred to in section 333(c)(2) of this title, which guaranty or undertaking is false, except by a person who relied upon a guaranty or undertaking to the same effect signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the food, drug, device, tobacco product, or cosmetic; or the giving of a guaranty or undertaking referred to in section 333(c)(3) of this title, which guaranty or undertaking is false.

(i)(1) Forging, counterfeiting, simulating, or falsely representing, or without proper authority using any mark, stamp, tag, label, or other identification device authorized or required by regulations promulgated under the provisions of section 344 or 379e of this title.

(2) Making, selling, disposing of, or keeping in possession, control, or custody, or concealing any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit drug.

(3) The doing of any act which causes a drug to be a counterfeit drug, or the sale or dispensing, or the holding for sale or dispensing, of a counterfeit drug.

(j) The using by any person to his own advantage, or revealing, other than to the Secretary or officers or employees of the Department, or to the courts when relevant in any judicial proceeding under this chapter, any information acquired under authority of section 344, 348, 350a, 350c, 355, 360, 360b, 360c, 360d, 360e, 360f, 360h, 360i, 360j, 360ccc, 360ccc–1, 360ccc–2, 374, 379, 379e, 387d, 387e, 387f, 387g, 387h, 387i, or 387t(b) of this title concerning any method or process which as a trade secret is entitled to protection; or the violating of section 346a(i)(2) of this title or any regulation issued under that section..[2] This paragraph does not authorize the withholding of information from either House of Congress or from, to the extent of matter within its jurisdiction, any committee or subcommittee of such committee or any joint committee of Congress or any subcommittee of such joint committee.

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, tobacco product, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

(l) Repealed. Pub. L. 105–115, title IV, §421, Nov. 21, 1997, 111 Stat. 2380.

(m) The sale or offering for sale of colored oleomargarine or colored margarine, or the possession or serving of colored oleomargarine or colored margarine in violation of subsections (b) or (c) of section 347 of this title.

(n) The using, in labeling, advertising or other sales promotion of any reference to any report or analysis furnished in compliance with section 374 of this title.

(o) In the case of a prescription drug distributed or offered for sale in interstate commerce, the failure of the manufacturer, packer, or distributor thereof to maintain for transmittal, or to transmit, to any practitioner licensed by applicable State law to administer such drug who makes written request for information as to such drug, true and correct copies of all printed matter which is required to be included in any package in which that drug is distributed or sold, or such other printed matter as is approved by the Secretary. Nothing in this paragraph shall be construed to exempt any person from any labeling requirement imposed by or under other provisions of this chapter.

(p) The failure to register in accordance with section 360 or 387e of this title, the failure to provide any information required by section 360(j), 360(k), 387e(i), or 387e(j) of this title, or the failure to provide a notice required by section 360(j)(2) or 387e(i)(3) of this title.

(q)(1) The failure or refusal—

(A) to comply with any requirement prescribed under section 360h, 360j(g), 387c(b), 387g, 387h, or 387o of this title;

(B) to furnish any notification or other material or information required by or under section 360i, 360j(g), 387d, 387i, or 387t of this title; or

(C) to comply with a requirement under section 360l or 387m of this title.

(2) With respect to any device or tobacco product, the submission of any report that is required by or under this chapter that is false or misleading in any material respect.

(r) The movement of a device, drug, or tobacco product in violation of an order under section 334(g) of this title or the removal or alteration of any mark or label required by the order to identify the device, drug, or tobacco product as detained.

(s) The failure to provide the notice required by section 350a(c) or 350a(e) of this title, the failure to make the reports required by section 350a(f)(1)(B) of this title, the failure to retain the records required by section 350a(b)(4) of this title, or the failure to meet the requirements prescribed under section 350a(f)(3) of this title.

(t) The importation of a drug in violation of section 381(d)(1) of this title, the sale, purchase, or trade of a drug or drug sample or the offer to sell, purchase, or trade a drug or drug sample in violation of section 353(c) of this title, the sale, purchase, or trade of a coupon, the offer to sell, purchase, or trade such a coupon, or the counterfeiting of such a coupon in violation of section 353(c)(2) of this title, the distribution of a drug sample in violation of section 353(d) of this title or the failure to otherwise comply with the requirements of section 353(d) of this title, the distribution of drugs in violation of section 353(e) of this title, failure to comply with the requirements under section 360eee–1 of this title, the failure to comply with the requirements under section 360eee–3 of this title, as applicable, or the failure to otherwise comply with the requirements of section 353(e) of this title.

(u) The failure to comply with any requirements of the provisions of, or any regulations or orders of the Secretary, under section 360b(a)(4)(A), 360b(a)(4)(D), or 360b(a)(5) of this title.

(v) The introduction or delivery for introduction into interstate commerce of a dietary supplement that is unsafe under section 350b of this title.

(w) The making of a knowingly false statement in any statement, certificate of analysis, record, or report required or requested under section 381(d)(3) of this title; the failure to submit a certificate of analysis as required under such section; the failure to maintain records or to submit records or reports as required by such section; the release into interstate commerce of any article or portion thereof imported into the United States under such section or any finished product made from such article or portion, except for export in accordance with section 381(e) or 382 of this title, or with section 262(h) of title 42; or the failure to so export or to destroy such an article or portions thereof, or such a finished product.

(x) The falsification of a declaration of conformity submitted under section 360d(c) of this title or the failure or refusal to provide data or information requested by the Secretary under paragraph (3) of such section.

(y) In the case of a drug, device, or food—

(1) the submission of a report or recommendation by a person accredited under section 360m of this title that is false or misleading in any material respect;

(2) the disclosure by a person accredited under section 360m of this title of confidential commercial information or any trade secret without the express written consent of the person who submitted such information or secret to such person; or

(3) the receipt by a person accredited under section 360m of this title of a bribe in any form or the doing of any corrupt act by such person associated with a responsibility delegated to such person under this chapter.

(z) Omitted.

(aa) The importation of a prescription drug in violation of section 384 of this title, the falsification of any record required to be maintained or provided to the Secretary under such section, or any other violation of regulations under such section.

(bb) The transfer of an article of food in violation of an order under section 334(h) of this title, or the removal or alteration of any mark or label required by the order to identify the article as detained.

(cc) The importing or offering for import into the United States of an article of food or a drug by, with the assistance of, or at the direction of, a person debarred from such activity under section 335a(b)(3) of this title.

(dd) The failure to register in accordance with section 350d of this title.

(ee) The importing or offering for import into the United States of an article of food in violation of the requirements under section 381(m) of this title.

(ff) The importing or offering for import into the United States of a drug or device with respect to which there is a failure to comply with a request of the Secretary to submit to the Secretary a statement under section 381(o) of this title.

(gg) The knowing failure to comply with paragraph (7)(E) of section 374(g) of this title; the knowing inclusion by a person accredited under paragraph (2) of such section of false information in an inspection report under paragraph (7)(A) of such section; or the knowing failure of such a person to include material facts in such a report.

(hh) The failure by a shipper, carrier by motor vehicle or rail vehicle, receiver, or any other person engaged in the transportation of food to comply with the sanitary transportation practices prescribed by the

Secretary under section 350e of this title.

(ii) The falsification of a report of a serious adverse event submitted to a responsible person (as defined under section 379aa or 379aa–1 of this title) or the falsification of a serious adverse event report (as defined under section 379aa or 379aa–1 of this title) submitted to the Secretary.

(jj)(1) The failure to submit the certification required by section 282(j)(5)(B) of title 42, or knowingly submitting a false certification under such section.

(2) The failure to submit clinical trial information required under subsection (j) of section 282 of title 42.

(3) The submission of clinical trial information under subsection (j) of section 282 of title 42 that is false or misleading in any particular under paragraph (5)(D) of such subsection (j).

(kk) The dissemination of a television advertisement without complying with section 353c [1] of this title.

(ll) The introduction or delivery for introduction into interstate commerce of any food to which has been added a drug approved under section 355 of this title, a biological product licensed under section 262 of title 42, or a drug or a biological product for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public, unless—

(1) such drug or such biological product was marketed in food before any approval of the drug under section 355 of this title, before licensure of the biological product under such section 262 of title 42, and before any substantial clinical investigations involving the drug or the biological product have been instituted;

(2) the Secretary, in the Secretary's discretion, has issued a regulation, after notice and comment, approving the use of such drug or such biological product in the food;

(3) the use of the drug or the biological product in the food is to enhance the safety of the food to which the drug or the biological product is added or applied and not to have independent biological or therapeutic effects on humans, and the use is in conformity with—

(A) a regulation issued under section 348 of this title prescribing conditions of safe use in food;

(B) a regulation listing or affirming conditions under which the use of the drug or the biological product in food is generally recognized as safe;

(C) the conditions of use identified in a notification to the Secretary of a claim of exemption from the premarket approval requirements for food additives based on the notifier's determination that the use of the drug or the biological product in food is generally recognized as safe, provided that the Secretary has not questioned the general recognition of safety determination in a letter to the notifier;

(D) a food contact substance notification that is effective under section 348(h) of this title; or

(E) such drug or biological product had been marketed for smoking cessation prior to September 27, 2007; or

(4) the drug is a new animal drug whose use is not unsafe under section 360b of this title.

(mm) The failure to submit a report or provide a notification required under section 350f(d) of this title.

(nn) The falsification of a report or notification required under section 350f(d) of this title.

(oo) The sale of tobacco products in violation of a no-tobacco-sale order issued under section 333(f) of this title.

(pp) The introduction or delivery for introduction into interstate commerce of a tobacco product in violation of section 387k of this title.

(qq)(1) Forging, counterfeiting, simulating, or falsely representing, or without proper authority using any mark, stamp (including tax stamp), tag, label, or other identification device upon any tobacco product or container or labeling thereof so as to render such tobacco product a counterfeit tobacco product.

(2) Making, selling, disposing of, or keeping in possession, control, or custody, or concealing any punch, die, plate, stone, or other item that is designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any tobacco product or container or labeling thereof so as to render such tobacco product a counterfeit tobacco product.

(3) The doing of any act that causes a tobacco product to be a counterfeit tobacco product, or the sale or dispensing, or the holding for sale or dispensing, of a counterfeit tobacco product.

(rr) The charitable distribution of tobacco products.

(ss) The failure of a manufacturer or distributor to notify the Attorney General and the Secretary of the Treasury of their knowledge of tobacco products used in illicit trade.

(tt) Making any express or implied statement or representation directed to consumers with respect to a tobacco product, in a label or labeling or through the media or advertising, that either conveys, or misleads or would mislead consumers into believing, that—

(1) the product is approved by the Food and Drug Administration;

(2) the Food and Drug Administration deems the product to be safe for use by consumers;

(3) the product is endorsed by the Food and Drug Administration for use by consumers; or

(4) the product is safe or less harmful by virtue of—

(A) its regulation or inspection by the Food and Drug Administration; or

(B) its compliance with regulatory requirements set by the Food and Drug Administration;

including any such statement or representation rendering the product misbranded under section 387c of this title.

(uu) The operation of a facility that manufactures, processes, packs, or holds food for sale in the United States if the owner, operator, or agent in charge of such facility is not in compliance with section 350g of this title.

(vv) The failure to comply with the requirements under section 350h of this title.

(ww) The failure to comply with section 350i of this title.

(xx) The refusal or failure to follow an order under section 350l of this title.

(yy) The knowing and willful failure to comply with the notification requirement under section 350f(h) of this title.

(zz) The importation or offering for importation of a food if the importer (as defined in section 384a of this title) does not have in place a foreign supplier verification program in compliance with such section 384a of this title.

(aaa) The failure to register in accordance with section 381(s) of this title.

(bbb) The failure to notify the Secretary in violation of section 360bbb–7 of this title.

(ccc)(1) The resale of a compounded drug that is labeled "not for resale" in accordance with section 353b of this title.

(2) With respect to a drug to be compounded pursuant to section 353a or 353b of this title, the intentional falsification of a prescription, as applicable.

(3) The failure to report drugs or adverse events by an entity that is registered in accordance with subsection (b) of section 353b of this title.

(ddd)(1) The manufacture or the introduction or delivery for introduction into interstate commerce of a rinse-off cosmetic that contains intentionally-added plastic microbeads.

(2) In this paragraph—

(A) the term "plastic microbead" means any solid plastic particle that is less than five millimeters in size and is intended to be used to exfoliate or cleanse the human body or any part thereof; and

(B) the term "rinse-off cosmetic" includes toothpaste.

(eee) The failure to comply with any order issued under section 360bbb–8d of this title.

(June 25, 1938, ch. 675, §301, 52 Stat. 1042; Dec. 22, 1941, ch. 613, §1, 55 Stat. 851; July 6, 1945, ch. 281, §1, 59 Stat. 463; Mar. 10, 1947, ch. 16, §1, 61 Stat. 11; June 24, 1948, ch. 613, §1, 62 Stat. 582; Mar. 16, 1950, ch. 61, §3(b), 64 Stat. 20; Aug. 7, 1953, ch. 350, §2, 67 Stat. 477; Pub. L. 85–929, §5, Sept. 6, 1958, 72 Stat. 1788; Pub. L. 86–618, title I, §§104, 105(a), July 12, 1960, 74 Stat. 403; Pub. L. 87–781, title I, §§103(c), 104(e)(1), 106(c), 114(a), title III, §304, Oct. 10, 1962, 76 Stat. 784, 785, 788, 791, 795; Pub. L. 89–74, §§5, 9(c), July 15, 1965, 79 Stat. 232, 235; Pub. L. 90–399, §103, July 13, 1968, 82 Stat. 352; Pub. L. 90–639, §2(b), Oct. 24, 1968, 82 Stat. 1361; Pub. L. 91–513, title II, §701(a), Oct. 27, 1970, 84 Stat. 1281; Pub. L. 92–387, §4(e), Aug. 16, 1972, 86 Stat. 562; Pub. L. 94–295, §§3(b), 4(b)(1), 7(b), May 28, 1976, 90 Stat. 576, 580, 582; Pub. L. 96–359, §5, Sept. 26, 1980, 94 Stat. 1193; Pub. L. 99–570, title IV, §4014(b)(2), Oct. 27, 1986, 100 Stat. 3207–120; Pub. L. 100–293, §7(a), Apr. 22, 1988, 102 Stat. 99; Pub. L. 101–502, §5(j), Nov. 3, 1990, 104 Stat. 1289; Pub. L. 101–508, title IV, §4755(c)(2), Nov. 5, 1990, 104 Stat. 1388–210; Pub. L. 102–300, §3(a)(1), June 16, 1992, 106 Stat. 238; Pub. L. 102–571, title I, §107(2), (3), Oct. 29, 1992, 106 Stat. 4499; Pub. L. 103–80, §3(c), Aug. 13, 1993, 107 Stat. 775; Pub. L.

103–396, §2(b)(1), Oct. 22, 1994, 108 Stat. 4154; Pub. L. 103–417, §10(b), Oct. 25, 1994, 108 Stat. 4332; Pub. L. 104–134, title II, §2103, Apr. 26, 1996, 110 Stat. 1321–319; Pub. L. 104–170, title IV, §403, Aug. 3, 1996, 110 Stat. 1514; Pub. L. 104–250, §5(d), Oct. 9, 1996, 110 Stat. 3156; Pub. L. 105–115, title I, §125(a)(2)(A), (C), (b)(2)(B), title II, §§204(b), 210(c), title IV, §§401(b), 421, Nov. 21, 1997, 111 Stat. 2325, 2336, 2345, 2364, 2380; Pub. L. 106–387, §1(a) [title VII, §745(d)(1)], Oct. 28, 2000, 114 Stat. 1549, 1549A-39; Pub. L. 107–188, title III, §§303(b), 304(d), 305(b), 306(c), 307(b), 321(b)(2), 322(b), June 12, 2002, 116 Stat. 664, 666, 668, 670, 672, 676, 677; Pub. L. 107–250, title II, §201(d), Oct. 26, 2002, 116 Stat. 1609; Pub. L. 108–136, div. A, title XVI, §1603(c), Nov. 24, 2003, 117 Stat. 1690; Pub. L. 108–173, title XI, §1121(b)(1), Dec. 8, 2003, 117 Stat. 2469; Pub. L. 108–214, §2(b)(2)(A), Apr. 1, 2004, 118 Stat. 575; Pub. L. 108–282, title I, §102(b)(5)(C), (D), Aug. 2, 2004, 118 Stat. 902; Pub. L. 109–59, title VII, §7202(d), (e), Aug. 10, 2005, 119 Stat. 1913; Pub. L. 109–462, §§2(c), 3(b), 4(a), Dec. 22, 2006, 120 Stat. 3472, 3475; Pub. L. 110–85, title VIII, §801(b)(1), title IX, §§901(d)(1), 912(a), title X, §1005(d), Sept. 27, 2007, 121 Stat. 920, 939, 951, 968; Pub. L. 111–31, div. A, title I, §103(b), June 22, 2009, 123 Stat. 1833; Pub. L. 111–353, title I, §§102(d)(1), 103(e), 105(c), 106(d), title II, §§204(j)(1), 206(d), 211(b), (c), title III, §301(b), Jan. 4, 2011, 124 Stat. 3889, 3898, 3904, 3906, 3937, 3943, 3953, 3954; Pub. L. 112–144, title VII, §§714(a), 715(a), July 9, 2012, 126 Stat. 1073, 1075; Pub. L. 113–54, title I, §103(a), title II, §206(a), Nov. 27, 2013, 127 Stat. 597, 639; Pub. L. 114–114, §2(a), Dec. 28, 2015, 129 Stat. 3129; Pub. L. 114–255, div. A, title III, §3101(a)(2)(A), Dec. 13, 2016, 130 Stat. 1152; Pub. L. 115–271, title III, §§3012(a), 3022(b)(1), Oct. 24, 2018, 132 Stat. 3935, 3938.)

Editorial Notes

References in Text

Section 2223 of this title, referred to in par. (e), was in the original "section 204 of the FDA Food Safety Modernization Act", meaning section 204 of Pub. L. 111–353, which enacted section 2223 of this title and amended this section and section 381 of this title.

Section 353c of this title, referred to in par. (kk), was in the original a reference to section 503B of act June 25, 1938, and was translated as if it referred to section 503C of that Act, to reflect the probable intent of Congress and the renumbering of section 503B as 503C by Pub. L. 113–54, title I, §102(a)(1), Nov. 27, 2013, 127 Stat. 587, and its transfer to section 353c of this title. A new section 503B, which was enacted by section 102(a)(2) of Pub. L. 113–54, is classified to section 353b of this title and does not relate to television advertisements.

Constitutionality

For information regarding constitutionality of certain provisions of section 301 of act June 25, 1938, see Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation, Appendix 1, Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States.

Amendments

2018—Par. (cc). Pub. L. 115–271, §3022(b)(1), inserted "or a drug" after "food" and "from such activity" after "person debarred".

Par. (eee). Pub. L. 115–271, §3012(a), added par. (eee).

2016—Subsec. (r). Pub. L. 114–255 inserted ", drug," after "device" in two places.

2015—Par. (ddd). Pub. L. 114–114 added par. (ddd).

2013—Par. (t). Pub. L. 113–54, §206(a), struck out "or" after "the requirements of section 353(d) of this title," and inserted ", failure to comply with the requirements under section 360eee–1 of this title, the failure to comply with the requirements under section 360eee–3 of this title, as applicable," after "in violation of section 353(e) of this title".

Par. (ccc). Pub. L. 113–54, §103(a), added par. (ccc).

2012—Par. (aaa). Pub. L. 112–144, §714(a), added par. (aaa).

Par. (bbb). Pub. L. 112–144, §715(a), added par. (bbb).

2011—Par. (d). Pub. L. 111–353, §102(d)(1), inserted "350d," after "344,".

Par. (e). Pub. L. 111–353, §§204(j)(1), 211(c), substituted "350f(j)" for "350f(g)" and inserted before period at end "; or the violation of any recordkeeping requirement under section 2223 of this title (except when such violation is committed by a farm)".

Par. (uu). Pub. L. 111–353, §103(e), added par. (uu).

Par. (vv). Pub. L. 111–353, §105(c), added par. (vv).

Par. (ww). Pub. L. 111–353, §106(d), added par. (ww).

Par. (xx). Pub. L. 111–353, §206(d), added par. (xx).

Par. (yy). Pub. L. 111–353, §211(b), added par. (yy).

Par. (zz). Pub. L. 111–353, §301(b), added par. (zz).

2009—Pars. (a) to (c). Pub. L. 111–31, §103(b)(1)–(3), inserted "tobacco product," after "device,".

Par. (e). Pub. L. 111–31, §103(b)(4)(B), which directed substitution of "379aa–1, 387i, or 387t of this title or the refusal to permit access to" for "or 379aa–1 of this title or the refusal to permit access to", was executed by making the substitution for "or 379aa–1 of this title, or the refusal to permit access to", to reflect the probable intent of Congress.

Pub. L. 111–31, §103(b)(4)(A), struck out period after "360ccc–1(i)".

Pars. (g), (h). Pub. L. 111–31, §103(b)(5), (6), inserted "tobacco product," after "device,".

Par. (j). Pub. L. 111–31, §103(b)(7), struck out period after "360ccc–2" and substituted "379, 379e, 387d, 387e, 387f, 387g, 387h, 387i, or 387t(b)" for "379, or 379e".

Par. (k). Pub. L. 111–31, §103(b)(8), inserted "tobacco product," after "device,".

Par. (p). Pub. L. 111–31, §103(b)(9), added par. (p) and struck out former par. (p) which read as follows: "The failure to register in accordance with section 360 of this title, the failure to provide any information required by section 360(j) or 360(k) of this title, or the failure to provide a notice required by section 360(j)(2) of this title."

Par. (q)(1). Pub. L. 111–31, §103(b)(10), added subpar. (1) and struck out former subpar. (1) which read as follows: "The failure or refusal to (A) comply with any requirement prescribed under section 360h or 360j(g) of this title, (B) furnish any notification or other material or information required by or under section 360i or 360j(g) of this title, or (C) comply with a requirement under section 360l of this title."

Par. (q)(2). Pub. L. 111–31, §103(b)(11), substituted "device or tobacco product," for "device,".

Par. (r). Pub. L. 111–31, §103(b)(12), inserted "or tobacco product" after "device" in two places.

Pars. (oo) to (tt). Pub. L. 111–31, §103(b)(13), added pars. (oo) to (tt).

2007—Par. (e). Pub. L. 110–85, §1005(d)(1), substituted "350c, 350f(g)," for "350c," and "350c(b), 350f" for "350c(b)".

Par. (jj). Pub. L. 110–85, §801(b)(1), added par. (jj).

Par. (kk). Pub. L. 110–85, §901(d)(1), added par. (kk).

Par. (ll). Pub. L. 110–85, §912(a), added par. (ll).

Pars. (mm), (nn). Pub. L. 110–85, §1005(d)(2), added pars. (mm) and (nn).

2006—Par. (e). Pub. L. 109–462, §3(b), substituted "374(a), 379aa, or 379aa–1" for "374(a), or 379aa" and "360bbb–3, 379aa, or 379aa–1" for "360bbb–3, or 379aa".

Pub. L. 109–462, §2(c), substituted ", 374(a), or 379aa" for ", or 374(a)" and ", 360bbb–3, or 379aa" for ", or 360bbb–3".

Par. (ii). Pub. L. 109–462, §4(a), added par. (ii).

2005—Par. (e). Pub. L. 109–59, §7202(d), inserted "350e," before "354," in two places.

Par. (hh). Pub. L. 109–59, §7202(e), added par. (hh).

2004—Par. (e). Pub. L. 108–282, §102(b)(5)(C), which directed the substitution of "360b(a)(4)(C), 360b (j), (l) or (m), 360ccc–1(i)." for "360b(a)(4)(C), 360b(j), (l) or (m)" was executed by making the substitution for "360b(a)(4)(C), 360b(j), (l), or (m)", to reflect the probable intent of Congress.

Par. (j). Pub. L. 108–282, §102(b)(5)(D), substituted "360j, 360ccc, 360ccc–1, 360ccc–2." for "360j".

Par. (gg). Pub. L. 108–214 amended par. (gg) generally. Prior to amendment, text read as follows: "The knowing failure of a person accredited under paragraph (2) of section 374(g) of this title to comply with paragraph (7)(E) of such section; the knowing inclusion by such a person of false information in an inspection report under paragraph (7)(A) of such section; or the knowing failure of such a person to include material facts in such a report."

2003—Par. (d). Pub. L. 108–136 substituted "section 344, 355, or 360bbb–3" for "section 344 or 355".

Par. (e). Pub. L. 108–136 inserted "360bbb–3," after "350c, 354," and substituted "360i, or 360bbb–3" for "or 360i".

Par. (aa). Pub. L. 108–173 substituted "prescription drug in violation of section 384" for "covered product in violation of section 384".

2002—Par. (e). Pub. L. 107–188, §306(c)(1), substituted "by section 350a, 350c, 354, 373, or 374(a) of this title" for "by section 350a, 354, or 373 of this title" and "under section 350a, 350c(b)" for "under section 350a".

Par. (j). Pub. L. 107–188, §306(c)(2), inserted "350c," after "350a,".

Par. (w). Pub. L. 107–188, §322(b), amended par. (w) generally. Prior to amendment, par. (w) read as follows: "The making of a knowingly false statement in any record or report required or requested under subparagraph (A) or (B) of section 381(d)(3) of this title, the failure to submit or maintain records as required by sections 381(d)(3)(A)

and 381(d)(3)(B) of this title, the release into interstate commerce of any article imported into the United States under section 381(d)(3) of this title or any finished product made from such article (except for export in accordance with section 381(e) or 382 of this title or section 262(h) of title 42), or the failure to export or destroy any component, part or accessory not incorporated into a drug, biological product or device that will be exported in accordance with section 381(e) or 382 of this title or section 262(h) of title 42."

Par. (bb). Pub. L. 107–188, §303(b), added par. (bb).

Par. (cc). Pub. L. 107–188, §304(d), added par. (cc).

Par. (dd). Pub. L. 107–188, §305(b), added par. (dd).

Par. (ee). Pub. L. 107–188, §307(b), added par. (ee).

Par. (ff). Pub. L. 107–188, §321(b)(2), added par. (ff).

Par. (gg). Pub. L. 107–250 added par. (gg).

2000—Par. (aa). Pub. L. 106–387 added par. (aa).

1997—Par. (e). Pub. L. 105–115, §125(b)(2)(B), struck out "357(d) or (g)," after "355(i) or (k),".

Par. (i)(1). Pub. L. 105–115, §125(a)(2)(C), struck out ", 356, 357," before "or 379e of this title".

Par. (j). Pub. L. 105–115, §125(a)(2)(A), struck out "356, 357," before "360,".

Par. (l). Pub. L. 105–115, §421, struck out par. (l) which read as follows: "The using, on the labeling of any drug or device or in any advertising relating to such drug or device, of any representation or suggestion that approval of an application with respect to such drug or device is in effect under section 355, 360e, or 360j(g) of this title, as the case may be, or that such drug or device complies with the provisions of such section."

Par. (x). Pub. L. 105–115, §204(b), added par. (x).

Par. (y). Pub. L. 105–115, §210(c), added par. (y).

Par. (z). Pub. L. 105–115, §401(b), temporarily added par. (z) which related to dissemination of information in violation of section 360aaa of this title. See Effective and Termination Dates of 1997 Amendment note below.

1996—Par. (e). Pub. L. 104–250 inserted ", 354," before "or 373 of this title" and "354," before "355(i) or (k)".

Par. (j). Pub. L. 104–170 inserted before period at end of first sentence "; or the violating of section 346a(i)(2) of this title or any regulation issued under that section."

Pars. (u) to (w). Pub. L. 104–134 redesignated par. (u) relating to introduction into interstate commerce of unsafe dietary supplement as (v) and added par. (w).

1994—Par. (e). Pub. L. 103–396, §2(b)(1)(A), substituted "357(d) or (g), 360b(a)(4)(C)," for "357(d) or (g),".

Par. (u). Pub. L. 103–417 added par. (u) relating to introduction into interstate commerce of unsafe dietary supplement.

Pub. L. 103–396, §2(b)(1)(B), added par. (u) relating to failure to comply with regulations or orders of Secretary.

1993—Par. (j). Pub. L. 103–80, §3(c)(1), substituted "379, or 379e" for "379e, or 379".

Par. (s). Pub. L. 103–80, §3(c)(2), substituted "350a(e)" for "350a(d)".

1992—Pars. (i)(1), (j). Pub. L. 102–571 substituted "379e" for "376".

Par. (q)(1)(C). Pub. L. 102–300 added cl. (C).

1990—Par. (e). Pub. L. 101–502 substituted "or (k)" for "or (j)".

Par. (j). Pub. L. 101–508 inserted at end "This paragraph does not authorize the withholding of information from either House of Congress or from, to the extent of matter within its jurisdiction, any committee or subcommittee of such committee or any joint committee of Congress or any subcommittee of such joint committee."

1988—Par. (t). Pub. L. 100–293 added par. (t).

1986—Par. (s). Pub. L. 99–570 amended par. (s) generally. Prior to amendment, par. (s) read as follows: "The failure to provide the notice required by section 350a(b) or 350a(c), the failure to make the reports required by section 350a(d)(1)(B), or the failure to meet the requirements prescribed under section 350a(d)(2)."

1980—Par. (e). Pub. L. 96–359, §5(b), inserted reference to section 350a of this title in two places.

Par. (j). Pub. L. 96–359, §5(c), inserted reference to section 350a of this title.

Par. (s). Pub. L. 96–359, §5(a), added par. (s).

1976—Par. (e). Pub. L. 94–295, §3(b)(2), inserted references to sections 360e(f) and 360i of this title.

Par. (j). Pub. L. 94–295, §3(b)(3), inserted references to sections 360, 360c, 360d, 360e, 360f, 360h, 360i, 360j, and 379 of this title.

Par. (l). Pub. L. 94–295, §3(b)(4), substituted "drug or device" for "drug" wherever appearing, and inserted references to sections 360e and 360j(g) of this title.

Par. (p). Pub. L. 94–295, §4(b)(1), substituted "section 360(j) or 360(k) of this title," for "section 360(j) of this title,".

Par. (q). Pub. L. 94–295, §3(b)(1), added par. (q).

Par. (r). Pub. L. 94–295, §7(b), added par. (r).

1972—Par. (p). Pub. L. 92–387 added failure to provide information required by section 360(j) of this title, and failure to provide notice required by section 360(j)(2) of this title as prohibited acts.

1970—Par. (q). Pub. L. 91–513 struck out par. (q) which set out penalties for illegal manufacture, sale, disposition, possession and other traffic in stimulant and depressant drugs. See section 801 et seq. of this title.

1968—Par. (e). Pub. L. 90–399, §103(1), struck out "or" before "357(d) or (g)" and inserted ", or 360b(j), (l), or (m)" after "357(d) or (g)". Amendment striking out "or" was executed as described, notwithstanding directory language that "or" before "357," be stricken out, to reflect the probable intent of Congress.

Par. (j). Pub. L. 90–399, §103(2), inserted reference to section 360b of this title.

Par. (q). Pub. L. 90–639 divided cl. (3), which referred simply to possession in violation of section 360a(c) of this title, into subcls. (A) and (B) which refer, respectively, to possession in violation of section 360a(c)(1) of this title and possession in violation of section 360a(c)(2) of this title.

1965—Par. (i). Pub. L. 89–74, §9(c), designated existing provisions as subpar. (1) and added subpars. (2) and (3).

Par. (q). Pub. L. 89–74, §5, added par. (q).

1962—Par. (e). Pub. L. 87–781, §§103(c), 106(c), prohibited the failure to establish or maintain any record, or make any report, required under sections 355(i) or (j) and 507(d) or (g) of this title, or the refusal to permit access to, or verification or copying of, any such required record.

Par. (l). Pub. L. 87–781, §104(e)(1), inserted "approval of" before "an application", and substituted "in effect" for "effective".

Par. (o). Pub. L. 87–781, §114(a), added par. (o).

Par. (p). Pub. L. 87–781, §304, added par. (p).

1960—Par. (i). Pub. L. 86–618, §105(a), struck out references to sections 346(b), 354, and 364 of this title and inserted reference to section 376 of this title.

Par. (j). Pub. L. 86–618, §104, inserted reference to section 376 of this title.

1958—Par. (j). Pub. L. 85–929, inserted reference to section 348 of this title.

1953—Par. (n). Act Aug. 7, 1953, added par. (n).

1950—Par. (m). Act Mar. 16, 1950, added par. (m).

1948—Par. (k). Act June 24, 1948, inserted "(whether or not the first sale)" so as to make it clear that this subsection is not limited to the case where the act occurs while the article is held for the first sale after interstate shipment, and extended coverage of subsection to acts which result in adulteration.

1947—Par. (j). Act Mar. 10, 1947, inserted reference to sections 356 and 357 of this title.

1945—Par. (i). Act July 6, 1945, inserted reference to section 357 of this title.

1941—Par. (i). Act Dec. 22, 1941, inserted reference to section 356 of this title.

Statutory Notes and Related Subsidiaries

Effective Date of 2018 Amendment

Pub. L. 115–271, title III, §3012(d), Oct. 24, 2018, 132 Stat. 3936, provided that: "Sections 301(eee) [21 U.S.C. 331(eee)] and 569D [21 U.S.C. 360bbb–8d] of the Federal Food, Drug, and Cosmetic Act, as added by subsections (a) and (b), shall be effective beginning on the date of enactment of this Act [Oct. 24, 2018]."

Effective Date of 2015 Amendment

Pub. L. 114–114, §2(b), Dec. 28, 2015, 129 Stat. 3129, provided that:

"(1) In general.—The amendment made by subsection (a) [amending this section] applies—

"(A) with respect to manufacturing, beginning on July 1, 2017, and with respect to introduction or delivery for introduction into interstate commerce, beginning on July 1, 2018; and

"(B) notwithstanding subparagraph (A), in the case of a rinse-off cosmetic that is a nonprescription drug, with respect to manufacturing, beginning on July 1, 2018, and with respect to the introduction or delivery for introduction into interstate commerce, beginning on July 1, 2019.

"(2) Nonprescription drug.—For purposes of this subsection, the term 'nonprescription drug' means a drug not subject to section 503(b)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 353(b)(1))."

Effective Date of 2011 Amendment

Amendment by section 103(e) of Pub. L. 111–353 effective 18 months after Jan. 4, 2011, and applicable to a small business (as defined in the regulations promulgated under section 350g(n) of this title) beginning on the date that is 6 months after the effective date of such regulations and to a very small business (as defined in such regulations) beginning on the date that is 18 months after the effective date of such regulations, see section 103(i) of Pub. L. 111–353, set out as an Effective Date note under section 350g of this title.

Pub. L. 111–353, title III, §301(d), Jan. 4, 2011, 124 Stat. 3955, provided that: "The amendments made by this section [enacting section 384a of this title and amending this section and section 381 of this title] shall take effect 2 years after the date of enactment of this Act [Jan. 4, 2011]."

Effective Date of 2007 Amendment

Pub. L. 110–85, title IX, §909, Sept. 27, 2007, 121 Stat. 950, provided that:

"(a) Effective Date.—This subtitle [subtitle A (§§901–909) of title IX of Pub. L. 110–85, enacting sections 353b and 355–1 of this title, amending this section, sections 333, 352, and 355 of this title, and section 262 of Title 42, The Public Health and Welfare, and enacting provisions set out as notes under sections 352, 355, and 355a of this title] takes effect 180 days after the date of the enactment of this Act [Sept. 27, 2007].

"(b) Drugs Deemed to Have Risk Evaluation and Mitigation Strategies.—

"(1) In general.—A drug that was approved before the effective date of this Act [probably means "this subtitle", see above] is, in accordance with paragraph (2), deemed to have in effect an approved risk evaluation and mitigation strategy under section 505–1 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355–1] (as added by section 901) (referred to in this section as the 'Act') if there are in effect on the effective date of this Act elements to assure safe use—

"(A) required under section 314.520 or section 601.42 of title 21, Code of Federal Regulations; or

"(B) otherwise agreed to by the applicant and the Secretary for such drug.

"(2) Elements of strategy; enforcement.—The approved risk evaluation and mitigation strategy in effect for a drug under paragraph (1)—

"(A) is deemed to consist of the timetable required under section 505–1(d) and any additional elements under subsections (e) and (f) of such section in effect for such drug on the effective date of this Act; and

"(B) is subject to enforcement by the Secretary to the same extent as any other risk evaluation and mitigation strategy under section 505–1 of the Act, except that sections 303(f)(4) and 502(y) and (z) of the Act [21 U.S.C. 333(f)(4), 352(y), (z)] (as added by section 902) shall not apply to such strategy before the Secretary has completed review of, and acted on, the first assessment of such strategy under such section 505–1.

"(3) Submission.—Not later than 180 days after the effective date of this Act, the holder of an approved application for which a risk evaluation and mitigation strategy is deemed to be in effect under paragraph (1) shall submit to the Secretary a proposed risk evaluation and mitigation strategy. Such proposed strategy is subject to section 505–1 of the Act as if included in such application at the time of submission of the application to the Secretary."

Effective Date of 2006 Amendment

Amendment by section 2(c) of Pub. L. 109–462 effective 1 year after Dec. 22, 2006, see section 2(e)(1) of Pub. L. 109–462, set out as a note under section 352 of this title.

Amendment by section 3(b) of Pub. L. 109–462 effective 1 year after Dec. 22, 2006, see section 3(d)(1) of Pub. L. 109–462, set out as a note under section 343 of this title.

Pub. L. 109–462, §4(b), Dec. 22, 2006, 120 Stat. 3475, provided that: "The amendment made by this section [amending this section] shall take effect 1 year after the date of enactment of this Act [Dec. 22, 2006]."

Effective Date of 2005 Amendment

Pub. L. 109–59, title VII, §7204, Aug. 10, 2005, 119 Stat. 1914, provided that: "This subtitle [subtitle B (§§7201–7204) of title VII of Pub. L. 109–59, enacting section 350e of this title, amending this section, sections 342 and 373 of this title, and section 5701 of Title 49, Transportation, omitting sections 5702 to 5714 of Title 49, and enacting provisions set out as a note under section 301 of this title] takes effect on October 1, 2005."

Effective Date of 2002 Amendment

Pub. L. 107–188, title III, §321(c), June 12, 2002, 116 Stat. 676, provided that: "The amendments made by this section [amending this section and sections 360 and 381 of this title] take effect upon the expiration of the 180-day period beginning on the date of the enactment of this Act [June 12, 2002]."

Pub. L. 107–188, title III, §322(c), June 12, 2002, 116 Stat. 678, provided that: "The amendments made by this section [amending this section and section 381 of this title] take effect upon the expiration of the 90-day period beginning on the date of the enactment of this Act [June 12, 2002]."

Effective and Termination Dates of 1997 Amendment

Amendment by sections 204, 210, and 421 of Pub. L. 105–115 effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as a note under section 321 of this title.

Amendment by section 401(b) of Pub. L. 105–115 effective 1 year after Nov. 21, 1997, or upon Secretary's issuance of final regulations pursuant to section 401(c) of Pub. L. 105–115, whichever is sooner, and ceases to be effective Sept. 30, 2006, see section 401(d), (e) of Pub. L. 105–115, set out as an Effective and Termination Dates note under former section 360aaa of this title.

Effective Date of 1994 Amendment

Amendment by Pub. L. 103–396 effective upon adoption of final regulations under section 2(c) of Pub. L. 103–396, set out as a Regulations note under section 360b of this title, see section 2(d) of Pub. L. 103–396, set out as a note under section 360b of this title.

Effective Date of 1990 Amendment

Pub. L. 101–508, title IV, §4755(c)(2), Nov. 5, 1990, 104 Stat. 1388–210, provided that the amendment made by section 4755(c)(2) is effective as if included in subtitle D of title VI of the Omnibus Budget Reconciliation Act of 1989, Pub. L. 101–239, title VI, §§6601, 6602, Dec. 19, 1989, 103 Stat. 2285, see 42 U.S.C. 300aa–1 note, 300aa–10 note.

Effective Date of 1988 Amendment

Amendment by Pub. L. 100–293 effective upon expiration of 90 days after Apr. 22, 1988, see section 8(a) of Pub. L. 100–293, set out as a note under section 353 of this title.

Effective Date of 1972 Amendment

Amendment by Pub. L. 92–387 effective on first day of sixth month beginning after Aug. 16, 1972, see section 5 of Pub. L. 92–387, set out as a note under section 360 of this title.

Effective Date of 1970 Amendment

Amendment by Pub. L. 91–513 effective on first day of seventh calendar month that begins after Oct. 26, 1970, see section 704 of Pub. L. 91–513, set out as an Effective Date note under section 801 of this title.

Effective Date of 1968 Amendments

Amendment by Pub. L. 90–399 effective on first day of thirteenth calendar month after July 13, 1968, see section 108(a) of Pub. L. 90–399, set out as an Effective Date and Transitional Provisions note under section 360b of this title.

Amendment by Pub. L. 90–639 applicable only with respect to violations of this chapter committed after Oct. 24, 1968, see section 6 of Pub. L. 90–639, set out as an Effective Date of 1968 Amendments; Transitional Provisions note under section 321 of this title.

Effective Date of 1965 Amendment

Amendment by Pub. L. 89–74 effective Feb. 1, 1966, see section 11 of Pub. L. 89–74, set out as a note under section 321 of this title.

Effective Date of 1962 Amendment

Amendment by sections 103(c) and 106(c) of Pub. L. 87–781 effective on first day of seventh calendar month following Oct. 1962, and amendment by section 104(e)(1) of Pub. L. 87–781 effective Oct. 10, 1962, see section 107 of Pub. L. 87–781, set out as a note under section 321 of this title.

Pub. L. 87–781, title I, §114(b), Oct. 10, 1962, 76 Stat. 791, provided that: "This section [amending this section] shall take effect on the first day of the seventh calendar month following the month in which this Act is enacted [October 1962]."

Effective Date of 1960 Amendment

Amendment by Pub. L. 86–618 effective July 12, 1960, subject to provisions of section 203 of Pub. L. 86–618, see section 202 of Pub. L. 86–618, set out as a note under section 379e of this title.

Effective Date of 1958 Amendment

Amendment by Pub. L. 85–929 effective Sept. 6, 1958, see section 6(a) of Pub. L. 85–929, set out as a note under section 342 of this title.

Effective Date of 1950 Amendment

Amendment by act Mar. 16, 1950, effective July 1, 1950, see section 7 of that act, set out as an Effective Date note under section 347 of this title.

Regulations

Pub. L. 113–54, title I, §104, Nov. 27, 2013, 127 Stat. 597, provided that: "In promulgating any regulations to implement this title [enacting subpart 9 of part C of subchapter VII of this chapter and sections 353a–1 and 353b of this title, amending this section and sections 352, 353a, 352b, and 353c of this title, and enacting provisions set out as notes under section 301 of this title] (and the amendments made by this title), the Secretary of Health and Human Services shall—

"(1) issue a notice of proposed rulemaking that includes the proposed regulation;

"(2) provide a period of not less than 60 calendar days for comments on the proposed regulation; and

"(3) publish the final regulation not more than 18 months following publication of the proposed rule and not less than 30 calendar days before the effective date of such final regulation."

Secretary of Health and Human Services to promulgate regulations to implement amendments made by section 401 of Pub. L. 105–115 not later than 1 year after Nov. 21, 1997, see section 401(c) of Pub. L. 105–115, set out as a note under section 360aaa of this title.

Savings Provisions

Pub. L. 113–54, title II, §208, Nov. 27, 2013, 127 Stat. 640, provided that: "Except as provided in the amendments made by paragraphs (1), (2), and (3) of section 204(a) [amending section 353 of this title] and by section 206(a) [amending this section], nothing in this title [enacting part H of subchapter V of this chapter, amending this section and sections 333, 352, 353, and 360eee–1 of this title, and enacting provisions set out as notes under sections 301, 333, and 353 of this title] (including the amendments made by this title) shall be construed as altering any authority of the Secretary of Health and Human Services with respect to a drug subject to section 503(b)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 353(b)(1)) under any other provision of such Act [21 U.S.C. 301 et seq.] or the Public Health Service Act (42 U.S.C. 201 et seq.)."

Amendment by Pub. L. 91–513 not to affect or abate any prosecutions for violation of law or any civil seizures or forfeitures and injunctive proceedings commenced prior to the effective date of such amendment, and all administrative proceedings pending before the Bureau of Narcotics and Dangerous Drugs [now the Drug Enforcement Administration] on Oct. 27, 1970, to be continued and brought to final determination in accord with laws and regulations in effect prior to Oct. 27, 1970, see section 702 of Pub. L. 91–513, set out as a note under section 321 of this title.

Construction of 2015 Amendment

Pub. L. 114–114, §2(d), Dec. 28, 2015, 129 Stat. 3130, provided that: "Nothing in this Act [amending this section and enacting provisions set out as notes under this section and section 301 of this title] (or the amendments made by this Act) shall be construed to apply with respect to drugs that are not also cosmetics (as such terms are defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321))."

Construction of 2011 Amendment

Nothing in amendments by sections 103(e), 105(c), 106(d), 204(j)(1), 211(b), (c), and 301(b) of Pub. L. 111–353 to be construed to apply to certain alcohol-related facilities, see section 2206 of this title.

Nothing in amendments by Pub. L. 111–353 to be construed to alter jurisdiction and authorities established under certain other Acts or in a manner inconsistent with international agreements to which the United States is a party, see sections 2251 and 2252 of this title.

Construction of 2009 Amendments

Pub. L. 111–31, div. A, title I, §103(p), June 22, 2009, 123 Stat. 1838, provided that: "Nothing in this section [amending this section and sections 333, 334, 355, 360m, 372 to 374, 375, 379a, 381, 393, 399, and 679 of this title and enacting provisions set out as notes under sections 333 and 387c of this title] is intended or shall be construed to expand, contract, or otherwise modify or amend the existing limitations on State government authority over tribal restricted fee or trust lands."

Construction of 2002 Amendments

Pub. L. 107–188, title III, §315, June 12, 2002, 116 Stat. 675, provided that: "Nothing in this title [enacting sections 350c, 350d, 398, 399, and 679c of this title, sections 3353, 3354, 8319, and 8320 of Title 7, Agriculture,

and section 247b–20 of Title 42, The Public Health and Welfare, amending this section, sections 334, 335a, 342, 343, 360, 372, 374, and 381 of this title, and section 43 of Title 18, Crimes and Criminal Procedure, and enacting provisions set out as notes under this section and sections 341, 350c, 350d, and 381 of this title], or an amendment made by this title, shall be construed to alter the jurisdiction between the Secretaries of Agriculture and of Health and Human Services, under applicable statutes and regulations."

Transfer of Functions

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

Preemption of State Laws

Pub. L. 114–114, §2(c), Dec. 28, 2015, 129 Stat. 3129, provided that: "No State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect restrictions with respect to the manufacture or introduction or delivery for introduction into interstate commerce of rinse-off cosmetics containing plastic microbeads (as defined in section 301(ddd) of the Federal Food, Drug, and Cosmetic Act, as added by subsection (a)) that are not identical to the restrictions under such section 301(ddd) that have begun to apply under subsection (b) [set out as a note above]."

[1] *See References in Text note below.*

[2] *So in original.*

§332. Injunction proceedings

(a) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown [1] to restrain violations of section 331 of this title, except paragraphs (h), (i), and (j).

(b) Violation of injunction

In case of violation of an injunction or restraining order issued under this section, which also constitutes a violation of this chapter, trial shall be by the court, or, upon demand of the accused, by a jury.

(June 25, 1938, ch. 675, §302, 52 Stat. 1043; Pub. L. 87–781, title I, §103(d), title II, §201(c), Oct. 10, 1962, 76 Stat. 784, 793; Pub. L. 103–80, §3(d), Aug. 13, 1993, 107 Stat. 775.)

Editorial Notes

Amendments

1993—Subsec. (a). Pub. L. 103–80, §3(d)(1), struck out ", and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U.S.C., 1934 ed., title 28, sec. 381)," after "for cause shown".

Subsec. (b). Pub. L. 103–80, §3(d)(2), struck out at end "Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of section 22 of such Act of October 15, 1914, as amended (U.S.C., 1934 ed., title 28, sec. 387)."

1962—Subsec. (a). Pub. L. 87–781, §103(d), struck out "(e)," after "paragraphs".

Pub. L. 87–781, §201(c), struck out "(f)," after "paragraphs".

Statutory Notes and Related Subsidiaries

Effective Date of 1962 Amendment

Amendment by section 103(c) of Pub. L. 87–781 effective on first day of seventh calendar month following October 1962, see section 107 of Pub. L. 87–781, set out as a note under section 321 of this title.

Pub. L. 87–781, title II, §203, Oct. 10, 1962, 76 Stat. 793, provided that: "The amendments made by this title [amending this section and section 374 of this title and enacting provisions set out as notes under sections 321 and 374 of this title] shall take effect on the date of enactment of this Act [Oct. 10, 1962]."

[1] *So in original. Probably should be followed by a comma.*

§333. Penalties

(a) Violation of section 331 of this title; second violation; intent to defraud or mislead

(1) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.

(2) Notwithstanding the provisions of paragraph (1) of this section,[1] if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000, or both.

(b) Prescription drug marketing violations

(1) Notwithstanding subsection (a), any person who violates section 331(t) of this title by—

(A) knowingly importing a drug in violation of section 381(d)(1) of this title,

(B) knowingly selling, purchasing, or trading a drug or drug sample or knowingly offering to sell, purchase, or trade a drug or drug sample, in violation of section 353(c)(1) of this title,

(C) knowingly selling, purchasing, or trading a coupon, knowingly offering to sell, purchase, or trade such a coupon, or knowingly counterfeiting such a coupon, in violation of section 353(c)(2) of this title, or

(D) knowingly distributing drugs in violation of section 353(e)(1) of this title,

shall be imprisoned for not more than 10 years or fined not more than $250,000, or both.

(2) Any manufacturer or distributor who distributes drug samples by means other than the mail or common carrier whose representative, during the course of the representative's employment or association with that manufacturer or distributor, violated section 331(t) of this title because of a violation of section 353(c)(1) of this title or violated any State law prohibiting the sale, purchase, or trade of a drug sample subject to section 353(b) of this title or the offer to sell, purchase, or trade such a drug sample shall, upon conviction of the representative for such violation, be subject to the following civil penalties:

(A) A civil penalty of not more than $50,000 for each of the first two such violations resulting in a conviction of any representative of the manufacturer or distributor in any 10-year period.

(B) A civil penalty of not more than $1,000,000 for each violation resulting in a conviction of any representative after the second conviction in any 10-year period.

For the purposes of this paragraph, multiple convictions of one or more persons arising out of the same event or transaction, or a related series of events or transactions, shall be considered as one violation.

(3) Any manufacturer or distributor who violates section 331(t) of this title because of a failure to make a report required by section 353(d)(3)(E) of this title shall be subject to a civil penalty of not more than $100,000.

(4)(A) If a manufacturer or distributor or any representative of such manufacturer or distributor provides information leading to the institution of a criminal proceeding against, and conviction of, any representative of that manufacturer or distributor for a violation of section 331(t) of this title because of a sale, purchase, or trade or offer to purchase, sell, or trade a drug sample in violation of section 353(c)(1) of this title or for a violation of State law prohibiting the sale, purchase, or trade or offer to sell, purchase, or trade a drug sample, the conviction of such representative shall not be considered as a violation for purposes of paragraph (2).

(B) If, in an action brought under paragraph (2) against a manufacturer or distributor relating to the conviction of a representative of such manufacturer or distributor for the sale, purchase, or trade of a drug or the offer to sell, purchase, or trade a drug, it is shown, by clear and convincing evidence—

(i) that the manufacturer or distributor conducted, before the institution of a criminal proceeding against such representative for the violation which resulted in such conviction, an investigation of events or transactions which would have led to the reporting of information leading to the institution of a criminal proceeding against, and conviction of, such representative for such purchase, sale, or trade or offer to purchase, sell, or trade, or

(ii) that, except in the case of the conviction of a representative employed in a supervisory function, despite diligent implementation by the manufacturer or distributor of an independent audit and security system designed to detect such a violation, the manufacturer or distributor could not reasonably have been expected to have detected such violation,

the conviction of such representative shall not be considered as a conviction for purposes of paragraph (2).

(5) If a person provides information leading to the institution of a criminal proceeding against, and conviction of, a person for a violation of section 331(t) of this title because of the sale, purchase, or trade of a drug sample or the offer to sell, purchase, or trade a drug sample in violation of section 353(c)(1) of this title, such person shall be entitled to one-half of the criminal fine imposed and collected for such violation but not more than $125,000.

(6) Notwithstanding subsection (a), any person who is a manufacturer or importer of a prescription drug under section 384(b) of this title and knowingly fails to comply with a requirement of section 384(e) of this title that is applicable to such manufacturer or importer, respectively, shall be imprisoned for not more than 10 years or fined not more than $250,000, or both.

(7) Notwithstanding subsection (a)(2), any person that knowingly and intentionally adulterates a drug such that the drug is adulterated under subsection (a)(1), (b), (c), or (d) of section 351 of this title and has a reasonable probability of causing serious adverse health consequences or death to humans or animals shall be imprisoned for not more than 20 years or fined not more than $1,000,000, or both.

(8) Notwithstanding subsection (a), any person who violates section 331(i)(3) of this title by knowingly making, selling or dispensing, or holding for sale or dispensing, a counterfeit drug shall be imprisoned for not more than 10 years or fined in accordance with title 18, or both.

(c) Exceptions in certain cases of good faith, etc.

No person shall be subject to the penalties of subsection (a)(1) of this section, (1) for having received in interstate commerce any article and delivered it or proffered delivery of it, if such delivery or proffer was made in good faith, unless he refuses to furnish on request of an officer or employee duly designated by the Secretary the name and address of the person from whom he purchased or received such article and copies of all documents, if any there be, pertaining to the delivery of the article to him; or (2) for having violated section 331(a) or (d) of this title, if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 331(a) of this title, that such article is not adulterated or misbranded, within the meaning of this chapter designating this chapter or to the effect, in case of an alleged violation of section 331(d) of this title, that such article is not an article which may not, under the provisions of section 344 or 355 of this title, be introduced into interstate commerce; or (3) for having violated section 331(a) of this title, where the violation exists because the article is adulterated by reason of containing a color additive not from a batch certified in accordance with regulations promulgated by the Secretary under this chapter, if such person establishes a guaranty or undertaking signed by, and containing the name and address of, the manufacturer of the color additive, to the effect that such color additive was from a batch certified in accordance with the applicable regulations promulgated by the Secretary under this chapter; or (4) for having violated section 331(b), (c) or (k) of this title by failure to comply with section 352(f) of this title in respect to an article received in interstate commerce to which neither section 353(a) nor 353(b)(1) of this title is applicable, if the delivery or proffered delivery was made in good faith and the labeling at the time thereof contained the same directions for use and warning statements as were contained in the labeling at the time of such receipt of

such article; or (5) for having violated section 331(i)(2) of this title if such person acted in good faith and had no reason to believe that use of the punch, die, plate, stone, or other thing involved would result in a drug being a counterfeit drug, or for having violated section 331(i)(3) of this title if the person doing the act or causing it to be done acted in good faith and had no reason to believe that the drug was a counterfeit drug.

(d) Exceptions involving misbranded food

No person shall be subject to the penalties of subsection (a)(1) of this section for a violation of section 331 of this title involving misbranded food if the violation exists solely because the food is misbranded under section 343(a)(2) of this title because of its advertising.

(e) Prohibited distribution of human growth hormone

(1) Except as provided in paragraph (2), whoever knowingly distributes, or possesses with intent to distribute, human growth hormone for any use in humans other than the treatment of a disease or other recognized medical condition, where such use has been authorized by the Secretary of Health and Human Services under section 355 of this title and pursuant to the order of a physician, is guilty of an offense punishable by not more than 5 years in prison, such fines as are authorized by title 18, or both.

(2) Whoever commits any offense set forth in paragraph (1) and such offense involves an individual under 18 years of age is punishable by not more than 10 years imprisonment, such fines as are authorized by title 18, or both.

(3) Any conviction for a violation of paragraphs (1) and (2) of this subsection shall be considered a felony violation of the Controlled Substances Act [21 U.S.C. 801 et seq.] for the purposes of forfeiture under section 413 of such Act [21 U.S.C. 853].

(4) As used in this subsection the term "human growth hormone" means somatrem, somatropin, or an analogue of either of them.

(5) The Drug Enforcement Administration is authorized to investigate offenses punishable by this subsection.

(f) Violations related to devices

(1)(A) Except as provided in subparagraph (B), any person who violates a requirement of this chapter which relates to devices shall be liable to the United States for a civil penalty in an amount not to exceed $15,000 for each such violation, and not to exceed $1,000,000 for all such violations adjudicated in a single proceeding. For purposes of the preceding sentence, a person accredited under paragraph (2) of section 374(g) of this title who is substantially not in compliance with the standards of accreditation under such section, or who poses a threat to public health or fails to act in a manner that is consistent with the purposes of such section, shall be considered to have violated a requirement of this chapter that relates to devices.

(B) Subparagraph (A) shall not apply—

(i) to any person who violates the requirements of section 360i(a) or 360j(f) of this title unless such violation constitutes (I) a significant or knowing departure from such requirements, or (II) a risk to public health,

(ii) to any person who commits minor violations of section 360i(e) or 360i(g) of this title (only with respect to correction reports) if such person demonstrates substantial compliance with such section, or

(iii) to violations of section 351(a)(2)(A) of this title which involve one or more devices which are not defective.

(2)(A) Any person who introduces into interstate commerce or delivers for introduction into interstate commerce an article of food that is adulterated within the meaning of section 342(a)(2)(B) of this title or any person who does not comply with a recall order under section 350l of this title shall be subject to a civil money penalty of not more than $50,000 in the case of an individual and $250,000 in the case of any other person for such introduction or delivery, not to exceed $500,000 for all such violations adjudicated in a single proceeding.

(B) This paragraph shall not apply to any person who grew the article of food that is adulterated. If the Secretary assesses a civil penalty against any person under this paragraph, the Secretary may not use the criminal authorities under this section to sanction such person for the introduction or delivery for

introduction into interstate commerce of the article of food that is adulterated. If the Secretary assesses a civil penalty against any person under this paragraph, the Secretary may not use the seizure authorities of section 334 of this title or the injunction authorities of section 332 of this title with respect to the article of food that is adulterated.

(C) In a hearing to assess a civil penalty under this paragraph, the presiding officer shall have the same authority with regard to compelling testimony or production of documents as a presiding officer has under section 346a(g)(2)(B) of this title. The third sentence of paragraph (5)(A) shall not apply to any investigation under this paragraph.

(3)(A) Any person who violates section 331(jj) of this title shall be subject to a civil monetary penalty of not more than $10,000 for all violations adjudicated in a single proceeding.

(B) If a violation of section 331(jj) of this title is not corrected within the 30-day period following notification under section 282(j)(5)(C)(ii) [2] of title 42, the person shall, in addition to any penalty under subparagraph (A), be subject to a civil monetary penalty of not more than $10,000 for each day of the violation after such period until the violation is corrected.

(4)(A) Any responsible person (as such term is used in section 355–1 of this title) that violates a requirement of section 355(o), 355(p), or 355–1 of this title shall be subject to a civil monetary penalty of —

(i) not more than $250,000 per violation, and not to exceed $1,000,000 for all such violations adjudicated in a single proceeding; or

(ii) in the case of a violation that continues after the Secretary provides written notice to the responsible person, the responsible person shall be subject to a civil monetary penalty of $250,000 for the first 30-day period (or any portion thereof) that the responsible person continues to be in violation, and such amount shall double for every 30-day period thereafter that the violation continues, not to exceed $1,000,000 for any 30-day period, and not to exceed $10,000,000 for all such violations adjudicated in a single proceeding.

(B) In determining the amount of a civil penalty under subparagraph (A)(ii), the Secretary shall take into consideration whether the responsible person is making efforts toward correcting the violation of the requirement of section 355(o), 355(p), or 355–1 of this title for which the responsible person is subject to such civil penalty.

(5)(A) A civil penalty under paragraph (1), (2), (3), (4), or (9) shall be assessed, or a no-tobacco-sale order may be imposed, by the Secretary by an order made on the record after opportunity for a hearing provided in accordance with this subparagraph and section 554 of title 5. Before issuing such an order, the Secretary shall give written notice to the person to be assessed a civil penalty, or upon whom a no-tobacco-sale order is to be imposed, under such order of the Secretary's proposal to issue such order and provide such person an opportunity for a hearing on the order. In the course of any investigation, the Secretary may issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence that relates to the matter under investigation.

(B) In determining the amount of a civil penalty, or the period to be covered by a no-tobacco-sale order, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require. A no-tobacco-sale order permanently prohibiting an individual retail outlet from selling tobacco products shall include provisions that allow the outlet, after a specified period of time, to request that the Secretary compromise, modify, or terminate the order.

(C) The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty which may be assessed under paragraph (1), (2), (3), (4), or (9). The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

(D) The Secretary may compromise, modify, or terminate, with or without conditions, any no-tobacco-sale order.

(6) Any person who requested, in accordance with paragraph (5)(A), a hearing respecting the assessment of a civil penalty or the imposition of a no-tobacco-sale order and who is aggrieved by an order assessing a civil penalty or the imposition of a no-tobacco-sale order may file a petition for judicial

review of such order with the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business. Such a petition may only be filed within the 60-day period beginning on the date the order making such assessment was issued, or on which the no-tobacco-sale order was imposed, as the case may be.

(7) If any person fails to pay an assessment of a civil penalty—

(A) after the order making the assessment becomes final, and if such person does not file a petition for judicial review of the order in accordance with paragraph (6), or

(B) after a court in an action brought under paragraph (6) has entered a final judgment in favor of the Secretary,

the Attorney General shall recover the amount assessed (plus interest at currently prevailing rates from the date of the expiration of the 60-day period referred to in paragraph (6) or the date of such final judgment, as the case may be) in an action brought in any appropriate district court of the United States. In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review.

(8) If the Secretary finds that a person has committed repeated violations of section 387f(d)(5) of this title or of restrictions promulgated under section 387f(d) of this title at a particular retail outlet then the Secretary may impose a no-tobacco-sale order on that person prohibiting the sale of tobacco products in that outlet. A no-tobacco-sale order may be imposed with a civil penalty under paragraph (1). Prior to the entry of a no-sale order under this paragraph, a person shall be entitled to a hearing pursuant to the procedures established through regulations of the Food and Drug Administration for assessing civil money penalties, including at a retailer's request a hearing by telephone, or at the nearest regional or field office of the Food and Drug Administration, or at a Federal, State, or county facility within 100 miles from the location of the retail outlet, if such a facility is available.

(9) Civil Monetary Penalties for Violation of Tobacco Product Requirements.—

(A) In general.—Subject to subparagraph (B), any person who violates a requirement of this chapter which relates to tobacco products shall be liable to the United States for a civil penalty in an amount not to exceed $15,000 for each such violation, and not to exceed $1,000,000 for all such violations adjudicated in a single proceeding.

(B) Enhanced penalties.—

(i) Any person who intentionally violates a requirement of section 387b(5), 387b(6), 387d, 387h(c), or 387k(a) of this title, shall be subject to a civil monetary penalty of—

(I) not to exceed $250,000 per violation, and not to exceed $1,000,000 for all such violations adjudicated in a single proceeding; or

(II) in the case of a violation that continues after the Secretary provides written notice to such person, $250,000 for the first 30-day period (or any portion thereof) that the person continues to be in violation, and such amount shall double for every 30-day period thereafter that the violation continues, not to exceed $1,000,000 for any 30-day period, and not to exceed $10,000,000 for all such violations adjudicated in a single proceeding.

(ii) Any person who violates a requirement of section 387k(g)(2)(C)(ii) or 387k(i)(1) of this title, shall be subject to a civil monetary penalty of—

(I) not to exceed $250,000 per violation, and not to exceed $1,000,000 for all such violations adjudicated in a single proceeding; or

(II) in the case of a violation that continues after the Secretary provides written notice to such person, $250,000 for the first 30-day period (or any portion thereof) that the person continues to be in violation, and such amount shall double for every 30-day period thereafter that the violation continues, not to exceed $1,000,000 for any 30-day period, and not to exceed $10,000,000 for all such violations adjudicated in a single proceeding.

(iii) In determining the amount of a civil penalty under clause (i)(II) or (ii)(II), the Secretary shall take into consideration whether the person is making efforts toward correcting the violation of the requirements of the section for which such person is subject to such civil penalty.

(g) Violations regarding direct-to-consumer advertising

(1) With respect to a person who is a holder of an approved application under section 355 of this title for a drug subject to section 353(b) of this title or under section 262 of title 42, any such person who disseminates or causes another party to disseminate a direct-to-consumer advertisement that is false or misleading shall be liable to the United States for a civil penalty in an amount not to exceed $250,000 for the first such violation in any 3-year period, and not to exceed $500,000 for each subsequent violation in any 3-year period. No other civil monetary penalties in this chapter (including the civil penalty in subsection (f)(4)) shall apply to a violation regarding direct-to-consumer advertising. For purposes of this paragraph: (A) Repeated dissemination of the same or similar advertisement prior to the receipt of the written notice referred to in paragraph (2) for such advertisements shall be considered one violation. (B) On and after the date of the receipt of such a notice, all violations under this paragraph occurring in a single day shall be considered one violation. With respect to advertisements that appear in magazines or other publications that are published less frequently than daily, each issue date (whether weekly or monthly) shall be treated as a single day for the purpose of calculating the number of violations under this paragraph.

(2) A civil penalty under paragraph (1) shall be assessed by the Secretary by an order made on the record after providing written notice to the person to be assessed a civil penalty and an opportunity for a hearing in accordance with this paragraph and section 554 of title 5. If upon receipt of the written notice, the person to be assessed a civil penalty objects and requests a hearing, then in the course of any investigation related to such hearing, the Secretary may issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence that relates to the matter under investigation, including information pertaining to the factors described in paragraph (3).

(3) The Secretary, in determining the amount of the civil penalty under paragraph (1), shall take into account the nature, circumstances, extent, and gravity of the violation or violations, including the following factors:

(A) Whether the person submitted the advertisement or a similar advertisement for review under section 379h–1 of this title.

(B) Whether the person submitted the advertisement for review if required under section 353c [2] of this title.

(C) Whether, after submission of the advertisement as described in subparagraph (A) or (B), the person disseminated or caused another party to disseminate the advertisement before the end of the 45-day comment period.

(D) Whether the person incorporated any comments made by the Secretary with regard to the advertisement into the advertisement prior to its dissemination.

(E) Whether the person ceased distribution of the advertisement upon receipt of the written notice referred to in paragraph (2) for such advertisement.

(F) Whether the person had the advertisement reviewed by qualified medical, regulatory, and legal reviewers prior to its dissemination.

(G) Whether the violations were material.

(H) Whether the person who created the advertisement or caused the advertisement to be created acted in good faith.

(I) Whether the person who created the advertisement or caused the advertisement to be created has been assessed a civil penalty under this provision within the previous 1-year period.

(J) The scope and extent of any voluntary, subsequent remedial action by the person.

(K) Such other matters, as justice may require.

(4)(A) Subject to subparagraph (B), no person shall be required to pay a civil penalty under paragraph (1) if the person submitted the advertisement to the Secretary and disseminated or caused another party to disseminate such advertisement after incorporating each comment received from the Secretary.

(B) The Secretary may retract or modify any prior comments the Secretary has provided to an advertisement submitted to the Secretary based on new information or changed circumstances, so long as the Secretary provides written notice to the person of the new views of the Secretary on the advertisement and provides a reasonable time for modification or correction of the advertisement prior to seeking any civil penalty under paragraph (1).

(5) The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty which may be assessed under paragraph (1). The amount of such penalty, when finally determined, or the amount charged upon in compromise, may be deducted from any sums owed by the United States to the person charged.

(6) Any person who requested, in accordance with paragraph (2), a hearing with respect to the assessment of a civil penalty and who is aggrieved by an order assessing a civil penalty, may file a petition for de novo judicial review of such order with the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business. Such a petition may only be filed within the 60-day period beginning on the date the order making such assessments was issued.

(7) If any person fails to pay an assessment of a civil penalty under paragraph (1)—

(A) after the order making the assessment becomes final, and if such person does not file a petition for judicial review of the order in accordance with paragraph (6), or

(B) after a court in an action brought under paragraph (6) has entered a final judgment in favor of the Secretary,

the Attorney General of the United States shall recover the amount assessed (plus interest at currently prevailing rates from the date of the expiration of the 60-day period referred to in paragraph (6) or the date of such final judgment, as the case may be) in an action brought in any appropriate district court of the United States. In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review.

(June 25, 1938, ch. 675, §303, 52 Stat. 1043; Oct. 26, 1951, ch. 578, §2, 65 Stat. 649; Pub. L. 86–618, title I, §105(b), July 12, 1960, 74 Stat. 403; Pub. L. 89–74, §§7, 9(d), July 15, 1965, 79 Stat. 233, 235; Pub. L. 90–639, §3, Oct. 24, 1968, 82 Stat. 1361; Pub. L. 91–513, title II, §701(b), Oct. 27, 1970, 84 Stat. 1281; Pub. L. 94–278, title V, §502(a)(2)(B), Apr. 22, 1976, 90 Stat. 411; Pub. L. 100–293, §7(b), Apr. 22, 1988, 102 Stat. 99; Pub. L. 100–690, title II, §2403, Nov. 18, 1988, 102 Stat. 4230; Pub. L. 101–629, §17(a), Nov. 28, 1990, 104 Stat. 4526; Pub. L. 101–647, title XIX, §1904, Nov. 29, 1990, 104 Stat. 4853; Pub. L. 102–353, §3, Aug. 26, 1992, 106 Stat. 941; Pub. L. 103–80, §3(e), Aug. 13, 1993, 107 Stat. 775; Pub. L. 103–322, title XXXIII, §330015, Sept. 13, 1994, 108 Stat. 2146; Pub. L. 104–170, title IV, §407, Aug. 3, 1996, 110 Stat. 1535; Pub. L. 106–387, §1(a) [title VII, §745(d)(2)], Oct. 28, 2000, 114 Stat. 1549, 1549A-40; Pub. L. 107–250, title II, §201(c), Oct. 26, 2002, 116 Stat. 1609; Pub. L. 108–173, title XI, §1121(b)(2), Dec. 8, 2003, 117 Stat. 2469; Pub. L. 110–85, title II, §226(b), title VIII, §801(b)(2), title IX, §§901(d)(4), 902(b), Sept. 27, 2007, 121 Stat. 854, 920, 940, 943; Pub. L. 111–31, div. A, title I, §103(c), June 22, 2009, 123 Stat. 1835; Pub. L. 111–353, title II, §206(c), Jan. 4, 2011, 124 Stat. 3943; Pub. L. 112–144, title VII, §716, July 9, 2012, 126 Stat. 1075; Pub. L. 113–54, title II, §207(a), Nov. 27, 2013, 127 Stat. 640; Pub. L. 115–52, title VI, §604(b), Aug. 18, 2017, 131 Stat. 1048; Pub. L. 116–94, div. N, title I, §603(d)(2), Dec. 20, 2019, 133 Stat. 3124.)

Editorial Notes

References in Text

The Controlled Substances Act, referred to in subsec. (e)(3), is title II of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1242, which is classified principally to subchapter I (§801 et seq.) of chapter 13 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 801 of this title and Tables.

Section 282(j)(5)(C)(ii) of title 42, referred to in subsec. (f)(3)(B), was in the original "section 402(j)(5)(C)(ii)", and was translated as meaning section 402(j)(5)(C)(ii) of the Public Health Service Act to reflect the probable intent of Congress because there is no subsec. (j) of section 402 of the Federal Food, Drug, and Cosmetic Act and section 402(j)(5)(C)(ii) of the Public Health Service Act relates to notification of noncompliance with clinical trial information requirements.

Section 353c of this title, referred to in subsec. (g)(3)(B), was in the original a reference to section 503B of act June 25, 1938, and was translated as if it referred to section 503C of that Act, to reflect the probable intent of Congress and the renumbering of section 503B as 503C by Pub. L. 113–54, title I, §102(a)(1), Nov. 27, 2013, 127 Stat. 587, and its transfer to section 353c of this title. A new section 503B, which was enacted by section 102(a)(2) of Pub. L. 113–54, is classified to section 353b of this title and does not relate to television advertisements.

AMENDMENTS

2019—Subsec. (f)(8). Pub. L. 116–94 inserted "section 387f(d)(5) of this title or of" after "repeated violations of".

2017—Subsec. (b)(8). Pub. L. 115–52 added par. (8).

2013—Subsec. (b)(1)(D). Pub. L. 113–54 substituted "353(e)(1)" for "353(e)(2)(A)".

2012—Subsec. (b)(7). Pub. L. 112–144 added par. (7).

2011—Subsec. (f)(2)(A). Pub. L. 111–353 inserted "or any person who does not comply with a recall order under section 350l of this title" after "section 342(a)(2)(B) of this title".

2009—Subsec. (f)(5)(A). Pub. L. 111–31, §103(c)(1)(A), (B), substituted "paragraph (1), (2), (3), (4), or (9)" for "paragraph (1), (2), (3), or (4)", "shall be assessed, or a no-tobacco-sale order may be imposed," for "shall be assessed", and "assessed a civil penalty, or upon whom a no-tobacco-sale order is to be imposed," for "assessed a civil penalty".

Subsec. (f)(5)(B). Pub. L. 111–31, §103(c)(1)(C), inserted "or the period to be covered by a no-tobacco-sale order," after "penalty," and inserted at end "A no-tobacco-sale order permanently prohibiting an individual retail outlet from selling tobacco products shall include provisions that allow the outlet, after a specified period of time, to request that the Secretary compromise, modify, or terminate the order."

Subsec. (f)(5)(C). Pub. L. 111–31, §103(c)(1)(A), substituted "paragraph (1), (2), (3), (4), or (9)" for "paragraph (1), (2), (3), or (4)".

Subsec. (f)(5)(D). Pub. L. 111–31, §103(c)(1)(D), added subpar. (D).

Subsec. (f)(6). Pub. L. 111–31, §103(c)(2), inserted "or the imposition of a no-tobacco-sale order" after "penalty" in two places and substituted "issued, or on which the no-tobacco-sale order was imposed, as the case may be." for "issued."

Subsec. (f)(8), (9). Pub. L. 111–31, §103(c)(3), added pars. (8) and (9).

2007—Subsec. (f). Pub. L. 110–85, §226(b)(1), redesignated subsec. (g) as (f).

Subsec. (f)(1)(B)(ii). Pub. L. 110–85, §226(b)(2), substituted "360i(g)" for "360i(f)".

Subsec. (f)(2)(C). Pub. L. 110–85, §801(b)(2)(C), substituted "paragraph (5)(A)" for "paragraph (3)(A)".

Subsec. (f)(3). Pub. L. 110–85, §801(b)(2)(B), added par. (3). Former par. (3) redesignated (5).

Subsec. (f)(4). Pub. L. 110–85, §902(b)(1), added par. (4).

Pub. L. 110–85, §801(b)(2)(A), redesignated par. (4) as (6).

Subsec. (f)(5). Pub. L. 110–85, §801(b)(2)(A), redesignated par. (3) as (5). Former par. (5) redesignated (7).

Subsec. (f)(5)(A), (C). Pub. L. 110–85, §902(b)(2), substituted "paragraph (1), (2), (3), or (4)" for "paragraph (1), (2), or (3)".

Pub. L. 110–85, §801(b)(2)(D), substituted "paragraph (1), (2), or (3)" for "paragraph (1) or (2)".

Subsec. (f)(6). Pub. L. 110–85, §801(b)(2)(A), (E), redesignated par. (4) as (6) and substituted "paragraph (5)(A)" for "paragraph (3)(A)".

Subsec. (f)(7). Pub. L. 110–85, §801(b)(2)(A), (F), redesignated par. (5) as (7) and substituted "paragraph (6)" for "paragraph (4)" wherever appearing.

Subsec. (g). Pub. L. 110–85, §901(d)(4), added subsec. (g).

Pub. L. 110–85, §226(b)(1), redesignated subsec. (g) as (f).

2003—Subsec. (b)(6). Pub. L. 108–173, which directed amendment of subsec. (a)(6) by substituting "prescription drug under section 384(b)" for "covered product pursuant to section 384(a)", was executed by making the substitution in subsec. (b)(6), to reflect the probable intent of Congress.

2002—Subsec. (g)(1)(A). Pub. L. 107–250 inserted at end "For purposes of the preceding sentence, a person accredited under paragraph (2) of section 374(g) of this title who is substantially not in compliance with the standards of accreditation under such section, or who poses a threat to public health or fails to act in a manner that is consistent with the purposes of such section, shall be considered to have violated a requirement of this chapter that relates to devices."

2000—Subsec. (b)(6). Pub. L. 106–387 added par. (6).

1996—Subsec. (g)(2). Pub. L. 104–170, §407(1), (2), added par. (2). Former par. (2) redesignated (3).

Subsec. (g)(3). Pub. L. 104–170, §407(1), (3), redesignated par. (2) as (3) and substituted "paragraph (1) or (2)" for "paragraph (1)" in subpars. (A) and (C). Former par. (3) redesignated (4).

Subsec. (g)(4). Pub. L. 104–170, §407(1), (4), redesignated par. (3) as (4) and substituted "paragraph (3)(A)" for "paragraph (2)(A)". Former par. (4) redesignated (5).

Subsec. (g)(5). Pub. L. 104–170, §407(1), (5), redesignated par. (4) as (5) and substituted "paragraph (4)" for "paragraph (3)" wherever appearing.

1994—Subsec. (e). Pub. L. 103–322 amended directory language of Pub. L. 101–647. See 1990 Amendment note below.

1993—Subsecs. (e) to (g). Pub. L. 103–80, which directed the amendment of this section by redesignating the second subsec. (e) and subsec. (f) as subsecs. (f) and (g), respectively, could only be executed by designating subsec. (f) as (g) because this section did not contain a second subsec. (e) subsequent to amendment of Pub. L. 101–647 by Pub. L. 103–322. See 1990 and 1994 amendment notes for subsec. (e) under this section.

1992—Subsec. (b)(1). Pub. L. 102–353, §3(a), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "Notwithstanding subsection (a) of this section, any person who violates section 331(t) of this title because of an importation of a drug in violation of section 381(d)(1) of this title, because of a sale, purchase, or trade of a drug or drug sample or the offer to sell, purchase, or trade a drug or drug sample in violation of section 353(c) of this title, because of the sale, purchase, or trade of a coupon, the offer to sell, purchase, or trade such a coupon, or the counterfeiting of such a coupon in violation of section 353(c)(2) of this title, or the distribution of drugs in violation of section 353(e)(2)(A) of this title shall be imprisoned for not more than 10 years or fined not more than $250,000, or both."

Subsec. (b)(4)(A). Pub. L. 102–353, §3(b)(1), substituted "the institution of a criminal proceeding against, and conviction of," for "the arrest and conviction of".

Subsec. (b)(4)(B)(i). Pub. L. 102–353, §3(b)(1), (2), substituted "before the institution of a criminal proceeding against" for "before the arrest of" and "the institution of a criminal proceeding against, and conviction of," for "the arrest and conviction of".

Subsec. (b)(5). Pub. L. 102–353, §3(b)(3), substituted "the institution of a criminal proceeding against, and conviction of," for "the arrest and conviction of".

Subsec. (c). Pub. L. 102–353, §3(b)(4), substituted "subsection (a)(1) of this section" for "subsection (a) of this section".

Subsec. (d). Pub. L. 102–353, §3(b)(4), (5), substituted "subsection (a)(1) of this section" for "subsection (a) of this section" and struck out ", and no person shall be subject to the penalties of subsection (b) of this section for such a violation unless the violation is committed with the intent to defraud or mislead" after "advertising".

1990—Subsec. (e). Pub. L. 101–647, as amended by Pub. L. 103–322, amended subsec. (e) generally. Prior to amendment, subsec. (e) read as follows:

"(e)(1) Except as provided in paragraph (2), any person who distributes or possesses with the intent to distribute any anabolic steroid for any use in humans other than the treatment of disease pursuant to the order of a physician shall be imprisoned for not more than three years or fined under title 18, or both.

"(2) Any person who distributes or possesses with the intent to distribute to an individual under 18 years of age, any anabolic steroid for any use in humans other than the treatment of disease pursuant to the order of a physician shall be imprisoned for not more than six years or fined under title 18, or both."

Subsec. (f). Pub. L. 101–629 added subsec. (f).

1988—Subsecs. (a), (b). Pub. L. 100–293 designated existing subsecs. (a) and (b) as pars. (1) and (2) of subsec. (a), substituted "paragraph (1)" for "subsection (a)" in par. (2), and added subsec. (b).

Subsec. (e). Pub. L. 100–690 added subsec. (e).

1976—Subsec. (d). Pub. L. 94–278 added subsec. (d).

1970—Subsec. (a). Pub. L. 91–513 struck out reference to subsec. (b) and transferred to subsec. (b) provisions covering second offenses and offenses committed with intent to defraud or mislead.

Subsec. (b). Pub. L. 91–513 inserted provisions covering second offenses and offenses committed with intent to defraud or mislead formerly set out in subsec. (a) and struck out provisions covering violations involving depressant and stimulant drugs. See section 801 et seq. of this title.

1968—Subsecs. (a), (b). Pub. L. 90–639 made a general revision in the penalties prescribed for offenses involving depressant or stimulant drugs, set a fine of not to exceed $10,000 or imprisonment of not more than 5 years for offenses involving the unlawful manufacturing of, sale, or disposal of, or possession with intent to sell, a depressant or stimulant drug or involving counterfeit depressant or stimulant drugs, stiffened the penalties for unlawful sales or other disposals by persons over 18 to persons under 21, and set new penalties for possession of a depressant or stimulant drug for purposes other than sale or other disposal.

1965—Subsec. (a). Pub. L. 89–74, §7(a), inserted proviso limiting the penalties for depressant or stimulant drug violations to two years imprisonment or $5,000 fine or both for first offense and to two years imprisonment or $15,000 fine or both for subsequent offenses.

Subsec. (b). Pub. L. 89–74, §7(b), inserted parenthetical exception provision.

Subsec. (c)(5). Pub. L. 89–74, §9(d), added cl. (5).

1960—Subsec. (c)(3). Pub. L. 86–618 substituted "a color additive" for "a coal-tar color", "the color additive" for "the coal-tar color" and "such color additive was" for "such color was".

1951—Subsec. (c)(4). Act Oct. 26, 1951, added cl. (4).

Statutory Notes and Related Subsidiaries

Effective Date of 2013 Amendment

Pub. L. 113–54, title II, §207(b), Nov. 27, 2013, 127 Stat. 640, provided that: "The amendment made by subsection (a) [amending this section] shall take effect on January 1, 2015."

Effective Date of 2009 Amendment

Pub. L. 111–31, div. A, title I, §103(q)(3), (4), June 22, 2009, 123 Stat. 1840, provided that:

"(3) General effective date.—The amendments made by paragraphs (2) [amending this section], (3) [amending this section], and (4) [no par. (4) has been enacted] of subsection (c) shall take effect upon the issuance of guidance described in paragraph (1) of this subsection [set out as a Guidance note below].

"(4) Special effective date.—The amendment made by subsection (c)(1) [amending this section] shall take effect on the date of enactment of this Act [June 22, 2009]."

Effective Date of 2007 Amendment

Amendment by sections 901(d)(4) and 902(b) of Pub. L. 110–85 effective 180 days after Sept. 27, 2007, see section 909 of Pub. L. 110–85, set out as a note under section 331 of this title.

Effective Date of 1994 Amendment

Pub. L. 103–322, title XXXIII, §330015, Sept. 13, 1994, 108 Stat. 2146, provided that the amendment made by that section is effective as of the date on which section 1904 of Pub. L. 101–647, which amended this section, took effect.

Effective Date of 1990 Amendment

Pub. L. 101–629, §17(b), Nov. 28, 1990, 104 Stat. 4528, provided that:

"(b) Effective Date of Application to Device User Facilities.—

"(1) The Secretary of Health and Human Services shall conduct a study to determine whether there has been substantial compliance with the requirements of section 519(b) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 360i(b)] by device user facilities (as defined in section 519(b)(5)(A) of such Act). The Secretary shall report the results of the study to the Congress after the expiration of 45 months after the date of the enactment of this Act [Nov. 28, 1990].

"(2)(A) If upon the expiration of 48 months after the date of the enactment of this Act [Nov. 28, 1990] the Secretary has not made the report required by paragraph (1), section 303(f) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 333(f)], as added by the amendment made by subsection (a), shall take effect with respect to device user facilities (as defined in section 519(b)(5)(A) of such Act). [Secretary of Health and Human Services had not made the report required by par. (1) on the expiration of 48 months after Nov. 28, 1990.]

"(B) If in the report under paragraph (1) the Secretary reports that there has been substantial compliance with the requirements of such section 519(b) by a type of device user facility and if the Secretary does not make a determination under subparagraph (C) with respect to such type of facility, such section 303(f) shall not take effect with respect to such type of facility.

"(C) If the Secretary determines in the report under paragraph (1) that there is not substantial compliance with the requirements of such section 519(b) by a type of device user facility or if the Secretary makes such a determination after making the report under paragraph (1), such section 303(f) shall take effect with respect to such type of facility upon the effective date of the report."

Effective Date of 1988 Amendment

Amendment by Pub. L. 100–293 effective upon expiration of 90 days after Apr. 22, 1988, see section 8(a) of Pub. L. 100–293, set out as a note under section 353 of this title.

Effective Date of 1976 Amendment

Amendment by Pub. L. 94–278 effective 180 days after Apr. 22, 1976, see section 502(c) of Pub. L. 94–278, set out as a note under section 334 of this title.

Effective Date of 1970 Amendment

Amendment by Pub. L. 91–513 effective on first day of seventh calendar month that begins after Oct. 26, 1970, see section 704 of Pub. L. 91–513, set out as an Effective Date note under section 801 of this title.

Effective Date of 1968 Amendment

Amendment by Pub. L. 90–639 applicable only with respect to violations of this chapter committed after Oct. 24, 1968, see section 6 of Pub. L. 90–639, set out as an Effective Date of 1968 Amendments; Transitional Provisions note under section 321 of this title.

Effective Date of 1965 Amendment

Amendment by Pub. L. 89–74 effective Feb. 1, 1966, see section 11 of Pub. L. 89–74, set out as a note under section 321 of this title.

Effective Date of 1960 Amendment

Amendment by Pub. L. 86–618 effective July 12, 1960, subject to the provisions of section 203 of Pub. L. 86–618, see section 202 of Pub. L. 86–618, set out as a note under section 379e of this title.

Effective Date of 1951 Amendment

Act Oct. 26, 1951, ch. 578, §3, 65 Stat. 649, provided that: "The provisions of this Act [amending this section and section 353 of this title] shall take effect six months after the date of its enactment [Oct. 26, 1951]."

Savings Provision

Amendment by Pub. L. 91–513 not to affect or abate any prosecutions for violation of law or any civil seizures or forfeitures and injunctive proceedings commenced prior to the effective date of such amendment, and all administrative proceedings pending before the Bureau of Narcotics and Dangerous Drugs [now the Drug Enforcement Administration] on Oct. 27, 1970, to be continued and brought to final determination in accord with laws and regulations in effect prior to Oct. 27, 1970, see section 702 of Pub. L. 91–513, set out as a note under section 321 of this title.

Transfer of Functions

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

Guidance

Pub. L. 111–31, div. A, title I, §103(q)(1), (2), June 22, 2009, 123 Stat. 1838, 1839, as amended by Pub. L. 116–94, div. N, title I, §603(d)(1), Dec. 20, 2019, 133 Stat. 3124, provided that:

"(1) In general.—The Secretary of Health and Human Services shall issue guidance [see 76 F.R. 22905, effective Apr. 15, 2011]—

"(A) defining the term 'repeated violation', as used in section 303(f)(8) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 333(f)(8)) as amended by subsection (c), as including at least 5 violations of particular requirements over a 36-month period at a particular retail outlet that constitute a repeated violation and providing for civil penalties in accordance with paragraph (2);

"(B) providing for timely and effective notice by certified or registered mail or personal delivery to the retailer of each alleged violation at a particular retail outlet prior to conducting a followup compliance check, such notice to be sent to the location specified on the retailer's registration or to the retailer's registered agent if the retailer has provider [sic] such agent information to the Food and Drug Administration prior to the violation;

"(C) providing for a hearing pursuant to the procedures established through regulations of the Food and Drug Administration for assessing civil money penalties, including at a retailer's request a hearing by telephone or at the nearest regional or field office of the Food and Drug Administration, and providing for an expedited procedure for the administrative appeal of an alleged violation;

"(D) providing that a person may not be charged with a violation at a particular retail outlet unless the Secretary has provided notice to the retailer of all previous violations at that outlet;

"(E) establishing that civil money penalties for multiple violations shall increase from one violation to the next violation pursuant to paragraph (2) within the time periods provided for in such paragraph;

"(F) providing that good faith reliance on the presentation of a false government-issued photographic identification that contains a date of birth does not constitute a violation of any minimum age requirement for the sale of tobacco products if the retailer has taken effective steps to prevent such violations, including—

"(i) adopting and enforcing a written policy against sales to minors;

"(ii) informing its employees of all applicable laws;

"(iii) establishing disciplinary sanctions for employee noncompliance; and

"(iv) requiring its employees to verify age by way of photographic identification or electronic scanning device; and

"(G) providing for the Secretary, in determining whether to impose a no-tobacco-sale order and in determining whether to compromise, modify, or terminate such an order, to consider whether the retailer has taken effective steps to prevent violations of the minimum age requirements for the sale of tobacco products, including the steps listed in subparagraph (F).

"(2) PENALTIES FOR VIOLATIONS.—

"(A) IN GENERAL.—The amount of the civil penalty to be applied for violations of section 906(d)(5) [probably means section 906(d)(5) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 387f(d)(5)] or of restrictions promulgated under section 906(d) [21 U.S.C. 387f(d)], as described in paragraph (1), shall be as follows:

"(i) With respect to a retailer with an approved training program, the amount of the civil penalty shall not exceed—

"(I) in the case of the first violation, $0.00 together with the issuance of a warning letter to the retailer;

"(II) in the case of a second violation within a 12-month period, $250;

"(III) in the case of a third violation within a 24-month period, $500;

"(IV) in the case of a fourth violation within a 24-month period, $2,000;

"(V) in the case of a fifth violation within a 36-month period, $5,000; and

"(VI) in the case of a sixth or subsequent violation within a 48-month period, $10,000 as determined by the Secretary on a case-by-case basis.

"(ii) With respect to a retailer that does not have an approved training program, the amount of the civil penalty shall not exceed—

"(I) in the case of the first violation, $250;

"(II) in the case of a second violation within a 12-month period, $500;

"(III) in the case of a third violation within a 24-month period, $1,000;

"(IV) in the case of a fourth violation within a 24-month period, $2,000;

"(V) in the case of a fifth violation within a 36-month period, $5,000; and

"(VI) in the case of a sixth or subsequent violation within a 48-month period, $10,000 as determined by the Secretary on a case-by-case basis.

"(B) TRAINING PROGRAM.—For purposes of subparagraph (A), the term 'approved training program' means a training program that complies with standards developed by the Food and Drug Administration for such programs.

"(C) CONSIDERATION OF STATE PENALTIES.—The Secretary shall coordinate with the States in enforcing the provisions of this Act [probably means div. A of Pub. L. 111–31, see Short Title of 2009 Amendment note set out under section 301 of this title and Tables for classifications] and, for purposes of mitigating a civil penalty to be applied for a violation by a retailer of section 906(d)(5) [21 U.S.C. 387f(d)(5)] or of any restriction promulgated under section 906(d) [21 U.S.C. 387f(d)], shall consider the amount of any penalties paid by the retailer to a State for the same violation."

CONSTRUCTION OF 2011 AMENDMENT

Nothing in amendment by Pub. L. 111–353 to be construed to alter jurisdiction and authorities established under certain other Acts or in a manner inconsistent with international agreements to which the United States is a party, see sections 2251 and 2252 of this title.

ENFORCEMENT

Pub. L. 99–660, title I, §103, Nov. 14, 1986, 100 Stat. 3751, provided that: "For the fines authorized to be imposed under section 303 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 333], see section 3623 of title 18, United States Code, for the period ending October 31, 1986 [probably should be October 31, 1987], and sections 3559 and 3571 of such title for the period beginning November 1, 1986 [probably should be November 1, 1987]."

[1] *So in original. Words "of this section" probably should not appear.*

[2] *See References in Text note below.*

§333a. Repealed. Pub. L. 101–647, title XIX, §1905, Nov. 29, 1990, 104 Stat. 4853

Section, Pub. L. 100–690, title II, §2401, Nov. 18, 1988, 102 Stat. 4230, related to forfeiture and illegal trafficking in steroids or human growth hormones.

§334. Seizure

(a) Grounds and jurisdiction

(1) Any article of food, drug, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not, under the provisions of section 331(ll), 344, or 355 of this title, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States or United States court of a Territory within the jurisdiction of which the article is found. No libel for condemnation shall be instituted under this chapter, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this chapter based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (A) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this chapter, or (B) when the Secretary has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Department that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial.

(2) The following shall be liable to be proceeded against at any time on libel of information and condemned in any district court of the United States or United States court of a Territory within the jurisdiction of which they are found: (A) Any drug that is a counterfeit drug, (B) Any container of a counterfeit drug, (C) Any punch, die, plate, stone, labeling, container, or other thing used or designed for use in making a counterfeit drug or drugs, (D) Any adulterated or misbranded device, and (E) Any adulterated or misbranded tobacco product.

(3)(A) Except as provided in subparagraph (B), no libel for condemnation may be instituted under paragraph (1) or (2) against any food which—

(i) is misbranded under section 343(a)(2) of this title because of its advertising, and

(ii) is being held for sale to the ultimate consumer in an establishment other than an establishment owned or operated by a manufacturer, packer, or distributor of the food.

(B) A libel for condemnation may be instituted under paragraph (1) or (2) against a food described in subparagraph (A) if—

(i)(I) the food's advertising which resulted in the food being misbranded under section 343(a)(2) of this title was disseminated in the establishment in which the food is being held for sale to the ultimate consumer,

(II) such advertising was disseminated by, or under the direction of, the owner or operator of such establishment, or

(III) all or part of the cost of such advertising was paid by such owner or operator; and

(ii) the owner or operator of such establishment used such advertising in the establishment to promote the sale of the food.

(b) Procedure; multiplicity of pending proceedings

The article, equipment, or other thing proceeded against shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure

in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. When libel for condemnation proceedings under this section, involving the same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby.

(c) Availability of samples of seized goods prior to trial

The court at any time after seizure up to a reasonable time before trial shall by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized and a true copy of the analysis, if any, on which the proceeding is based and the identifying marks or numbers, if any, of the packages from which the samples analyzed were obtained.

(d) Disposition of goods after decree of condemnation; claims for remission or mitigation of forfeitures

(1) Any food, drug, device, tobacco product, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this chapter or the laws of the jurisdiction in which sold. After entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this chapter or the laws of any State or Territory in which sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this chapter, under the supervision of an officer or employee duly designated by the Secretary, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. If the article was imported into the United States and the person seeking its release establishes (A) that the adulteration, misbranding, or violation did not occur after the article was imported, and (B) that he had no cause for believing that it was adulterated, misbranded, or in violation before it was released from customs custody, the court may permit the article to be delivered to the owner for exportation in lieu of destruction upon a showing by the owner that all of the conditions of section 381(e) of this title can and will be met. The provisions of this sentence shall not apply where condemnation is based upon violation of section 342(a)(1), (2), or (6), section 351(a)(3), section 352(j), or section 361(a) or (d) of this title. Where such exportation is made to the original foreign supplier, then subparagraphs (A) and (B) of section 381(e)(1) of this title and the preceding sentence shall not be applicable; and in all cases of exportation the bond shall be conditioned that the article shall not be sold or disposed of until the applicable conditions of section 381(e) of this title have been met. Any person seeking to export an imported article pursuant to any of the provisions of this subsection shall establish that the article was intended for export at the time the article entered commerce. Any article condemned by reason of its being an article which may not, under section 344 or 355 of this title, be introduced into interstate commerce, shall be disposed of by destruction.

(2) The provisions of paragraph (1) of this subsection shall, to the extent deemed appropriate by the court, apply to any equipment or other thing which is not otherwise within the scope of such paragraph and which is referred to in paragraph (2) of subsection (a).

(3) Whenever in any proceeding under this section, involving paragraph (2) of subsection (a), the condemnation of any equipment or thing (other than a drug) is decreed, the court shall allow the claim of any claimant, to the extent of such claimant's interest, for remission or mitigation of such forfeiture if such claimant proves to the satisfaction of the court (i) that he has not committed or caused to be committed

any prohibited act referred to in such paragraph (2) and has no interest in any drug referred to therein, (ii) that he has an interest in such equipment or other thing as owner or lienor or otherwise, acquired by him in good faith, and (iii) that he at no time had any knowledge or reason to believe that such equipment or other thing was being or would be used in, or to facilitate, the violation of laws of the United States relating to counterfeit drugs.

(e) Costs

When a decree of condemnation is entered against the article, court costs and fees, and storage and other proper expenses, shall be awarded against the person, if any, intervening as claimant of the article.

(f) Removal of case for trial

In the case of removal for trial of any case as provided by subsection (a) or (b)—

(1) The clerk of the court from which removal is made shall promptly transmit to the court in which the case is to be tried all records in the case necessary in order that such court may exercise jurisdiction.

(2) The court to which such case was removed shall have the powers and be subject to the duties, for purposes of such case, which the court from which removal was made would have had, or to which such court would have been subject, if such case had not been removed.

(g) Administrative restraint; detention orders

(1) If during an inspection conducted under section 374 of this title of a facility or a vehicle, a device, drug, or tobacco product which the officer or employee making the inspection has reason to believe is adulterated or misbranded is found in such facility or vehicle, such officer or employee may order the device, drug, or tobacco product detained (in accordance with regulations prescribed by the Secretary) for a reasonable period which may not exceed twenty days unless the Secretary determines that a period of detention greater than twenty days is required to institute an action under subsection (a) or section 332 of this title, in which case he may authorize a detention period of not to exceed thirty days. Regulations of the Secretary prescribed under this paragraph shall require that before a device, drug, or tobacco product may be ordered detained under this paragraph the Secretary or an officer or employee designated by the Secretary approve such order. A detention order under this paragraph may require the labeling or marking of a device, drug, or tobacco product during the period of its detention for the purpose of identifying the device, drug, or tobacco product as detained. Any person who would be entitled to claim a device, drug, or tobacco product if it were seized under subsection (a) may appeal to the Secretary a detention of such device, drug, or tobacco product under this paragraph. Within five days of the date an appeal of a detention is filed with the Secretary, the Secretary shall after affording opportunity for an informal hearing by order confirm the detention or revoke it.

(2)(A) Except as authorized by subparagraph (B), a device, drug, or tobacco product subject to a detention order issued under paragraph (1) shall not be moved by any person from the place at which it is ordered detained until—

(i) released by the Secretary, or

(ii) the expiration of the detention period applicable to such order,

whichever occurs first.

(B) A device or drug subject to a detention order under paragraph (1) may be moved—

(i) in accordance with regulations prescribed by the Secretary, and

(ii) if not in final form for shipment, at the discretion of the manufacturer of the device or drug for the purpose of completing the work required to put it in such form.

(h) Administrative detention of foods

(1) Detention authority

(A) In general

An officer or qualified employee of the Food and Drug Administration may order the detention, in accordance with this subsection, of any article of food that is found during an inspection, examination, or investigation under this chapter conducted by such officer or qualified employee, if the officer or qualified employee has reason to believe that such article is adulterated or misbranded.

(B) Secretary's approval

An article of food may be ordered detained under subparagraph (A) only if the Secretary or an official designated by the Secretary approves the order. An official may not be so designated unless the official is the director of the district under this chapter in which the article involved is located, or is an official senior to such director.

(2) Period of detention

An article of food may be detained under paragraph (1) for a reasonable period, not to exceed 20 days, unless a greater period, not to exceed 30 days, is necessary, to enable the Secretary to institute an action under subsection (a) or section 332 of this title. The Secretary shall by regulation provide for procedures for instituting such action on an expedited basis with respect to perishable foods.

(3) Security of detained article

An order under paragraph (1) with respect to an article of food may require that such article be labeled or marked as detained, and shall require that the article be removed to a secure facility, as appropriate. An article subject to such an order shall not be transferred by any person from the place at which the article is ordered detained, or from the place to which the article is so removed, as the case may be, until released by the Secretary or until the expiration of the detention period applicable under such order, whichever occurs first. This subsection may not be construed as authorizing the delivery of the article pursuant to the execution of a bond while the article is subject to the order, and section 381(b) of this title does not authorize the delivery of the article pursuant to the execution of a bond while the article is subject to the order.

(4) Appeal of detention order

(A) In general

With respect to an article of food ordered detained under paragraph (1), any person who would be entitled to be a claimant for such article if the article were seized under subsection (a) may appeal the order to the Secretary. Within five days after such an appeal is filed, the Secretary, after providing opportunity for an informal hearing, shall confirm or terminate the order involved, and such confirmation by the Secretary shall be considered a final agency action for purposes of section 702 of title 5. If during such five-day period the Secretary fails to provide such an opportunity, or to confirm or terminate such order, the order is deemed to be terminated.

(B) Effect of instituting court action

The process under subparagraph (A) for the appeal of an order under paragraph (1) terminates if the Secretary institutes an action under subsection (a) or section 332 of this title regarding the article of food involved.

(i) Procedures for promulgating regulations

(1) In general

In promulgating a regulation implementing this section, the Secretary shall—

(A) issue a notice of proposed rulemaking that includes the proposed regulation;

(B) provide a period of not less than 60 days for comments on the proposed regulation; and

(C) publish the final regulation not less than 30 days before the regulation's effective date.

(2) Restrictions

Notwithstanding any other provision of Federal law, in implementing this section, the Secretary shall only promulgate regulations as described in paragraph (1).

(June 25, 1938, ch. 675, §304, 52 Stat. 1044; June 24, 1948, ch. 613, §2, 62 Stat. 582; Aug. 7, 1953, ch. 350, §3, 67 Stat. 477; Pub. L. 85–250, Aug. 31, 1957, 71 Stat. 567; Pub. L. 89–74, §6, July 15, 1965, 79 Stat. 232; Pub. L. 90–639, §4(b), Oct. 24, 1968, 82 Stat. 1362; Pub. L. 91–513, title II, §701(c), (d), Oct. 27, 1970, 84 Stat. 1281, 1282; Pub. L. 94–278, title V, §502(a)(2)(C), Apr. 22, 1976, 90 Stat. 411; Pub. L. 94–295, §§3(c), 7(a), May 28, 1976, 90 Stat. 576, 582; Pub. L. 102–300, §6(c), June 16, 1992, 106 Stat. 240; Pub. L. 103–80, §3(f), Aug. 13, 1993, 107 Stat. 775; Pub. L. 105–115, title IV, §418, Nov. 21, 1997, 111 Stat. 2379; Pub. L. 107–188, title III, §303(a), June 12, 2002, 116 Stat. 663; Pub. L. 110–85, title IX, §912(b)(1), Sept. 27, 2007, 121 Stat. 952; Pub. L. 111–31, div. A, title I, §103(d), June 22, 2009, 123 Stat.

1836; Pub. L. 111–353, title II, §207(a), Jan. 4, 2011, 124 Stat. 3944; Pub. L. 112–144, title VII, §709(a), (b)(2), July 9, 2012, 126 Stat. 1069.)

Editorial Notes

Amendments

2012—Subsec. (g)(1). Pub. L. 112–144, §709(a)(1), inserted ", drug," after "device" wherever appearing.

Subsec. (g)(2)(A). Pub. L. 112–144, §709(a)(2), inserted ", drug," after "(B), a device".

Subsec. (g)(2)(B). Pub. L. 112–144, §709(a)(3), inserted "or drug" after "device" in introductory provisions and in cl. (ii).

Subsec. (i). Pub. L. 112–144, §709(b)(2), added subsec. (i).

2011—Subsec. (h)(1)(A). Pub. L. 111–353 substituted "reason to believe" for "credible evidence or information indicating" and "is adulterated or misbranded" for "presents a threat of serious adverse health consequences or death to humans or animals".

2009—Subsec. (a)(2)(E). Pub. L. 111–31, §103(d)(1), added cl. (E).

Subsec. (d)(1). Pub. L. 111–31, §103(d)(2), inserted "tobacco product," after "device," in first sentence.

Subsec. (g)(1). Pub. L. 111–31, §103(d)(3), inserted "or tobacco product" after "device" wherever appearing.

Subsec. (g)(2)(A). Pub. L. 111–31, §103(d)(4), inserted "or tobacco product" after "device" in introductory provisions.

2007—Subsec. (a)(1). Pub. L. 110–85 substituted "section 331(ll), 344, or 355" for "section 344 or 355".

2002—Subsec. (h). Pub. L. 107–188 added subsec. (h).

1997—Subsec. (d)(1). Pub. L. 105–115 substituted "subparagraphs (A) and (B) of section 381(e)(1) of this title" for "paragraphs (1) and (2) of section 381(e) of this title" and inserted "Any person seeking to export an imported article pursuant to any of the provisions of this subsection shall establish that the article was intended for export at the time the article entered commerce." before "Any article condemned by reason".

1993—Subsec. (a)(1). Pub. L. 103–80, §3(f)(1), substituted "found. No libel" for "found: *Provided, however*, That no libel".

Subsec. (d)(1). Pub. L. 103–80, §3(f)(2), substituted "sold. After entry" for "sold: *Provided*, That after entry", "met. The provisions of this sentence" for "met: *Provided, however*, That the provisions of this sentence", "title. Where such exportation" for "title: *And provided further*, That where such exportation", and "the preceding sentence shall not be applicable" for "the foregoing proviso shall not be applicable".

1992—Subsec. (d)(1). Pub. L. 102–300 substituted "381(e)" for "381(d)" in three places and "paragraphs" for "clauses" before "(1) and (2) of section 381(e)".

1976—Subsec. (a)(1). Pub. L. 94–295, §3(c)(1), struck out "device," after "Any article of food, drug,".

Subsec. (a)(2). Pub. L. 94–295, §3(c)(2), (3), added cl. (D) covering adulterated or misbranded devices.

Subsec. (a)(3). Pub. L. 94–278 added par. (3).

Subsec. (g). Pub. L. 94–295, §7(a), added subsec. (g).

1970—Subsec. (a)(2). Pub. L. 91–513, §701(c), struck out cls. (A) and (D) which dealt with depressant or stimulant drugs, struck out reference to depressant or stimulant drugs in cl. (C), and redesignated cls. (B), (C), and (E) as cls. (A), (B), and (C), respectively.

Subsec. (d)(3)(iii). Pub. L. 91–513, §701(d), struck out reference to depressant or stimulant drugs.

1968—Subsec. (a). Pub. L. 90–639 inserted references to the United States courts of Territories.

1965—Subsec. (a). Pub. L. 89–74, §6(a), designated existing provisions as par. (1), redesignated cls. (1) and (2) of proviso as (A) and (B), and added par. (2).

Subsec. (b). Pub. L. 89–74, §6(b)(1), inserted "equipment, or other thing proceeded against" after "article" in first sentence.

Subsec. (d). Pub. L. 89–74, §6(b)(2), designated existing provisions as par. (1), redesignated cls. (1) and (2) of the second sentence thereof as (A) and (B), and added pars. (2) and (3).

1957—Subsec. (d). Pub. L. 85–250 permitted, under certain circumstances, reexportation of articles condemned at places other than original port of entry.

1953—Subsec. (c). Act Aug. 7, 1953, provided that a true copy of the analysis in any case shall be furnished the owner.

1948—Subsec. (a). Act June 24, 1948, inserted "or while held for sale (whether or not the first sale) after shipment in interstate commerce" to make this subsection coextensive with section 331(k) of this title.

Statutory Notes and Related Subsidiaries

Effective Date of 2012 Amendment

Pub. L. 112–144, title VII, §709(c), July 9, 2012, 126 Stat. 1070, provided that: "The amendments made by subsection (a) [amending this section] shall not take effect until the Secretary has issued a final regulation under subsection (b) [amending this section and enacting provisions set out as a note under this section]."

[Final regulation issued May 29, 2014, effective June 30, 2014. See 79 F.R. 30716.]

Effective Date of 2011 Amendment

Pub. L. 111–353, title II, §207(c), Jan. 4, 2011, 124 Stat. 3944, provided that: "The amendment made by this section [amending this section] shall take effect 180 days after the date of enactment of this Act [Jan. 4, 2011]."

Effective Date of 1997 Amendment

Amendment by Pub. L. 105–115 effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as a note under section 321 of this title.

Effective Date of 1976 Amendment

Pub. L. 94–278, title V, §502(c), Apr. 22, 1976, 90 Stat. 413, provided that: "The amendments made by subsection (a) [amending this section and sections 321, 333, and 343 of this title] shall take effect 180 days after the date of the enactment of this Act [Apr. 22, 1976]."

Effective Date of 1970 Amendment

Amendment by Pub. L. 91–513 effective on first day of seventh calendar month that begins after Oct. 26, 1970, see section 704 of Pub. L. 91–513, set out as an Effective Date note under section 801 of this title.

Effective Date of 1968 Amendment

Amendment by Pub. L. 90–639 applicable only with respect to violations of this chapter committed after Oct. 24, 1968, see section 6 of Pub. L. 90–639, set out as an Effective Date of 1968 Amendments; Transitional Provisions note under section 321 of this title.

Effective Date of 1965 Amendment

Amendment by Pub. L. 89–74 effective Feb. 1, 1966, see section 11 of Pub. L. 89–74, set out as a note under section 321 of this title.

Regulations

Pub. L. 112–144, title VII, §709(b)(1), July 9, 2012, 126 Stat. 1069, provided that: "Not later than 2 years after the date of the enactment of this Act [July 9, 2012], the Secretary of Health and Human Services shall promulgate regulations in accordance with section 304(i) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 334(i)], as added by paragraph (2) of this subsection, to implement administrative detention authority with respect to drugs, as authorized by the amendments made by subsection (a) [amending this section]. Before promulgating such regulations, the Secretary shall consult with stakeholders, including manufacturers of drugs."

Pub. L. 111–353, title II, §207(b), Jan. 4, 2011, 124 Stat. 3944, provided that: "Not later than 120 days after the date of enactment of this Act [Jan. 4, 2011], the Secretary shall issue an interim final rule amending subpart K of part 1 of title 21, Code of Federal Regulations, to implement the amendment made by this section [amending this section]."

Savings Provision

Amendment by Pub. L. 91–513 not to affect or abate any prosecutions for any violation of law or any civil seizures or forfeitures and injunctive proceedings commenced prior to the effective date of such amendment, and all administrative proceedings pending before the Bureau of Narcotics and Dangerous Drugs [now the Drug Enforcement Administration] on Oct. 27, 1970, to be continued and brought to final determination in accord with laws and regulations in effect prior to Oct. 27, 1970, see section 702 of Pub. L. 91–513, set out as a note under section 321 of this title.

Construction of 2011 Amendment

Nothing in amendment by Pub. L. 111–353 to be construed to alter jurisdiction and authorities established under certain other Acts or in a manner inconsistent with international agreements to which the United States is a party, see sections 2251 and 2252 of this title.

Transfer of Functions

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

§335. Hearing before report of criminal violation

Before any violation of this chapter is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding.

(June 25, 1938, ch. 675, §305, 52 Stat. 1045.)

Statutory Notes and Related Subsidiaries

Transfer of Functions

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

§335a. Debarment, temporary denial of approval, and suspension

(a) Mandatory debarment; certain drug applications

(1) Corporations, partnerships, and associations

If the Secretary finds that a person other than an individual has been convicted, after May 13, 1992, of a felony under Federal law for conduct relating to the development or approval, including the process for development or approval, of any abbreviated drug application, the Secretary shall debar such person from submitting, or assisting in the submission of, any such application.

(2) Individuals

If the Secretary finds that an individual has been convicted of a felony under Federal law for conduct —

(A) relating to the development or approval, including the process for development or approval, of any drug product, or

(B) otherwise relating to the regulation of any drug product under this chapter,

the Secretary shall debar such individual from providing services in any capacity to a person that has an approved or pending drug product application.

(b) Permissive debarment; certain drug applications; food imports

(1) In general

The Secretary, on the Secretary's own initiative or in response to a petition, may, in accordance with paragraph (2) or (3), debar—

(A) a person other than an individual from submitting or assisting in the submission of any abbreviated drug application;

(B) an individual from providing services in any capacity to a person that has an approved or pending drug product application;

(C) a person from importing an article of food or offering such an article for import into the United States; or

(D) a person from importing or offering for import into the United States a drug.

(2) Persons subject to permissive debarment; certain drug applications

The following persons are subject to debarment under subparagraph (A) or (B) of paragraph (1):

(A) Corporations, partnerships, and associations

Any person other than an individual that the Secretary finds has been convicted—

(i) for conduct that—

(I) relates to the development or approval, including the process for the development or approval, of any abbreviated drug application; and

(II) is a felony under Federal law (if the person was convicted before May 13, 1992), a misdemeanor under Federal law, or a felony under State law, or

(ii) of a conspiracy to commit, or aiding or abetting, a criminal offense described in clause (i) or a felony described in subsection (a)(1),

if the Secretary finds that the type of conduct which served as the basis for such conviction undermines the process for the regulation of drugs.

(B) Individuals

(i) Any individual whom the Secretary finds has been convicted of—

(I) a misdemeanor under Federal law or a felony under State law for conduct relating to the development or approval, including the process for development or approval, of any drug product or otherwise relating to the regulation of drug products under this chapter, or

(II) a conspiracy to commit, or aiding or abetting, such criminal offense or a felony described in subsection (a)(2),

if the Secretary finds that the type of conduct which served as the basis for such conviction undermines the process for the regulation of drugs.

(ii) Any individual whom the Secretary finds has been convicted of—

(I) a felony which is not described in subsection (a)(2) or clause (i) of this subparagraph and which involves bribery, payment of illegal gratuities, fraud, perjury, false statement, racketeering, blackmail, extortion, falsification or destruction of records, or interference with, obstruction of an investigation into, or prosecution of, any criminal offense, or

(II) a conspiracy to commit, or aiding or abetting, such felony,

if the Secretary finds, on the basis of the conviction of such individual and other information, that such individual has demonstrated a pattern of conduct sufficient to find that there is reason to believe that such individual may violate requirements under this chapter relating to drug products.

(iii) Any individual whom the Secretary finds materially participated in acts that were the basis for a conviction for an offense described in subsection (a) or in clause (i) or (ii) for which a conviction was obtained, if the Secretary finds, on the basis of such participation and other information, that such individual has demonstrated a pattern of conduct sufficient to find that there is reason to believe that such individual may violate requirements under this chapter relating to drug products.

(iv) Any high managerial agent whom the Secretary finds—

(I) worked for, or worked as a consultant for, the same person as another individual during the period in which such other individual took actions for which a felony conviction was obtained and which resulted in the debarment under subsection (a)(2), or clause (i), of such other individual,

(II) had actual knowledge of the actions described in subclause (I) of such other individual, or took action to avoid such actual knowledge, or failed to take action for the purpose of avoiding such actual knowledge,

(III) knew that the actions described in subclause (I) were violative of law, and

(IV) did not report such actions, or did not cause such actions to be reported, to an officer, employee, or agent of the Department or to an appropriate law enforcement officer, or failed to take other appropriate action that would have ensured that the process for the regulation of drugs was not undermined, within a reasonable time after such agent first knew of such actions,

if the Secretary finds that the type of conduct which served as the basis for such other individual's conviction undermines the process for the regulation of drugs.

(3) Persons subject to permissive debarment; food or drug importation

A person is subject to debarment under paragraph (1)(C) if—

(A) the person has been convicted of a felony for conduct relating to the importation into the United States of any food;

(B) the person has engaged in a pattern of importing or offering for import adulterated food that presents a threat of serious adverse health consequences or death to humans or animals;

(C) the person has been convicted of a felony for conduct relating to the importation into the United States of any drug or controlled substance (as defined in section 802 of this title);

(D) the person has engaged in a pattern of importing or offering for import—

(i) controlled substances that are prohibited from importation under section 1401(m) of title 19; or

(ii) adulterated or misbranded drugs that are—

(I) not designated in an authorized electronic data interchange system as a product that is regulated by the Secretary; or

(II) knowingly or intentionally falsely designated in an authorized electronic data interchange system as a product that is regulated by the Secretary.

(4) Stay of certain orders

An order of the Secretary under clause (iii) or (iv) of paragraph (2)(B) shall not take effect until 30 days after the order has been issued.

(5) Definition

For purposes of paragraph (3)(D), the term "pattern of importing or offering for import" means importing or offering for import a drug described in clause (i) or (ii) of paragraph (3)(D) in an amount, frequency, or dosage that is inconsistent with personal or household use by the importer.

(c) Debarment period and considerations

(1) Effect of debarment

The Secretary—

(A) shall not accept or review (other than in connection with an audit under this section) any abbreviated drug application submitted by or with the assistance of a person debarred under subsection (a)(1) or (b)(2)(A) during the period such person is debarred,

(B) shall, during the period of a debarment under subsection (a)(2) or (b)(2)(B), debar an individual from providing services in any capacity to a person that has an approved or pending drug product application and shall not accept or review (other than in connection with an audit under this section) an abbreviated drug application from such individual, and

(C) shall, if the Secretary makes the finding described in paragraph (6) or (7) of section 335b(a) of this title, assess a civil penalty in accordance with section 335b of this title.

(2) Debarment periods

(A) In general

The Secretary shall debar a person under subsection (a) or (b) for the following periods:

(i) The period of debarment of a person (other than an individual) under subsection (a)(1) shall not be less than 1 year or more than 10 years, but if an act leading to a subsequent debarment under subsection (a) occurs within 10 years after such person has been debarred under subsection (a)(1), the period of debarment shall be permanent.

(ii) The debarment of an individual under subsection (a)(2) shall be permanent.

(iii) The period of debarment of any person under paragraph (2) or (3) of subsection (b) shall not be more than 5 years.

The Secretary may determine whether debarment periods shall run concurrently or consecutively in the case of a person debarred for multiple offenses.

(B) Notification

Upon a conviction for an offense described in subsection (a) or (b) or upon execution of an agreement with the United States to plead guilty to such an offense, the person involved may notify the Secretary that the person acquiesces to debarment and such person's debarment shall commence upon such notification.

(3) Considerations

In determining the appropriateness and the period of a debarment of a person under subsection (b) and any period of debarment beyond the minimum specified in subparagraph (A)(i) of paragraph (2), the Secretary shall consider where applicable—

(A) the nature and seriousness of any offense involved,

(B) the nature and extent of management participation in any offense involved, whether corporate policies and practices encouraged the offense, including whether inadequate institutional controls contributed to the offense,

(C) the nature and extent of voluntary steps to mitigate the impact on the public of any offense involved, including the recall or the discontinuation of the distribution of suspect drugs, full cooperation with any investigations (including the extent of disclosure to appropriate authorities of all wrongdoing), the relinquishing of profits on drug approvals fraudulently obtained, and any other actions taken to substantially limit potential or actual adverse effects on the public health,

(D) whether the extent to which changes in ownership, management, or operations have corrected the causes of any offense involved and provide reasonable assurances that the offense will not occur in the future,

(E) whether the person to be debarred is able to present adequate evidence that current production of drugs subject to abbreviated drug applications and all pending abbreviated drug applications are free of fraud or material false statements, and

(F) prior convictions under this chapter or under other Acts involving matters within the jurisdiction of the Food and Drug Administration.

(d) Termination of debarment

(1) Application

Any person that is debarred under subsection (a) (other than a person permanently debarred) or any person that is debarred under subsection (b) may apply to the Secretary for termination of the debarment under this subsection. Any information submitted to the Secretary under this paragraph does not constitute an amendment or supplement to pending or approved abbreviated drug applications.

(2) Deadline

The Secretary shall grant or deny any application respecting a debarment which is submitted under paragraph (1) within 180 days of the date the application is submitted.

(3) Action by the Secretary

(A) Corporations

(i) Conviction reversal

If the conviction which served as the basis for the debarment of a person under subsection (a)(1) or paragraph (2)(A) or (3) of subsection (b) is reversed, the Secretary shall withdraw the order of debarment.

(ii) Application

Upon application submitted under paragraph (1), the Secretary shall terminate the debarment of a person if the Secretary finds that—

(I) changes in ownership, management, or operations have fully corrected the causes of the offense involved and provide reasonable assurances that the offense will not occur in the future, and

(II) in applicable cases, sufficient audits, conducted by the Food and Drug Administration or by independent experts acceptable to the Food and Drug Administration, demonstrate that pending applications and the development of drugs being tested before the submission of an application are free of fraud or material false statements.

In the case of persons debarred under subsection (a)(1), such termination shall take effect no earlier than the expiration of one year from the date of the debarment.

(B) Individuals

(i) Conviction reversal

If the conviction which served as the basis for the debarment of an individual under subsection (a)(2) or clause (i), (ii), (iii), or (iv) of subsection (b)(2)(B) or subsection (b)(3) is reversed, the Secretary shall withdraw the order of debarment.

(ii) Application

Upon application submitted under paragraph (1), the Secretary shall terminate the debarment of an individual who has been debarred under subsection (b)(2)(B) or subsection (b)(3) if such termination serves the interests of justice and adequately protects the integrity of the drug approval process or the food importation process, as the case may be.

(4) Special termination

(A) Application

Any person that is debarred under subsection (a)(1) (other than a person permanently debarred under subsection (c)(2)(A)(i)) or any individual who is debarred under subsection (a)(2) may apply to the Secretary for special termination of debarment under this subsection. Any information submitted to the Secretary under this subparagraph does not constitute an amendment or supplement to pending or approved abbreviated drug applications.

(B) Corporations

Upon an application submitted under subparagraph (A), the Secretary may take the action described in subparagraph (D) if the Secretary, after an informal hearing, finds that—

(i) the person making the application under subparagraph (A) has demonstrated that the felony conviction which was the basis for such person's debarment involved the commission of an offense which was not authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the person within the scope of the board's or agent's office or employment,

(ii) all individuals who were involved in the commission of the offense or who knew or should have known of the offense have been removed from employment involving the development or approval of any drug subject to sections [1] 355 of this title,

(iii) the person fully cooperated with all investigations and promptly disclosed all wrongdoing to the appropriate authorities, and

(iv) the person acted to mitigate any impact on the public of any offense involved, including the recall, or the discontinuation of the distribution, of any drug with respect to which the Secretary requested a recall or discontinuation of distribution due to concerns about the safety or efficacy of the drug.

(C) Individuals

Upon an application submitted under subparagraph (A), the Secretary may take the action described in subparagraph (D) if the Secretary, after an informal hearing, finds that such individual has provided substantial assistance in the investigations or prosecutions of offenses which are described in subsection (a) or (b) or which relate to any matter under the jurisdiction of the Food and Drug Administration.

(D) Secretarial action

The action referred to in subparagraphs (B) and (C) is—

(i) in the case of a person other than an individual—

(I) terminating the debarment immediately, or

(II) limiting the period of debarment to less than one year, and

(ii) in the case of an individual, limiting the period of debarment to less than permanent but to no less than 1 year,

whichever best serves the interest of justice and protects the integrity of the drug approval process.

(e) Publication and list of debarred persons

The Secretary shall publish in the Federal Register the name of any person debarred under subsection (a) or (b), the effective date of the debarment, and the period of the debarment. The Secretary shall also maintain and make available to the public a list, updated no less often than quarterly, of such persons, of the effective dates and minimum periods of such debarments, and of the termination of debarments.

(f) Temporary denial of approval

(1) In general

The Secretary, on the Secretary's own initiative or in response to a petition, may, in accordance with paragraph (3), refuse by order, for the period prescribed by paragraph (2), to approve any abbreviated drug application submitted by any person—

(A) if such person is under an active Federal criminal investigation in connection with an action described in subparagraph (B),

(B) if the Secretary finds that such person—

(i) has bribed or attempted to bribe, has paid or attempted to pay an illegal gratuity, or has induced or attempted to induce another person to bribe or pay an illegal gratuity to any officer, employee, or agent of the Department of Health and Human Services or to any other Federal, State, or local official in connection with any abbreviated drug application, or has conspired to commit, or aided or abetted, such actions, or

(ii) has knowingly made or caused to be made a pattern or practice of false statements or misrepresentations with respect to material facts relating to any abbreviated drug application, or the production of any drug subject to an abbreviated drug application, to any officer, employee, or agent of the Department of Health and Human Services, or has conspired to commit, or aided or abetted, such actions, and

(C) if a significant question has been raised regarding—

(i) the integrity of the approval process with respect to such abbreviated drug application, or

(ii) the reliability of data in or concerning such person's abbreviated drug application.

Such an order may be modified or terminated at any time.

(2) Applicable period

(A) In general

Except as provided in subparagraph (B), a denial of approval of an application of a person under paragraph (1) shall be in effect for a period determined by the Secretary but not to exceed 18 months beginning on the date the Secretary finds that the conditions described in subparagraphs (A), (B), and (C) of paragraph (1) exist. The Secretary shall terminate such denial—

(i) if the investigation with respect to which the finding was made does not result in a criminal charge against such person, if criminal charges have been brought and the charges have been dismissed, or if a judgment of acquittal has been entered, or

(ii) if the Secretary determines that such finding was in error.

(B) Extension

If, at the end of the period described in subparagraph (A), the Secretary determines that a person has been criminally charged for an action described in subparagraph (B) of paragraph (1), the Secretary may extend the period of denial of approval of an application for a period not to exceed 18 months. The Secretary shall terminate such extension if the charges have been dismissed, if a judgment of acquittal has been entered, or if the Secretary determines that the finding described in subparagraph (A) was in error.

(3) Informal hearing

Within 10 days of the date an order is issued under paragraph (1), the Secretary shall provide such person with an opportunity for an informal hearing, to be held within such 10 days, on the decision of the Secretary to refuse approval of an abbreviated drug application. Within 60 days of the date on which such hearing is held, the Secretary shall notify the person given such hearing whether the Secretary's refusal of approval will be continued, terminated, or otherwise modified. Such notification shall be final agency action.

(g) Suspension authority

(1) In general

If—

(A) the Secretary finds—

(i) that a person has engaged in conduct described in subparagraph (B) of subsection (f)(1) in connection with 2 or more drugs under abbreviated drug applications, or

(ii) that a person has engaged in flagrant and repeated, material violations of good manufacturing practice or good laboratory practice in connection with the development, manufacturing, or distribution of one or more drugs approved under an abbreviated drug application during a 2-year period, and—

(I) such violations may undermine the safety and efficacy of such drugs, and

(II) the causes of such violations have not been corrected within a reasonable period of time following notice of such violations by the Secretary, and

(B) such person is under an active investigation by a Federal authority in connection with a civil or criminal action involving conduct described in subparagraph (A),

the Secretary shall issue an order suspending the distribution of all drugs the development or approval of which was related to such conduct described in subparagraph (A) or suspending the distribution of all drugs approved under abbreviated drug applications of such person if the Secretary finds that such conduct may have affected the development or approval of a significant number of drugs which the Secretary is unable to identify. The Secretary shall exclude a drug from such order if the Secretary determines that such conduct was not likely to have influenced the safety or efficacy of such drug.

(2) Public health waiver

The Secretary shall, on the Secretary's own initiative or in response to a petition, waive the suspension under paragraph (1) (involving an action described in paragraph (1)(A)(i)) with respect to any drug if the Secretary finds that such waiver is necessary to protect the public health because sufficient quantities of the drug would not otherwise be available. The Secretary shall act on any petition seeking action under this paragraph within 180 days of the date the petition is submitted to the Secretary.

(h) Termination of suspension

The Secretary shall withdraw an order of suspension of the distribution of a drug under subsection (g) if the person with respect to whom the order was issued demonstrates in a petition to the Secretary—

(1)(A) on the basis of an audit by the Food and Drug Administration or by experts acceptable to the Food and Drug Administration, or on the basis of other information, that the development, approval, manufacturing, and distribution of such drug is in substantial compliance with the applicable requirements of this chapter, and

(B) changes in ownership, management, or operations—

(i) fully remedy the patterns or practices with respect to which the order was issued, and

(ii) provide reasonable assurances that such actions will not occur in the future, or

(2) the initial determination was in error.

The Secretary shall act on a submission of a petition under this subsection within 180 days of the date of its submission and the Secretary may consider the petition concurrently with the suspension proceeding.

Any information submitted to the Secretary under this subsection does not constitute an amendment or supplement to a pending or approved abbreviated drug application.

(i) Procedure

The Secretary may not take any action under subsection (a), (b), (c), (d)(3), (g), or (h) with respect to any person unless the Secretary has issued an order for such action made on the record after opportunity for an agency hearing on disputed issues of material fact. In the course of any investigation or hearing under this subsection, the Secretary may administer oaths and affirmations, examine witnesses, receive evidence, and issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence that relates to the matter under investigation.

(j) Judicial review

(1) In general

Except as provided in paragraph (2), any person that is the subject of an adverse decision under subsection (a), (b), (c), (d), (f), (g), or (h) may obtain a review of such decision by the United States Court of Appeals for the District of Columbia or for the circuit in which the person resides, by filing in such court (within 60 days following the date the person is notified of the Secretary's decision) a petition requesting that the decision be modified or set aside.

(2) Exception

Any person that is the subject of an adverse decision under clause (iii) or (iv) of subsection (b)(2)(B) may obtain a review of such decision by the United States District Court for the District of Columbia or a district court of the United States for the district in which the person resides, by filing in such court (within 30 days following the date the person is notified of the Secretary's decision) a complaint requesting that the decision be modified or set aside. In such an action, the court shall determine the matter de novo.

(k) Certification

Any application for approval of a drug product shall include—

(1) a certification that the applicant did not and will not use in any capacity the services of any person debarred under subsection (a) or (b), in connection with such application, and

(2) if such application is an abbreviated drug application, a list of all convictions, described in subsections (a) and (b) which occurred within the previous 5 years, of the applicant and affiliated persons responsible for the development or submission of such application.

(l) Applicability

(1) Conviction

For purposes of this section, a person is considered to have been convicted of a criminal offense—

(A) when a judgment of conviction has been entered against the person by a Federal or State court, regardless of whether there is an appeal pending,

(B) when a plea of guilty or nolo contendere by the person has been accepted by a Federal or State court, or

(C) when the person has entered into participation in a first offender, deferred adjudication, or other similar arrangement or program where judgment of conviction has been withheld.

(2) Effective dates

Subsection (a), subparagraph (A) of subsection (b)(2), clauses (i) and (ii) of subsection (b)(2)(B), and subsection (b)(3)(A) shall not apply to a conviction which occurred more than 5 years before the initiation of an agency action proposed to be taken under subsection (a) or (b). Clauses (iii) and (iv) of subsection (b)(2)(B), subsection (b)(3)(B), and subsections (f) and (g) shall not apply to an act or action which occurred more than 5 years before the initiation of an agency action proposed to be taken under subsection (b), (f), or (g). Clause (iv) of subsection (b)(2)(B) shall not apply to an action which occurred before June 1, 1992. Subsection (k) shall not apply to applications submitted to the Secretary before June 1, 1992.

(m) Devices; mandatory debarment regarding third-party inspections and reviews

(1) In general

If the Secretary finds that a person has been convicted of a felony under section 331(gg) of this title, the Secretary shall debar such person from being accredited under section 360m(b) or 374(g)(2) of this title and from carrying out activities under an agreement described in section 383(b) of this title.

(2) Debarment period

The Secretary shall debar a person under paragraph (1) for the following periods:

(A) The period of debarment of a person (other than an individual) shall not be less than 1 year or more than 10 years, but if an act leading to a subsequent debarment under such paragraph occurs within 10 years after such person has been debarred under such paragraph, the period of debarment shall be permanent.

(B) The debarment of an individual shall be permanent.

(3) Termination of debarment; judicial review; other matters

Subsections (c)(3), (d), (e), (i), (j), and (l)(1) apply with respect to a person (other than an individual) or an individual who is debarred under paragraph (1) to the same extent and in the same manner as such subsections apply with respect to a person who is debarred under subsection (a)(1), or an individual who is debarred under subsection (a)(2), respectively.

(June 25, 1938, ch. 675, §306, as added Pub. L. 102–282, §2, May 13, 1992, 106 Stat. 150; amended Pub. L. 105–115, title I, §125(b)(2)(C), Nov. 21, 1997, 111 Stat. 2325; Pub. L. 107–188, title III, §304(a)–(c), June 12, 2002, 116 Stat. 665, 666; Pub. L. 107–250, title II, §203, Oct. 26, 2002, 116 Stat. 1610; Pub. L. 115–271, title III, §3022(b)(2), Oct. 24, 2018, 132 Stat. 3938.)

Editorial Notes

Prior Provisions

A prior section 306 of act June 25, 1938, was renumbered section 309 and is classified to section 336 of this title.

Amendments

2018—Subsec. (b)(1). Pub. L. 115–271, §3022(b)(2)(A)(i), inserted "or (3)" after "paragraph (2)" in introductory provisions.

Subsec. (b)(1)(D). Pub. L. 115–271, §3022(b)(2)(A)(ii)–(v), added subpar. (D).

Subsec. (b)(3). Pub. L. 115–271, §3022(b)(2)(B)(i), inserted "or drug" after "food" in heading.

Subsec. (b)(3)(C), (D). Pub. L. 115–271, §3022(b)(2)(B)(ii)–(iv), added subpars. (C) and (D).

Subsec. (b)(5). Pub. L. 115–271, §3022(b)(2)(C), added par. (5).

2002—Subsec. (a). Pub. L. 107–188, §304(b)(1), substituted "Mandatory debarment; certain drug applications" for "Mandatory debarment" in heading.

Subsec. (b). Pub. L. 107–188, §304(b)(2)(A), substituted "Permissive debarment; certain drug applications; food imports" for "Permissive debarment" in heading.

Subsec. (b)(1)(C). Pub. L. 107–188, §304(a)(1), added subpar. (C).

Subsec. (b)(2). Pub. L. 107–188, §304(b)(2)(B), substituted "permissive debarment; certain drug applications" for "permissive debarment" in heading.

Pub. L. 107–188, §304(a)(2)(A), inserted "subparagraph (A) or (B) of" before "paragraph (1)" in introductory provisions.

Subsec. (b)(3), (4). Pub. L. 107–188, §304(a)(2)(B), (C), added par. (3) and redesignated former par. (3) as (4).

Subsec. (c)(2)(A)(iii). Pub. L. 107–188, §304(b)(3), substituted "paragraph (2) or (3) of subsection (b)" for "subsection (b)(2)".

Subsec. (d)(3)(A)(i). Pub. L. 107–188, §304(b)(4)(A), substituted "subsection (a)(1) or paragraph (2)(A) or (3) of subsection (b)" for "subsection (a)(1) or (b)(2)(A)".

Subsec. (d)(3)(A)(ii)(II). Pub. L. 107–188, §304(b)(4)(B), inserted "in applicable cases," before "sufficient audits".

Subsec. (d)(3)(B)(i). Pub. L. 107–188, §304(b)(4)(C), inserted "or subsection (b)(3)" after "subsection (b)(2)(B)".

Subsec. (d)(3)(B)(ii). Pub. L. 107–188, §304(b)(4)(C), (D), inserted "or subsection (b)(3)" after "subsection (b)(2)(B)" and "or the food importation process, as the case may be" before period.

Subsec. (l)(2). Pub. L. 107–188, §304(c), in first sentence struck out "and" after "subsection (b)(2)," and inserted ", and subsection (b)(3)(A)" after "subsection (b)(2)(B)" and in second sentence inserted ", subsection (b)(3)(B),"

after "subsection (b)(2)(B)".

Subsec. (m). Pub. L. 107–250 added subsec. (m).

1997—Subsec. (d)(4)(B)(ii). Pub. L. 105–115 struck out "or 357" after "355".

Statutory Notes and Related Subsidiaries

Construction

Pub. L. 102–282, §7, May 13, 1992, 106 Stat. 162, provided that: "No amendment made by this Act [enacting this section and sections 335b and 335c of this title and amending sections 321, 336, 337, and 355 of this title] shall preclude any other civil, criminal, or administrative remedy provided under Federal or State law, including any private right of action against any person for the same action subject to any action or civil penalty under an amendment made by this Act."

Congressional Findings

Pub. L. 102–282, §1(c), May 13, 1992, 106 Stat. 149, provided that: "The Congress finds that—

"(1) there is substantial evidence that significant corruption occurred in the Food and Drug Administration's process of approving drugs under abbreviated drug applications,

"(2) there is a need to establish procedures designed to restore and to ensure the integrity of the abbreviated drug application approval process and to protect the public health, and

"(3) there is a need to establish procedures to bar individuals who have been convicted of crimes pertaining to the regulation of drug products from working for companies that manufacture or distribute such products."

[1] *So in original. Probably should be "section".*

§335b. Civil penalties

(a) In general

Any person that the Secretary finds—

(1) knowingly made or caused to be made, to any officer, employee, or agent of the Department of Health and Human Services, a false statement or misrepresentation of a material fact in connection with an abbreviated drug application,

(2) bribed or attempted to bribe or paid or attempted to pay an illegal gratuity to any officer, employee, or agent of the Department of Health and Human Services in connection with an abbreviated drug application,

(3) destroyed, altered, removed, or secreted, or procured the destruction, alteration, removal, or secretion of, any material document or other material evidence which was the property of or in the possession of the Department of Health and Human Services for the purpose of interfering with that Department's discharge of its responsibilities in connection with an abbreviated drug application,

(4) knowingly failed to disclose, to an officer or employee of the Department of Health and Human Services, a material fact which such person had an obligation to disclose relating to any drug subject to an abbreviated drug application,

(5) knowingly obstructed an investigation of the Department of Health and Human Services into any drug subject to an abbreviated drug application,

(6) is a person that has an approved or pending drug product application and has knowingly—

(A) employed or retained as a consultant or contractor, or

(B) otherwise used in any capacity the services of,

a person who was debarred under section 335a of this title, or

(7) is an individual debarred under section 335a of this title and, during the period of debarment, provided services in any capacity to a person that had an approved or pending drug product application,

shall be liable to the United States for a civil penalty for each such violation in an amount not to exceed $250,000 in the case of an individual and $1,000,000 in the case of any other person.

(b) Procedure

(1) In general

(A) Action by the Secretary

A civil penalty under subsection (a) shall be assessed by the Secretary on a person by an order made on the record after an opportunity for an agency hearing on disputed issues of material fact and the amount of the penalty. In the course of any investigation or hearing under this subparagraph, the Secretary may administer oaths and affirmations, examine witnesses, receive evidence, and issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence that relates to the matter under investigation.

(B) Action by the Attorney General

In lieu of a proceeding under subparagraph (A), the Attorney General may, upon request of the Secretary, institute a civil action to recover a civil money penalty in the amount and for any of the acts set forth in subsection (a). Such an action may be instituted separately from or in connection with any other claim, civil or criminal, initiated by the Attorney General under this chapter.

(2) Amount

In determining the amount of a civil penalty under paragraph (1), the Secretary or the court shall take into account the nature, circumstances, extent, and gravity of the act subject to penalty, the person's ability to pay, the effect on the person's ability to continue to do business, any history of prior, similar acts, and such other matters as justice may require.

(3) Limitation on actions

No action may be initiated under this section—

(A) with respect to any act described in subsection (a) that occurred before May 13, 1992, or

(B) more than 6 years after the date when facts material to the act are known or reasonably should have been known by the Secretary but in no event more than 10 years after the date the act took place.

(c) Judicial review

Any person that is the subject of an adverse decision under subsection (b)(1)(A) may obtain a review of such decision by the United States Court of Appeals for the District of Columbia or for the circuit in which the person resides, by filing in such court (within 60 days following the date the person is notified of the Secretary's decision) a petition requesting that the decision be modified or set aside.

(d) Recovery of penalties

The Attorney General may recover any civil penalty (plus interest at the currently prevailing rates from the date the penalty became final) assessed under subsection (b)(1)(A) in an action brought in the name of the United States. The amount of such penalty may be deducted, when the penalty has become final, from any sums then or later owing by the United States to the person against whom the penalty has been assessed. In an action brought under this subsection, the validity, amount, and appropriateness of the penalty shall not be subject to judicial review.

(e) Informants

The Secretary may award to any individual (other than an officer or employee of the Federal Government or a person who materially participated in any conduct described in subsection (a)) who provides information leading to the imposition of a civil penalty under this section an amount not to exceed—

(1) $250,000, or

(2) one-half of the penalty so imposed and collected,

whichever is less. The decision of the Secretary on such award shall not be reviewable.

(June 25, 1938, ch. 675, §307, as added Pub. L. 102–282, §3, May 13, 1992, 106 Stat. 159; amended Pub. L. 103–80, §3(g), Aug. 13, 1993, 107 Stat. 776.)

Editorial Notes

Prior Provisions

A prior section 307 of act June 25, 1938, was renumbered section 310 and is classified to section 337 of this title.

Amendments

1993—Subsec. (b)(3)(A). Pub. L. 103–80 made technical amendment to reference to May 13, 1992, to reflect correction of corresponding provision of original act.

Statutory Notes and Related Subsidiaries

Construction

This section not to preclude any other civil, criminal, or administrative remedy provided under Federal or State law, including any private right of action against any person for the same action subject to any action or civil penalty under an amendment made by Pub. L. 102–282, see section 7 of Pub. L. 102–282, set out as a note under section 335a of this title.

§335c. Authority to withdraw approval of abbreviated drug applications

(a) In general

The Secretary—

(1) shall withdraw approval of an abbreviated drug application if the Secretary finds that the approval was obtained, expedited, or otherwise facilitated through bribery, payment of an illegal gratuity, or fraud or material false statement, and

(2) may withdraw approval of an abbreviated drug application if the Secretary finds that the applicant has repeatedly demonstrated a lack of ability to produce the drug for which the application was submitted in accordance with the formulations or manufacturing practice set forth in the abbreviated drug application and has introduced, or attempted to introduce, such adulterated or misbranded drug into commerce.

(b) Procedure

The Secretary may not take any action under subsection (a) with respect to any person unless the Secretary has issued an order for such action made on the record after opportunity for an agency hearing on disputed issues of material fact. In the course of any investigation or hearing under this subsection, the Secretary may administer oaths and affirmations, examine witnesses, receive evidence, and issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence that relates to the matter under investigation.

(c) Applicability

Subsection (a) shall apply with respect to offenses or acts regardless of when such offenses or acts occurred.

(d) Judicial review

Any person that is the subject of an adverse decision under subsection (a) may obtain a review of such decision by the United States Court of Appeals for the District of Columbia or for the circuit in which the person resides, by filing in such court (within 60 days following the date the person is notified of the Secretary's decision) a petition requesting that the decision be modified or set aside.

(June 25, 1938, ch. 675, §308, as added Pub. L. 102–282, §4, May 13, 1992, 106 Stat. 160.)

Statutory Notes and Related Subsidiaries

Construction

This section not to preclude any other civil, criminal, or administrative remedy provided under Federal or State law, including any private right of action against any person for the same action subject to any action or civil

penalty under an amendment made by Pub. L. 102–282, see section 7 of Pub. L. 102–282, set out as a note under section 335a of this title.

§336. Report of minor violations

Nothing in this chapter shall be construed as requiring the Secretary to report for prosecution, or for the institution of libel or injunction proceedings, minor violations of this chapter whenever he believes that the public interest will be adequately served by a suitable written notice or warning.

(June 25, 1938, ch. 675, §309, formerly §306, 52 Stat. 1045; renumbered §309, Pub. L. 102–282, §2, May 13, 1992, 106 Stat. 150.)

Statutory Notes and Related Subsidiaries

Transfer of Functions

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

§337. Proceedings in name of United States; provision as to subpoenas

(a) Except as provided in subsection (b), all such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States. Subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district in any proceeding under this section.

(b)(1) A State may bring in its own name and within its jurisdiction proceedings for the civil enforcement, or to restrain violations, of section 341, 343(b), 343(c), 343(d), 343(e), 343(f), 343(g), 343(h), 343(i), 343(k), 343(q), or 343(r) of this title if the food that is the subject of the proceedings is located in the State.

(2) No proceeding may be commenced by a State under paragraph (1)—

(A) before 30 days after the State has given notice to the Secretary that the State intends to bring such proceeding,

(B) before 90 days after the State has given notice to the Secretary of such intent if the Secretary has, within such 30 days, commenced an informal or formal enforcement action pertaining to the food which would be the subject of such proceeding, or

(C) if the Secretary is diligently prosecuting a proceeding in court pertaining to such food, has settled such proceeding, or has settled the informal or formal enforcement action pertaining to such food.

In any court proceeding described in subparagraph (C), a State may intervene as a matter of right.

(June 25, 1938, ch. 675, §310, formerly §307, 52 Stat. 1046; Sept. 3, 1954, ch. 1263, §37, 68 Stat. 1239; Pub. L. 101–535, §4, Nov. 8, 1990, 104 Stat. 2362; renumbered §310, Pub. L. 102–282, §2, May 13, 1992, 106 Stat. 150.)

Editorial Notes

Amendments

1990—Pub. L. 101–535 substituted "(a) Except as provided in subsection (b), all" for "All" and "any proceeding under this section" for "any such proceeding" and added subsec. (b).

1954—Act Sept. 3, 1954, struck out reference to section 654 of title 28.

Statutory Notes and Related Subsidiaries

Effective Date of 1990 Amendment

Amendment by Pub. L. 101–535 effective 24 months after Nov. 8, 1990, except that such amendment effective Dec. 31, 1993, with respect to dietary supplements of vitamins, minerals, herbs, or other similar nutritional substances, see section 10(a)(1)(C) of Pub. L. 101–535, set out as a note under section 343 of this title.

Construction of Amendments by Pub. L. 101–535

Amendments by Pub. L. 101–535 not to be construed to alter authority of Secretary of Health and Human Services and Secretary of Agriculture under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), the Federal Meat Inspection Act (21 U.S.C. 601 et seq.), the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), and the Egg Products Inspection Act (21 U.S.C. 1031 et seq.), see section 9 of Pub. L. 101–535, set out as a note under section 343 of this title.

§337a. Extraterritorial jurisdiction

There is extraterritorial jurisdiction over any violation of this chapter relating to any article regulated under this chapter if such article was intended for import into the United States or if any act in furtherance of the violation was committed in the United States.

(June 25, 1938, ch. 675, §311, as added Pub. L. 112–144, title VII, §718, July 9, 2012, 126 Stat. 1077.)

SUBCHAPTER IV—FOOD

§341. Definitions and standards for food

Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, or reasonable standards of fill of container. No definition and standard of identity and no standard of quality shall be established for fresh or dried fruits, fresh or dried vegetables, or butter, except that definitions and standards of identity may be established for avocadoes, cantaloupes, citrus fruits, and melons. In prescribing any standard of fill of container, the Secretary shall give due consideration to the natural shrinkage in storage and in transit of fresh natural food and to need for the necessary packing and protective material. In the prescribing of any standard of quality for any canned fruit or canned vegetable, consideration shall be given and due allowance made for the differing characteristics of the several varieties of such fruit or vegetable. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Secretary shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. Any definition and standard of identity prescribed by the Secretary for avocadoes, cantaloupes, citrus fruits, or melons shall relate only to maturity and to the effects of freezing.

(June 25, 1938, ch. 675, §401, 52 Stat. 1046; Apr. 15, 1954, ch. 143, §1, 68 Stat. 54; Aug. 1, 1956, ch. 861, §1, 70 Stat. 919; Pub. L. 103–80, §3(h), Aug. 13, 1993, 107 Stat. 776.)

Editorial Notes

Amendments

1993—Pub. L. 103–80 substituted "or reasonable standards of fill of container. No definition" for "and/or reasonable standards of fill of container: *Provided*, That no definition".

1956—Act Aug. 1, 1956, designated provisions constituting subsec. (a) as entire section and repealed subsec. (b) which provided the procedure for establishment of regulations and is covered by section 371(e) of this title.

1954—Act Apr. 15, 1954, designated existing provisions as subsec. (a) and added subsec. (b).

Statutory Notes and Related Subsidiaries

Savings Provision

Act Aug. 1, 1956, ch. 861, §3, 70 Stat. 919, provided that: "In any case in which, prior to the enactment of this Act [Aug. 1, 1956], a public hearing has been begun in accordance with section 401 of the Federal Food, Drug, and Cosmetic Act [341 of this title] upon a proposal to issue, amend, or repeal any regulation contemplated by such section, or has been begun in accordance with section 701(e) of such Act [section 371(e) of this title] upon a proposal to issue, amend, or repeal any regulation contemplated by section 403(j), 404(a), 406(a) or (b), 501(b), 502(d), 502(h), 504 or 604 of such Act [section 343(j), 344(a), 346(a) or (b), 351(b), 352(d), 352(h), 354, or 364 of this title], the provisions of such section 401 or 701(e), as the case may be, as in force immediately prior to the date of the enactment of this Act [Aug. 1, 1956], shall be applicable as though this Act [amending this section and section 371(e) of this title] had not been enacted."

Transfer of Functions

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

Food Safety and Security Strategy

Pub. L. 107–188, title III, §301, June 12, 2002, 116 Stat. 662, provided that:

"(a) In General.—The President's Council on Food Safety (as established by Executive Order No. 13100 [set out below]) shall, in consultation with the Secretary of Transportation, the Secretary of the Treasury, other relevant Federal agencies, the food industry, consumer and producer groups, scientific organizations, and the States, develop a crisis communications and education strategy with respect to bioterrorist threats to the food supply. Such strategy shall address threat assessments; technologies and procedures for securing food processing and manufacturing facilities and modes of transportation; response and notification procedures; and risk communications to the public.

"(b) Authorization of Appropriations.—For the purpose of implementing the strategy developed under subsection (a), there are authorized to be appropriated $750,000 for fiscal year 2002, and such sums as may be necessary for each subsequent fiscal year."

Food Safety Commission

Pub. L. 107–171, title X, §10807, May 13, 2002, 116 Stat. 527, provided that:

"(a) Establishment.—

"(1) In general.—There is established a commission to be known as the 'Food Safety Commission' (referred to in this section as the 'Commission').

"(2) Membership.—

"(A) Composition.—The Commission shall be composed of 15 members (including a Chairperson, appointed by the President[])].

"(B) Eligibility.—

"(i) In general.—Members of the Commission—

"(I) shall have specialized training or significant experience in matters under the jurisdiction of the Commission; and

"(II) shall represent, at a minimum—

"(aa) consumers;

"(bb) food scientists;

"(cc) the food industry; and

"(dd) health professionals.

"(ii) Federal employees.—Not more than 3 members of the Commission may be Federal employees.

"(C) Date of appointments.—The appointment of the members of the Commission shall be made as soon as practicable after the date on which funds authorized to be appropriated under subsection (e)(1) are made available.

"(D) Vacancies.—A vacancy on the Commission—

"(i) shall not affect the powers of the Commission; and

"(ii) shall be filled—

"(I) not later than 60 days after the date on which the vacancy occurs; and

"(II) in the same manner as the original appointment was made.

"(3) Meetings.—

"(A) Initial meeting.—The initial meeting of the Commission shall be conducted not later than 30 days after the date of appointment of the final member of the Commission.

"(B) Other meetings.—The Commission shall meet at the call of the Chairperson.

"(4) Quorum; standing rules.—

"(A) Quorum.—A majority of the members of the Commission shall constitute a quorum to conduct business.

"(B) Standing rules.—At the first meeting of the Commission, the Commission shall adopt standing rules of the Commission to guide the conduct of business and decisionmaking of the Commission.

"(b) Duties.—

"(1) Recommendations.—The Commission shall make specific recommendations to enhance the food safety system of the United States, including a description of how each recommendation would improve food safety.

"(2) Components.—Recommendations made by the Commission under paragraph (1) shall address all food available commercially in the United States.

"(3) Report.—Not later than 1 year after the date on which the Commission first meets, the Commission shall submit to the President and Congress—

"(A) the findings, conclusions, and recommendations of the Commission, including a description of how each recommendation would improve food safety;

"(B) a summary of any other material used by the Commission in the preparation of the report under this paragraph; and

"(C) if requested by 1 or more members of the Commission, a statement of the minority views of the Commission.

"(c) Powers of the Commission.—

"(1) Hearings.—The Commission may, for the purpose of carrying out this section, hold such hearings, meet and act at such times and places, take such testimony, and receive such evidence as the Commission considers advisable.

"(2) Information from federal agencies.—

"(A) In general.—The Commission may secure directly, from any Federal agency, such information as the Commission considers necessary to carry out this section.

"(B) Provision of information.—

"(i) In general.—Subject to subparagraph (C), on the request of the Commission, the head of a Federal agency described in subparagraph (A) may furnish information requested by the Commission to the Commission.

"(ii) Administration.—The furnishing of information by a Federal agency to the Commission shall not be considered a waiver of any exemption available to the agency under section 552 of title 5, United States Code.

"(C) Information to be kept confidential.—

"(i) In general.—For purposes of section 1905 of title 18, United States Code—

"(I) the Commission shall be considered an agency of the Federal Government; and

"(II) any individual employed by an individual, entity, or organization that is a party to a contract with the Commission under this section shall be considered an employee of the Commission.

"(ii) Prohibition on disclosure.—Information obtained by the Commission, other than information that is available to the public, shall not be disclosed to any person in any manner except to an employee of the Commission as described in clause (i), for the purpose of receiving, reviewing, or processing the information.

"(d) Commission Personnel Matters.—

"(1) Members.—

"(A) Compensation.—A member of the Commission shall serve without compensation for the services of the member on the Commission.

"(B) Travel expenses.—A member of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for an employee of an agency under subchapter I of chapter 57 of title 5, United States Code, while away from the home or regular place of business of the member in the performance of the duties of the Commission.

"(2) Staff.—

"(A) In general.—The Chairperson of the Commission may, without regard to the civil service laws (including regulations), appoint and terminate the appointment of an executive director and such other additional personnel as are necessary to enable the Commission to perform the duties of the Commission.

"(B) CONFIRMATION OF EXECUTIVE DIRECTOR.—The employment of an executive director shall be subject to confirmation by the Commission.

"(C) COMPENSATION.—

"(i) IN GENERAL.—Except as provided in clause (ii), the Chairperson of the Commission may fix the compensation of the executive director and other personnel without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification of positions and General Schedule pay rates.

"(ii) MAXIMUM RATE OF PAY.—The rate of pay for the executive director and other personnel shall not exceed the rate payable for level II of the Executive Schedule under section 5316 of title 5, United States Code.

"(3) DETAIL OF FEDERAL GOVERNMENT EMPLOYEES.—

"(A) IN GENERAL.—An employee of the Federal Government may be detailed to the Commission, without reimbursement, for such period of time as is permitted by law.

"(B) CIVIL SERVICE STATUS.—The detail of the employee shall be without interruption or loss of civil service status or privilege.

"(4) PROCUREMENT OF TEMPORARY AND INTERMITTENT SERVICES.—The Chairperson of the Commission may procure temporary and intermittent services in accordance with section 3109(b) of title 5, United States Code, at rates for individuals that do not exceed the daily equivalent of the annual rate of basic pay prescribed for level II of the Executive Schedule under section 5316 of that title.

"(e) AUTHORIZATION OF APPROPRIATIONS.—

"(1) IN GENERAL.—There is authorized to be appropriated such sums as are necessary to carry out this section.

"(2) LIMITATION.—No payment may be made under subsection (d) except to the extent provided for in advance in an appropriations Act.

"(f) TERMINATION.—The Commission shall terminate on the date that is 60 days after the date on which the Commission submits the recommendations and report under subsection (b)(3)."

EXECUTIVE DOCUMENTS

EX. ORD. NO. 13100. PRESIDENT'S COUNCIL ON FOOD SAFETY

Ex. Ord. No. 13100, Aug. 25, 1998, 63 F.R. 45661, as amended by Ex. Ord. No. 13286, §16, Feb. 28, 2003, 68 F.R. 10623, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to improve the safety of the food supply through science-based regulation and well-coordinated inspection, enforcement, research, and education programs, it is hereby ordered as follows:

SECTION 1. *Establishment of President's Council on Food Safety*. (a) There is established the President's Council on Food Safety ("Council"). The Council shall comprise the Secretaries of Agriculture, Commerce, Health and Human Services, and Homeland Security, the Director of the Office of Management and Budget (OMB), the Administrator of the Environmental Protection Agency, the Assistant to the President for Science and Technology/Director of the Office of Science and Technology Policy, the Assistant to the President for Domestic Policy, and the Director of the National Partnership for Reinventing Government. The Council shall consult with other Federal agencies and State, local, and tribal government agencies, and consumer, producer, scientific, and industry groups, as appropriate.

(b) The Secretaries of Agriculture and of Health and Human Services and the Assistant to the President for Science and Technology/Director of the Office of Science and Technology Policy shall serve as Joint Chairs of the Council.

SEC. 2. *Purpose*. The purpose of the Council shall be to develop a comprehensive strategic plan for Federal food safety activities, taking into consideration the findings and recommendations of the National Academy of Sciences report "Ensuring Safe Food from Production to Consumption" and other input from the public on how to improve the effectiveness of the current food safety system. The Council shall make recommendations to the President on how to advance Federal efforts to implement a comprehensive science-based strategy to improve the safety of the food supply and to enhance coordination among Federal agencies, State, local, and tribal governments, and the private sector. The Council shall advise Federal agencies in setting priority areas for investment in food safety.

SEC. 3. *Specific Activities and Functions*. (a) The Council shall develop a comprehensive strategic Federal food safety plan that contains specific recommendations on needed changes, including measurable outcome goals. The principal goal of the plan should be the establishment of a seamless, science-based food safety system. The plan

should address the steps necessary to achieve this goal, including the key public health, resource, and management issues regarding food safety. The planning process should consider both short-term and long-term issues including new and emerging threats and the special needs of vulnerable populations such as children and the elderly. In developing this plan, the Council shall consult with all interested parties, including State and local agencies, tribes, consumers, producers, industry, and academia.

(b) Consistent with the comprehensive strategic Federal food safety plan described in section 3(a) of this order, the Council shall advise agencies of priority areas for investment in food safety and ensure that Federal agencies annually develop coordinated food safety budgets for submission to the OMB that sustain and strengthen existing capacities, eliminate duplication, and ensure the most effective use of resources for improving food safety. The Council shall also ensure that Federal agencies annually develop a unified budget for submission to the OMB for the President's Food Safety Initiative and such other food safety issues as the Council determines appropriate.

(c) The Council shall ensure that the Joint Institute for Food Safety Research (JIFSR), in consultation with the National Science and Technology Council, establishes mechanisms to guide Federal research efforts toward the highest priority food safety needs. The JIFSR shall report to the Council on a regular basis on its efforts: (i) to develop a strategic plan for conducting food safety research activities consistent with the President's Food Safety Initiative and such other food safety activities as the JIFSR determines appropriate; and (ii) to coordinate efficiently, within the executive branch and with the private sector and academia, all Federal food safety research.

SEC. 4. *Cooperation*. All actions taken by the Council shall, as appropriate, promote partnerships and cooperation with States, tribes, and other public and private sector efforts wherever possible to improve the safety of the food supply.

SEC. 5. *General Provisions*. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. Nothing in this order shall affect or alter the statutory responsibilities of any Federal agency charged with food safety responsibilities.

§342. Adulterated food

A food shall be deemed to be adulterated—

(a) Poisonous, insanitary, etc., ingredients

(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health.[1] (2)(A) if it bears or contains any added poisonous or added deleterious substance (other than a substance that is a pesticide chemical residue in or on a raw agricultural commodity or processed food, a food additive, a color additive, or a new animal drug) that is unsafe within the meaning of section 346 of this title; or (B) if it bears or contains a pesticide chemical residue that is unsafe within the meaning of section 346a(a) of this title; or (C) if it is or if it bears or contains (i) any food additive that is unsafe within the meaning of section 348 of this title; or (ii) a new animal drug (or conversion product thereof) that is unsafe within the meaning of section 360b of this title; or (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health; or (5) if it is, in whole or in part, the product of a diseased animal or of an animal which has died otherwise than by slaughter; or (6) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or (7) if it has been intentionally subjected to radiation, unless the use of the radiation was in conformity with a regulation or exemption in effect pursuant to section 348 of this title.

(b) Absence, substitution, or addition of constituents

(1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or (2) if any substance has been substituted wholly or in part therefor; or (3) if damage or inferiority has been concealed in any manner; or (4) if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

(c) Color additives

If it is, or it bears or contains, a color additive which is unsafe within the meaning of section 379e(a) of this title.

(d) Confectionery containing alcohol or nonnutritive substance

If it is confectionery, and—

(1) has partially or completely imbedded therein any nonnutritive object, except that this subparagraph shall not apply in the case of any nonnutritive object if, in the judgment of the Secretary as provided by regulations, such object is of practical functional value to the confectionery product and would not render the product injurious or hazardous to health;

(2) bears or contains any alcohol other than alcohol not in excess of one-half of 1 per centum by volume derived solely from the use of flavoring extracts, except that this clause shall not apply to confectionery which is introduced or delivered for introduction into, or received or held for sale in, interstate commerce if the sale of such confectionery is permitted under the laws of the State in which such confectionery is intended to be offered for sale; or

(3) bears or contains any nonnutritive substance, except that this subparagraph shall not apply to a safe nonnutritive substance which is in or on confectionery by reason of its use for some practical functional purpose in the manufacture, packaging, or storage of such confectionery if the use of the substance does not promote deception of the consumer or otherwise result in adulteration or misbranding in violation of any provision of this chapter, except that the Secretary may, for the purpose of avoiding or resolving uncertainty as to the application of this subparagraph, issue regulations allowing or prohibiting the use of particular nonnutritive substances.

(e) Oleomargarine containing filthy, putrid, etc., matter

If it is oleomargarine or margarine or butter and any of the raw material used therein consisted in whole or in part of any filthy, putrid, or decomposed substance, or such oleomargarine or margarine or butter is otherwise unfit for food.

(f) Dietary supplement or ingredient: safety

(1) If it is a dietary supplement or contains a dietary ingredient that—

(A) presents a significant or unreasonable risk of illness or injury under—

(i) conditions of use recommended or suggested in labeling, or

(ii) if no conditions of use are suggested or recommended in the labeling, under ordinary conditions of use;

(B) is a new dietary ingredient for which there is inadequate information to provide reasonable assurance that such ingredient does not present a significant or unreasonable risk of illness or injury;

(C) the Secretary declares to pose an imminent hazard to public health or safety, except that the authority to make such declaration shall not be delegated and the Secretary shall promptly after such a declaration initiate a proceeding in accordance with sections 554 and 556 of title 5 to affirm or withdraw the declaration; or

(D) is or contains a dietary ingredient that renders it adulterated under paragraph (a)(1) under the conditions of use recommended or suggested in the labeling of such dietary supplement.

In any proceeding under this subparagraph, the United States shall bear the burden of proof on each element to show that a dietary supplement is adulterated. The court shall decide any issue under this paragraph on a de novo basis.

(2) Before the Secretary may report to a United States attorney a violation of paragraph [2] (1)(A) for a civil proceeding, the person against whom such proceeding would be initiated shall be given appropriate notice and the opportunity to present views, orally and in writing, at least 10 days before such notice, with regard to such proceeding.

(g) Dietary supplement: manufacturing practices

(1) If it is a dietary supplement and it has been prepared, packed, or held under conditions that do not meet current good manufacturing practice regulations, including regulations requiring, when necessary, expiration date labeling, issued by the Secretary under subparagraph (2).

(2) The Secretary may by regulation prescribe good manufacturing practices for dietary supplements. Such regulations shall be modeled after current good manufacturing practice regulations for food and may not impose standards for which there is no current and generally available analytical methodology. No standard of current good manufacturing practice may be imposed unless such standard is included in a regulation promulgated after notice and opportunity for comment in accordance with chapter 5 of title 5.

(h) Reoffer of food previously denied admission

If it is an article of food imported or offered for import into the United States and the article of food has previously been refused admission under section 381(a) of this title, unless the person reoffering the article affirmatively establishes, at the expense of the owner or consignee of the article, that the article complies with the applicable requirements of this chapter, as determined by the Secretary.

(i) Noncompliance with sanitary transportation practices

If it is transported or offered for transport by a shipper, carrier by motor vehicle or rail vehicle, receiver, or any other person engaged in the transportation of food under conditions that are not in compliance with regulations promulgated under section 350e of this title.

(June 25, 1938, ch. 675, §402, 52 Stat. 1046; Mar. 16, 1950, ch. 61, §3(d), 64 Stat. 21; July 22, 1954, ch. 559, §2, 68 Stat. 511; July 9, 1956, ch. 530, 70 Stat. 512; Pub. L. 85–929, §3(a), (b), Sept. 6, 1958, 72 Stat. 1784; Pub. L. 86–2, Mar. 17, 1959, 73 Stat. 3; Pub. L. 86–618, title I, §§102(a)(1), (2), 105(c), July 12, 1960, 74 Stat. 397, 398, 404; Pub. L. 89–477, June 29, 1966, 80 Stat. 231; Pub. L. 90–399, §104, July 13, 1968, 82 Stat. 352; Pub. L. 99–252, §10, Feb. 27, 1986, 100 Stat. 35; Pub. L. 102–571, title I, §107(4), Oct. 29, 1992, 106 Stat. 4499; Pub. L. 103–80, §3(i), Aug. 13, 1993, 107 Stat. 776; Pub. L. 103–417, §§4, 9, Oct. 25, 1994, 108 Stat. 4328, 4332; Pub. L. 104–170, title IV, §404, Aug. 3, 1996, 110 Stat. 1514; Pub. L. 107–188, title III, §309, June 12, 2002, 116 Stat. 673; Pub. L. 109–59, title VII, §7202(a), Aug. 10, 2005, 119 Stat. 1911.)

Editorial Notes

Amendments

2005—Par. (i). Pub. L. 109–59 added par. (i).

2002—Par. (h). Pub. L. 107–188 added par. (h).

1996—Par. (a). Pub. L. 104–170 added subpar. (2) and struck out former subpar. (2) which read as follows: "(2) (A) if it bears or contains any added poisonous or added deleterious substance (other than one which is (i) a pesticide chemical in or on a raw agricultural commodity; (ii) a food additive; (iii) a color additive; or (iv) a new animal drug) which is unsafe within the meaning of section 346 of this title, or (B) if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of section 346a(a) of this title, or (C) if it is, or if it bears or contains, any food additive which is unsafe within the meaning of section 348 of this title: *Provided*, That where a pesticide chemical has been used in or on a raw agricultural commodity in conformity with an exemption granted or a tolerance prescribed under section 346a of this title and such raw agricultural commodity has been subjected to processing such as canning, cooking, freezing, dehydrating, or milling, the residue of such pesticide chemical remaining in or on such processed food shall, notwithstanding the provisions of sections 346 and 348 of this title, not be deemed unsafe if such residue in or on the raw agricultural commodity has been removed to the extent possible in good manufacturing practice and the concentration of such residue in the processed food when ready to eat is not greater than the tolerance prescribed for the raw agricultural commodity, or (D) if it is, or it bears or contains, a new animal drug (or conversion product thereof) which is unsafe within the meaning of section 360b of this title;". That part of Pub. L. 104–170 which directed the substitution of "or (3) if it consists" for "(3) if it consists" was executed by making the substitution for "(3) If it consists" to reflect the probable intent of Congress.

1994—Par. (f). Pub. L. 103–417, §4, added par. (f).

Par. (g). Pub. L. 103–417, §9, added par. (g).

1993—Par. (a). Pub. L. 103–80, §3(i)(1), substituted a period for "; or" at end of subpar. (1) and "If it" for "if it" at beginning of par. (3). That part of Pub. L. 103–80, §3(i)(1), which directed the substitution of a period for "; or" at end of subpar. (2) could not be executed because "; or" did not appear.

Par. (d)(1). Pub. L. 103–80, §3(i)(2), substituted ", except that this subparagraph" for ": *Provided*, That this clause".

Par. (d)(3). Pub. L. 103–80, §3(i)(3), substituted ", except that this subparagraph shall not apply" for ": *Provided*, That this clause shall not apply" and ", except that the Secretary may, for the purpose of avoiding or resolving uncertainty as to the application of this subparagraph" for ": *And provided further*, That the Secretary may, for the purpose of avoiding or resolving uncertainty as to the application of this clause".

1992—Par. (c). Pub. L. 102–571 substituted "379e(a)" for "376(a)".

1986—Par. (d)(2). Pub. L. 99–252 inserted provision that this clause not apply to confectionery introduced or delivered for introduction into or received or held for sale in, interstate commerce if the sale is permitted under the laws of the State in which the confectionery is intended to be offered for sale.

1968—Par. (a)(2). Pub. L. 90–399 added cls. (A)(iv) and (D).

1966—Par. (d). Pub. L. 89–477 permitted the imbedding of nonnutritive objects in confectionery foods if in the judgment of the Secretary of Health, Education, and Welfare, as provided by regulation, the imbedding of the object is of practical functional value to the confectionery product and would not render it injurious or hazardous to health, raised to one-half of 1 per centum by volume the upper limit for the allowable use of alcohol derived solely from the use of flavoring extracts, allowed the use of safe nonnutritive substances in and on confectionery foods by reason of their use for some practical and functional purpose in the manufacture, packaging, or storage of the confectionery foods if the use of the substances does not promote deception of the consumer or otherwise result in adulteration or misbranding, authorized the Secretary to issue regulations on the use of particular nonnutritive substances, and removed reference to nonnutritive masticatory substances added to chewing gum and harmless flavoring, harmless resinous glaze not in excess of four-tenths of 1 per centum, natural gum, authorized coloring, and pectin.

1960—Par. (a). Pub. L. 86–618, §102(a)(1), substituted "other than one which is (i) a pesticide chemical in or on a raw agricultural commodity; (ii) a food additive; or (iii) a color additive" for "(except a pesticide chemical in or on a raw agricultural commodity and except a food additive)" in cl. (2)(A).

Par. (c). Pub. L. 86–618, §102(a)(2), amended par. (c) generally, substituting provisions deeming a food adulterated if it is, or it bears or contains, a color additive which is unsafe within the meaning of section 376 of this title for provisions which related to food that bears or contains a coal-tar color other than one from a batch that has been certified in accordance with regulations as provided by section 346 of this title, and struck out provisos which related to the use of color on oranges.

Par. (d). Pub. L. 86–618, §105(c), substituted "authorized coloring" for "harmless coloring".

1959—Par. (c). Pub. L. 86–2 extended from Mar. 1, 1959, to May 1, 1959, the period during which par. is inapplicable to oranges which have been colored with F.D. & C. Red 32, and inserted proviso requiring Secretary to establish regulations prescribing the conditions under which Citrus Red No. 2 may be safely used in coloring certain mature oranges, and providing for separately listing and for certification of batches of such color.

1958—Par. (a). Pub. L. 85–929, among other changes, inserted cl. (2)(C) relating to food additive unsafe within the meaning of section 348 of this title, and to pesticide chemical, and added cl. (7) relating to radiated food.

1956—Par. (c). Act July 9, 1956, inserted second proviso relating to coloring of oranges.

1954—Par. (a)(2). Act July 22, 1954, provided in the case of any raw agricultural commodity bearing or containing a pesticide chemical, that such commodity shall be deemed to be adulterated if such pesticide chemical is unsafe within the meaning of section 346a of this title.

1950—Par. (e). Act Mar. 16, 1950, added par. (e).

Statutory Notes and Related Subsidiaries

Effective Date of 2005 Amendment

Amendment by Pub. L. 109–59 effective Oct. 1, 2005, see section 7204 of Pub. L. 109–59, set out as a note under section 331 of this title.

Effective Date of 1968 Amendment

Amendment by Pub. L. 90–399 effective on first day of thirteenth calendar month after July 13, 1968, see section 108(a) of Pub. L. 90–399, set out as an Effective Date and Transitional Provisions note under section 360b of this title.

Effective Date of 1960 Amendment

Amendment by Pub. L. 86–618 effective July 12, 1960, subject to the provisions of section 203 of Pub. L. 86–618, see section 202 of Pub. L. 86–618, set out as a note under section 379e of this title.

Effective Date of Nematocide, Plant Regulator, Defoliant, and Desiccant Amendment of 1959

Effective date of par. (a)(2) as in force prior to July 22, 1954, with respect to particular commercial use of a nematocide, plant regulator, defoliant, or desiccant in or on a raw agricultural commodity made before Jan. 1, 1958, see section 3(b) of Pub. L. 86–139, Aug. 7, 1959, 73 Stat. 288.

Effective Date of 1958 Amendment

Pub. L. 85–929, §6, Sept. 6, 1958, 72 Stat. 1788, as amended by Pub. L. 87–19, §2, Apr. 7, 1961, 75 Stat. 42; Pub. L. 88–625, §2, Oct. 3, 1964, 78 Stat. 1002, provided that:

"(a) Except as provided in subsections (b) and (c) of this section, this Act [amending this section, sections 321, 331, 346, and 348 of this title, and section 210 of Title 42, The Public Health and Welfare, and enacting provisions set out as notes under sections 321 and 451 of this title] shall take effect on the date of its enactment [Sept. 6, 1958].

"(b) Except as provided in subsection (c) of this section, section 3 of this Act [amending this section and section 346 of this title] shall take effect on the one hundred and eightieth day after the date of enactment of this Act [Sept. 6, 1958].

"(c) With respect to any particular commercial use of a food additive, if such use was made of such additive before January 1, 1958, section 3 of this Act [amending this section and section 346 of this title] shall take effect—

"(1) Either (A) one year after the effective date established in subsection (b) of this section, or (B) at the end of such additional period (but not later than two years from such effective date established in subsection (b)) as the Secretary of Health, Education, and Welfare [now Health and Human Services] may prescribe on the basis of a finding that such extension involves no undue risk to the public health and that conditions exist which necessitate the prescribing of such an additional period, or

"(2) on the date on which an order with respect to such use under section 409 of the Federal Food, Drug, and Cosmetic Act [section 348 of this title] becomes effective,

whichever date first occurs. Whenever the Secretary has, pursuant to clause (1)(B) of this subsection, extended the effective date of section 3 of this Act [amending this section] to March 5, 1961, or has on that date a request for such extension pending before him, with respect to any such particular use of a food additive, he may, notwithstanding the parenthetical time limitation in that clause, further extend such effective date, not beyond June 30, 1964, under the authority of that clause (but subject to clause (2)) with respect to such use of the additive (or a more limited specified use or uses thereof) if, in addition to making the findings required by clause (1)(B), he finds (i) that bona fide action to determine the applicability of such section 409 [section 348 of this title] to such use or uses, or to develop the scientific data necessary for action under such section, was commenced by an interested person before March 6, 1960, and was thereafter pursued with reasonable diligence, and (ii) that in the Secretary's judgment such extension is consistent with the objective of carrying to completion in good faith, as soon as reasonably practicable, the scientific investigations necessary as a basis for action under such section 409 [section 348 of this title]: *Provided*, That if the Secretary has, pursuant to this sentence, granted an extension to June 30, 1964, he may, upon making the findings required by clause (1)(B) of this subsection and clauses (i) and (ii) of this sentence, further extend such effective date, but not beyond December 31, 1965. The Secretary may at any time terminate an extension so granted if he finds that it should not have been granted, or that by reason of a change in circumstances the basis for such extension no longer exists, or that there has been a failure to comply with a requirement for submission of progress reports or with other conditions attached to such extension."

Effective Date of 1954 Amendment

Act July 22, 1954, ch. 559, §5, 68 Stat. 517, provided that: "This Act [amending this section and section 321 of this title and enacting sections 346a and 346b of this title] shall take effect upon the date of its enactment [July 22, 1954], except that with respect to pesticide chemicals for which tolerances or exemptions have not been established under section 408 of the Federal Food, Drug, and Cosmetic Act [section 346a of this title], the amendment to section 402(a) of such Act [par. (a) of this section] made by section 2 of this Act shall not be effective—

"(1) for the period of one year following the date of the enactment of this Act [July 22, 1954]; or

"(2) for such additional period following such period of one year, but not extending beyond two years after the date of the enactment of this Act [July 22, 1954] as the Secretary of Health, Education, and Welfare [now Health and Human Services] may prescribe on the basis of a finding that conditions exist which necessitate the prescribing of such additional period."

Effective Date of 1950 Amendment

Amendment by act Mar. 16, 1950, effective July 1, 1950, see section 7 of act Mar. 16, 1950, set out as an Effective Date note under section 347 of this title.

Effective Date; Postponement

Par. (c) effective Jan. 1, 1940, see act June 23, 1939, ch. 242, 53 Stat. 853, set out as an Effective Date; Postponement in Certain Cases note under section 301 of this title.

Short Title

Pub. L. 88–625, §1, Oct. 3, 1964, 78 Stat. 1002, provided: "That this Act [amending provisions set out as a note under this section and section 135 of Title 7, Agriculture] may be cited as the 'Food Additives Transitional Provisions Amendment of 1964'."

Transfer of Functions

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

Updating Guidance Relating to Fish and Fisheries Products Hazards and Controls

Pub. L. 111–353, title I, §103(h), Jan. 4, 2011, 124 Stat. 3898, provided that: "The Secretary shall, not later than 180 days after the date of enactment of this Act [Jan. 4, 2011], update the Fish and Fisheries Products Hazards and Control Guidance to take into account advances in technology that have occurred since the previous publication of such Guidance by the Secretary."

Guidance Relating to Post Harvest Processing of Raw Oysters

Pub. L. 111–353, title I, §114, Jan. 4, 2011, 124 Stat. 3921, provided that:

"(a) In General.—Not later than 90 days prior to the issuance of any guidance, regulation, or suggested amendment by the Food and Drug Administration to the National Shellfish Sanitation Program's Model Ordinance, or the issuance of any guidance or regulation by the Food and Drug Administration relating to the Seafood Hazard Analysis Critical Control Points Program of the Food and Drug Administration (parts 123 and 1240 of title 21, Code of Federal Regulations (or any successor regulations)[)], where such guidance, regulation or suggested amendment relates to post harvest processing for raw oysters, the Secretary shall prepare and submit to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Energy and Commerce of the House of Representatives a report which shall include—

"(1) an assessment of how post harvest processing or other equivalent controls feasibly may be implemented in the fastest, safest, and most economical manner;

"(2) the projected public health benefits of any proposed post harvest processing;

"(3) the projected costs of compliance with such post harvest processing measures;

"(4) the impact post harvest processing is expected to have on the sales, cost, and availability of raw oysters;

"(5) criteria for ensuring post harvest processing standards will be applied equally to shellfish imported from all nations of origin;

"(6) an evaluation of alternative measures to prevent, eliminate, or reduce to an acceptable level the occurrence of foodborne illness; and

"(7) the extent to which the Food and Drug Administration has consulted with the States and other regulatory agencies, as appropriate, with regard to post harvest processing measures.

"(b) Limitation.—Subsection (a) shall not apply to the guidance described in section 103(h) [section 103(h) of Pub. L. 111–353, set out as a note above].

"(c) Review and Evaluation.—Not later than 30 days after the Secretary issues a proposed regulation or guidance described in subsection (a), the Comptroller General of the United States shall—

"(1) review and evaluate the report described in (a) and report to Congress on the findings of the estimates and analysis in the report;

"(2) compare such proposed regulation or guidance to similar regulations or guidance with respect to other regulated foods, including a comparison of risks the Secretary may find associated with seafood and the instances of those risks in such other regulated foods; and

"(3) evaluate the impact of post harvest processing on the competitiveness of the domestic oyster industry in the United States and in international markets.

"(d) Waiver.—The requirement of preparing a report under subsection (a) shall be waived if the Secretary issues a guidance that is adopted as a consensus agreement between Federal and State regulators and the oyster industry, acting through the Interstate Shellfish Sanitation Conference.

"(e) Public Access.—Any report prepared under this section shall be made available to the public."

Domestic Fish or Fish Product Compliance With Food Safety Standards or Procedures Deemed To Have Met Requirements for Federal Commodity Purchase Programs

Pub. L. 104–180, title VII, §733, Aug. 6, 1996, 110 Stat. 1601, provided that: "Hereafter, notwithstanding any other provision of law, any domestic fish or fish product produced in compliance with food safety standards or procedures accepted by the Food and Drug Administration as satisfying the requirements of the 'Procedures for the Safe and Sanitary Processing and Importing of Fish and Fish Products' (published by the Food and Drug Administration as a final regulation in the Federal Register of December 18, 1995), shall be deemed to have met any inspection requirements of the Department of Agriculture or other Federal agency for any Federal commodity purchase program, including the program authorized under section 32 of the Act of August 24, 1935 (7 U.S.C. 612c) except that the Department of Agriculture or other Federal agency may utilize lot inspection to establish a reasonable degree of certainty that fish or fish products purchased under a Federal commodity purchase program, including the program authorized under section 32 of the Act of August 24, 1935 (7 U.S.C. 612c), meet Federal product specifications."

[1] *So in original. The period probably should be "; or".*

[2] *So in original. Probably should be "subparagraph".*

§343. Misbranded food

A food shall be deemed to be misbranded—

(a) False or misleading label

If (1) its labeling is false or misleading in any particular, or (2) in the case of a food to which section 350 of this title applies, its advertising is false or misleading in a material respect or its labeling is in violation of section 350(b)(2) of this title.

(b) Offer for sale under another name

If it is offered for sale under the name of another food.

(c) Imitation of another food

If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

(d) Misleading container

If its container is so made, formed, or filled as to be misleading.

(e) Package form

If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count, except that under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

(f) Prominence of information on label

If any word, statement, or other information required by or under authority of this chapter to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

(g) Representation as to definition and standard of identity

If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341 of this title, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and,

insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food.

(h) Representation as to standards of quality and fill of container

If it purports to be or is represented as—

(1) a food for which a standard of quality has been prescribed by regulations as provided by section 341 of this title, and its quality falls below such standard, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard;

(2) a food for which a standard or standards of fill of container have been prescribed by regulations as provided by section 341 of this title, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard; or

(3) a food that is pasteurized unless—

(A) such food has been subjected to a safe process or treatment that is prescribed as pasteurization for such food in a regulation promulgated under this chapter; or

(B)(i) such food has been subjected to a safe process or treatment that—

(I) is reasonably certain to achieve destruction or elimination in the food of the most resistant microorganisms of public health significance that are likely to occur in the food;

(II) is at least as protective of the public health as a process or treatment described in subparagraph (A);

(III) is effective for a period that is at least as long as the shelf life of the food when stored under normal and moderate abuse conditions; and

(IV) is the subject of a notification to the Secretary, including effectiveness data regarding the process or treatment; and

(ii) at least 120 days have passed after the date of receipt of such notification by the Secretary without the Secretary making a determination that the process or treatment involved has not been shown to meet the requirements of subclauses (I) through (III) of clause (i).

For purposes of paragraph (3), a determination by the Secretary that a process or treatment has not been shown to meet the requirements of subclauses (I) through (III) of subparagraph (B)(i) shall constitute final agency action under such subclauses.

(i) Label where no representation as to definition and standard of identity

Unless its label bears (1) the common or usual name of the food, if any there be, and (2) in case it is fabricated from two or more ingredients, the common or usual name of each such ingredient and if the food purports to be a beverage containing vegetable or fruit juice, a statement with appropriate prominence on the information panel of the total percentage of such fruit or vegetable juice contained in the food; except that spices, flavorings, and colors not required to be certified under section 379e(c) of this title [1] unless sold as spices, flavorings, or such colors, may be designated as spices, flavorings, and colorings without naming each. To the extent that compliance with the requirements of clause (2) of this paragraph is impracticable, or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the Secretary.

(j) Representation for special dietary use

If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral, and other dietary properties as the Secretary determines to be, and by regulations prescribes as, necessary in order fully to inform purchasers as to its value for such uses.

(k) Artificial flavoring, artificial coloring, or chemical preservatives

If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact, except that to the extent that compliance with the requirements of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the Secretary. The provisions of this paragraph and paragraphs (g) and (i) with respect to artificial coloring shall not apply in the case of butter, cheese, or ice cream. The provisions of this paragraph with respect to chemical

preservatives shall not apply to a pesticide chemical when used in or on a raw agricultural commodity which is the produce of the soil.

(l) Pesticide chemicals on raw agricultural commodities

If it is a raw agricultural commodity which is the produce of the soil, bearing or containing a pesticide chemical applied after harvest, unless the shipping container of such commodity bears labeling which declares the presence of such chemical in or on such commodity and the common or usual name and the function of such chemical, except that no such declaration shall be required while such commodity, having been removed from the shipping container, is being held or displayed for sale at retail out of such container in accordance with the custom of the trade.

(m) Color additives

If it is a color additive, unless its packaging and labeling are in conformity with such packaging and labeling requirements, applicable to such color additive, as may be contained in regulations issued under section 379e of this title.

(n) Packaging or labeling of drugs in violation of regulations

If its packaging or labeling is in violation of an applicable regulation issued pursuant to section 1472 or 1473 of title 15.

(o) Repealed. Pub. L. 106–554, §1(a)(1) [title V, §517], Dec. 21, 2000, 114 Stat. 2763, 2763A-73

(p) Repealed. Pub. L. 104–124, §1, Apr. 1, 1996, 110 Stat. 882

(q) Nutrition information

(1) Except as provided in subparagraphs (3), (4), and (5), if it is a food intended for human consumption and is offered for sale, unless its label or labeling bears nutrition information that provides—

(A)(i) the serving size which is an amount customarily consumed and which is expressed in a common household measure that is appropriate to the food, or

(ii) if the use of the food is not typically expressed in a serving size, the common household unit of measure that expresses the serving size of the food,

(B) the number of servings or other units of measure per container,

(C) the total number of calories—

(i) derived from any source, and

(ii) derived from the total fat,

in each serving size or other unit of measure of the food,

(D) the amount of the following nutrients: Total fat, saturated fat, cholesterol, sodium, total carbohydrates, complex carbohydrates, sugars, dietary fiber, and total protein contained in each serving size or other unit of measure,

(E) any vitamin, mineral, or other nutrient required to be placed on the label and labeling of food under this chapter before October 1, 1990, if the Secretary determines that such information will assist consumers in maintaining healthy dietary practices.

The Secretary may by regulation require any information required to be placed on the label or labeling by this subparagraph or subparagraph (2)(A) to be highlighted on the label or labeling by larger type, bold type, or contrasting color if the Secretary determines that such highlighting will assist consumers in maintaining healthy dietary practices.

(2)(A) If the Secretary determines that a nutrient other than a nutrient required by subparagraph (1)(C), (1)(D), or (1)(E) should be included in the label or labeling of food subject to subparagraph (1) for purposes of providing information regarding the nutritional value of such food that will assist consumers in maintaining healthy dietary practices, the Secretary may by regulation require that information relating to such additional nutrient be included in the label or labeling of such food.

(B) If the Secretary determines that the information relating to a nutrient required by subparagraph (1)(C), (1)(D), or (1)(E) or clause (A) of this subparagraph to be included in the label or labeling of food is not necessary to assist consumers in maintaining healthy dietary practices, the Secretary may by regulation remove information relating to such nutrient from such requirement.

(3) For food that is received in bulk containers at a retail establishment, the Secretary may, by regulation, provide that the nutrition information required by subparagraphs (1) and (2) be displayed at the location in the retail establishment at which the food is offered for sale.

(4)(A) The Secretary shall provide for furnishing the nutrition information required by subparagraphs (1) and (2) with respect to raw agricultural commodities and raw fish by issuing voluntary nutrition guidelines, as provided by clause (B) or by issuing regulations that are mandatory as provided by clause (D).

(B)(i) Upon the expiration of 12 months after November 8, 1990, the Secretary, after providing an opportunity for comment, shall issue guidelines for food retailers offering raw agricultural commodities or raw fish to provide nutrition information specified in subparagraphs (1) and (2). Such guidelines shall take into account the actions taken by food retailers during such 12-month period to provide to consumers nutrition information on raw agricultural commodities and raw fish. Such guidelines shall only apply—

(I) in the case of raw agricultural commodities, to the 20 varieties of vegetables most frequently consumed during a year and the 20 varieties of fruit most frequently consumed during a year, and

(II) to the 20 varieties of raw fish most frequently consumed during a year.

The vegetables, fruits, and raw fish to which such guidelines apply shall be determined by the Secretary by regulation and the Secretary may apply such guidelines regionally.

(ii) Upon the expiration of 12 months after November 8, 1990, the Secretary shall issue a final regulation defining the circumstances that constitute substantial compliance by food retailers with the guidelines issued under subclause (i). The regulation shall provide that there is not substantial compliance if a significant number of retailers have failed to comply with the guidelines. The size of the retailers and the portion of the market served by retailers in compliance with the guidelines shall be considered in determining whether the substantial-compliance standard has been met.

(C)(i) Upon the expiration of 30 months after November 8, 1990, the Secretary shall issue a report on actions taken by food retailers to provide consumers with nutrition information for raw agricultural commodities and raw fish under the guidelines issued under clause (A). Such report shall include a determination of whether there is substantial compliance with the guidelines.

(ii) If the Secretary finds that there is substantial compliance with the guidelines, the Secretary shall issue a report and make a determination of the type required in subclause (i) every two years.

(D)(i) If the Secretary determines that there is not substantial compliance with the guidelines issued under clause (A), the Secretary shall at the time such determination is made issue proposed regulations requiring that any person who offers raw agricultural commodities or raw fish to consumers provide, in a manner prescribed by regulations, the nutrition information required by subparagraphs (1) and (2). The Secretary shall issue final regulations imposing such requirements 6 months after issuing the proposed regulations. The final regulations shall become effective 6 months after the date of their promulgation.

(ii) Regulations issued under subclause (i) may require that the nutrition information required by subparagraphs (1) and (2) be provided for more than 20 varieties of vegetables, 20 varieties of fruit, and 20 varieties of fish most frequently consumed during a year if the Secretary finds that a larger number of such products are frequently consumed. Such regulations shall permit such information to be provided in a single location in each area in which raw agricultural commodities and raw fish are offered for sale. Such regulations may provide that information shall be expressed as an average or range per serving of the same type of raw agricultural commodity or raw fish. The Secretary shall develop and make available to the persons who offer such food to consumers the information required by subparagraphs (1) and (2).

(iii) Regulations issued under subclause (i) shall permit the required information to be provided in each area of an establishment in which raw agricultural commodities and raw fish are offered for sale. The regulations shall permit food retailers to display the required information by supplying copies of the information provided by the Secretary, by making the information available in brochure, notebook or leaflet form, or by posting a sign disclosing the information. Such regulations shall also permit presentation of the required information to be supplemented by a video, live demonstration, or other media which the Secretary approves.

(E) For purposes of this subparagraph, the term "fish" includes freshwater or marine fin fish, crustaceans, and mollusks, including shellfish, amphibians, and other forms of aquatic animal life.

(F) No person who offers raw agricultural commodities or raw fish to consumers may be prosecuted for minor violations of this subparagraph if there has been substantial compliance with the requirements of this paragraph.

(5)(A) Subparagraphs (1), (2), (3), and (4) shall not apply to food—

(i) except as provided in clause (H)(ii)(III), which is served in restaurants or other establishments in which food is served for immediate human consumption or which is sold for sale or use in such establishments,

(ii) except as provided in clause (H)(ii)(III), which is processed and prepared primarily in a retail establishment, which is ready for human consumption, which is of the type described in subclause (i), and which is offered for sale to consumers but not for immediate human consumption in such establishment and which is not offered for sale outside such establishment,

(iii) which is an infant formula subject to section 350a of this title,

(iv) which is a medical food as defined in section 360ee(b) of this title, or

(v) which is described in section 345(2) of this title.

(B) Subparagraphs (1) and (2) shall not apply to the label of a food if the Secretary determines by regulations that compliance with such subparagraphs is impracticable because the package of such food is too small to comply with the requirements of such subparagraphs and if the label of such food does not contain any nutrition information.

(C) If a food contains insignificant amounts, as determined by the Secretary, of all the nutrients required by subparagraphs (1) and (2) to be listed in the label or labeling of food, the requirements of such subparagraphs shall not apply to such food if the label, labeling, or advertising of such food does not make any claim with respect to the nutritional value of such food. If a food contains insignificant amounts, as determined by the Secretary, of more than one-half the nutrients required by subparagraphs (1) and (2) to be in the label or labeling of the food, the Secretary shall require the amounts of such nutrients to be stated in a simplified form prescribed by the Secretary.

(D) If a person offers food for sale and has annual gross sales made or business done in sales to consumers which is not more than $500,000 or has annual gross sales made or business done in sales of food to consumers which is not more than $50,000, the requirements of subparagraphs (1), (2), (3), and (4) shall not apply with respect to food sold by such person to consumers unless the label or labeling of food offered by such person provides nutrition information or makes a nutrition claim.

(E)(i) During the 12-month period for which an exemption from subparagraphs (1) and (2) is claimed pursuant to this subclause, the requirements of such subparagraphs shall not apply to any food product if —

(I) the labeling for such product does not provide nutrition information or make a claim subject to paragraph (r),

(II) the person who claims for such product an exemption from such subparagraphs employed fewer than an average of 100 full-time equivalent employees,

(III) such person provided the notice described in subclause (iii), and

(IV) in the case of a food product which was sold in the 12-month period preceding the period for which an exemption was claimed, fewer than 100,000 units of such product were sold in the United States during such preceding period, or in the case of a food product which was not sold in the 12-month period preceding the period for which such exemption is claimed, fewer than 100,000 units of such product are reasonably anticipated to be sold in the United States during the period for which such exemption is claimed.

(ii) During the 12-month period after the applicable date referred to in this sentence, the requirements of subparagraphs (1) and (2) shall not apply to any food product which was first introduced into interstate commerce before May 8, 1994, if the labeling for such product does not provide nutrition information or make a claim subject to paragraph (r), if such person provided the notice described in subclause (iii), and if—

(I) during the 12-month period preceding May 8, 1994, the person who claims for such product an exemption from such subparagraphs employed fewer than an average of 300 full-time equivalent employees and fewer than 600,000 units of such product were sold in the United States,

(II) during the 12-month period preceding May 8, 1995, the person who claims for such product an exemption from such subparagraphs employed fewer than an average of 300 full-time equivalent employees and fewer than 400,000 units of such product were sold in the United States, or

(III) during the 12-month period preceding May 8, 1996, the person who claims for such product an exemption from such subparagraphs employed fewer than an average of 200 full-time equivalent employees and fewer than 200,000 units of such product were sold in the United States.

(iii) The notice referred to in subclauses (i) and (ii) shall be given to the Secretary prior to the beginning of the period during which the exemption under subclause (i) or (ii) is to be in effect, shall state that the person claiming such exemption for a food product has complied with the applicable requirements of subclause (i) or (ii), and shall—

(I) state the average number of full-time equivalent employees such person employed during the 12 months preceding the date such person claims such exemption,

(II) state the approximate number of units the person claiming the exemption sold in the United States,

(III) if the exemption is claimed for a food product which was sold in the 12-month period preceding the period for which the exemption was claimed, state the approximate number of units of such product which were sold in the United States during such preceding period, and, if the exemption is claimed for a food product which was not sold in such preceding period, state the number of units of such product which such person reasonably anticipates will be sold in the United States during the period for which the exemption was claimed, and

(IV) contain such information as the Secretary may require to verify the information required by the preceding provisions of this subclause if the Secretary has questioned the validity of such information.

If a person is not an importer, has fewer than 10 full-time equivalent employees, and sells fewer than 10,000 units of any food product in any year, such person is not required to file a notice for such product under this subclause for such year.

(iv) In the case of a person who claimed an exemption under subclause (i) or (ii), if, during the period of such exemption, the number of full-time equivalent employees of such person exceeds the number in such subclause or if the number of food products sold in the United States exceeds the number in such subclause, such exemption shall extend to the expiration of 18 months after the date the number of full-time equivalent employees or food products sold exceeded the applicable number.

(v) For any food product first introduced into interstate commerce after May 8, 2002, the Secretary may by regulation lower the employee or units of food products requirement of subclause (i) if the Secretary determines that the cost of compliance with such lower requirement will not place an undue burden on persons subject to such lower requirement.

(vi) For purposes of subclauses (i), (ii), (iii), (iv), and (v)—

(I) the term "unit" means the packaging or, if there is no packaging, the form in which a food product is offered for sale to consumers,

(II) the term "food product" means food in any sized package which is manufactured by a single manufacturer or which bears the same brand name, which bears the same statement of identity, and which has similar preparation methods, and

(III) the term "person" in the case of a corporation includes all domestic and foreign affiliates of the corporation.

(F) A dietary supplement product (including a food to which section 350 of this title applies) shall comply with the requirements of subparagraphs (1) and (2) in a manner which is appropriate for the product and which is specified in regulations of the Secretary which shall provide that—

(i) nutrition information shall first list those dietary ingredients that are present in the product in a significant amount and for which a recommendation for daily consumption has been established by the Secretary, except that a dietary ingredient shall not be required to be listed if it is not present in a significant amount, and shall list any other dietary ingredient present and identified as having no such recommendation;

(ii) the listing of dietary ingredients shall include the quantity of each such ingredient (or of a proprietary blend of such ingredients) per serving;

(iii) the listing of dietary ingredients may include the source of a dietary ingredient; and

(iv) the nutrition information shall immediately precede the ingredient information required under subclause (i), except that no ingredient identified pursuant to subclause (i) shall be required to be identified a second time.

(G) Subparagraphs (1), (2), (3), and (4) shall not apply to food which is sold by a food distributor if the food distributor principally sells food to restaurants or other establishments in which food is served for immediate human consumption and does not manufacture, process, or repackage the food it sells.

(H) Restaurants, Retail Food Establishments, and Vending Machines.—

(i) General requirements for restaurants and similar retail food establishments.—Except for food described in subclause (vii), in the case of food that is a standard menu item that is offered for sale in a restaurant or similar retail food establishment that is part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items, the restaurant or similar retail food establishment shall disclose the information described in subclauses (ii) and (iii).

(ii) Information required to be disclosed by restaurants and retail food establishments.—Except as provided in subclause (vii), the restaurant or similar retail food establishment shall disclose in a clear and conspicuous manner—

(I)(aa) in a nutrient content disclosure statement adjacent to the name of the standard menu item, so as to be clearly associated with the standard menu item, on the menu listing the item for sale, the number of calories contained in the standard menu item, as usually prepared and offered for sale; and

(bb) a succinct statement concerning suggested daily caloric intake, as specified by the Secretary by regulation and posted prominently on the menu and designed to enable the public to understand, in the context of a total daily diet, the significance of the caloric information that is provided on the menu;

(II)(aa) in a nutrient content disclosure statement adjacent to the name of the standard menu item, so as to be clearly associated with the standard menu item, on the menu board, including a drive-through menu board, the number of calories contained in the standard menu item, as usually prepared and offered for sale; and

(bb) a succinct statement concerning suggested daily caloric intake, as specified by the Secretary by regulation and posted prominently on the menu board, designed to enable the public to understand, in the context of a total daily diet, the significance of the nutrition information that is provided on the menu board;

(III) in a written form, available on the premises of the restaurant or similar retail establishment and to the consumer upon request, the nutrition information required under clauses (C) and (D) of subparagraph (1); and

(IV) on the menu or menu board, a prominent, clear, and conspicuous statement regarding the availability of the information described in item (III).

(iii) Self-service food and food on display.—Except as provided in subclause (vii), in the case of food sold at a salad bar, buffet line, cafeteria line, or similar self-service facility, and for self-service beverages or food that is on display and that is visible to customers, a restaurant or similar retail food establishment shall place adjacent to each food offered a sign that lists calories per displayed food item or per serving.

(iv) Reasonable basis.—For the purposes of this clause, a restaurant or similar retail food establishment shall have a reasonable basis for its nutrient content disclosures, including nutrient databases, cookbooks, laboratory analyses, and other reasonable means, as described in section 101.10 of title 21, Code of Federal Regulations (or any successor regulation) or in a related guidance of the Food and Drug Administration.

(v) Menu variability and combination meals.—The Secretary shall establish by regulation standards for determining and disclosing the nutrient content for standard menu items that come in different flavors, varieties, or combinations, but which are listed as a single menu item, such as soft

drinks, ice cream, pizza, doughnuts, or children's combination meals, through means determined by the Secretary, including ranges, averages, or other methods.

(vi) ADDITIONAL INFORMATION.—If the Secretary determines that a nutrient, other than a nutrient required under subclause (ii)(III), should be disclosed for the purpose of providing information to assist consumers in maintaining healthy dietary practices, the Secretary may require, by regulation, disclosure of such nutrient in the written form required under subclause (ii)(III).

(vii) NONAPPLICABILITY TO CERTAIN FOOD.—

(I) IN GENERAL.—Subclauses (i) through (vi) do not apply to—

(aa) items that are not listed on a menu or menu board (such as condiments and other items placed on the table or counter for general use);

(bb) daily specials, temporary menu items appearing on the menu for less than 60 days per calendar year, or custom orders; or

(cc) such other food that is part of a customary market test appearing on the menu for less than 90 days, under terms and conditions established by the Secretary.

(II) WRITTEN FORMS.—Subparagraph (5)(C) shall apply to any regulations promulgated under subclauses (ii)(III) and (vi).

(viii) VENDING MACHINES.—

(I) IN GENERAL.—In the case of an article of food sold from a vending machine that—

(aa) does not permit a prospective purchaser to examine the Nutrition Facts Panel before purchasing the article or does not otherwise provide visible nutrition information at the point of purchase; and

(bb) is operated by a person who is engaged in the business of owning or operating 20 or more vending machines,

the vending machine operator shall provide a sign in close proximity to each article of food or the selection button that includes a clear and conspicuous statement disclosing the number of calories contained in the article.

(ix) VOLUNTARY PROVISION OF NUTRITION INFORMATION.—

(I) IN GENERAL.—An authorized official of any restaurant or similar retail food establishment or vending machine operator not subject to the requirements of this clause may elect to be subject to the requirements of such clause, by registering biannually the name and address of such restaurant or similar retail food establishment or vending machine operator with the Secretary, as specified by the Secretary by regulation.

(II) REGISTRATION.—Within 120 days of March 23, 2010, the Secretary shall publish a notice in the Federal Register specifying the terms and conditions for implementation of item (I), pending promulgation of regulations.

(III) RULE OF CONSTRUCTION.—Nothing in this subclause shall be construed to authorize the Secretary to require an application, review, or licensing process for any entity to register with the Secretary, as described in such item.

(x) REGULATIONS.—

(I) PROPOSED REGULATION.—Not later than 1 year after March 23, 2010, the Secretary shall promulgate proposed regulations to carry out this clause.

(II) CONTENTS.—In promulgating regulations, the Secretary shall—

(aa) consider standardization of recipes and methods of preparation, reasonable variation in serving size and formulation of menu items, space on menus and menu boards, inadvertent human error, training of food service workers, variations in ingredients, and other factors, as the Secretary determines; and

(bb) specify the format and manner of the nutrient content disclosure requirements under this subclause.

(III) REPORTING.—The Secretary shall submit to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Energy and Commerce of the House of Representatives a quarterly report that describes the Secretary's progress toward promulgating final regulations under this subparagraph.

(xi) DEFINITION.—In this clause, the term "menu" or "menu board" means the primary writing of the restaurant or other similar retail food establishment from which a consumer makes an order selection.

(r) Nutrition levels and health-related claims

(1) Except as provided in clauses (A) through (C) of subparagraph (5), if it is a food intended for human consumption which is offered for sale and for which a claim is made in the label or labeling of the food which expressly or by implication—

(A) characterizes the level of any nutrient which is of the type required by paragraph (q)(1) or (q)(2) to be in the label or labeling of the food unless the claim is made in accordance with subparagraph (2), or

(B) characterizes the relationship of any nutrient which is of the type required by paragraph (q)(1) or (q)(2) to be in the label or labeling of the food to a disease or a health-related condition unless the claim is made in accordance with subparagraph (3) or (5)(D).

A statement of the type required by paragraph (q) that appears as part of the nutrition information required or permitted by such paragraph is not a claim which is subject to this paragraph and a claim subject to clause (A) is not subject to clause (B).

(2)(A) Except as provided in subparagraphs (4)(A)(ii) and (4)(A)(iii) and clauses (A) through (C) of subparagraph (5), a claim described in subparagraph (1)(A)—

(i) may be made only if the characterization of the level made in the claim uses terms which are defined in regulations of the Secretary,

(ii) may not state the absence of a nutrient unless—

(I) the nutrient is usually present in the food or in a food which substitutes for the food as defined by the Secretary by regulation, or

(II) the Secretary by regulation permits such a statement on the basis of a finding that such a statement would assist consumers in maintaining healthy dietary practices and the statement discloses that the nutrient is not usually present in the food,

(iii) may not be made with respect to the level of cholesterol in the food if the food contains, as determined by the Secretary by regulation, fat or saturated fat in an amount which increases to persons in the general population the risk of disease or a health related condition which is diet related unless—

(I) the Secretary finds by regulation that the level of cholesterol is substantially less than the level usually present in the food or in a food which substitutes for the food and which has a significant market share, or the Secretary by regulation permits a statement regarding the absence of cholesterol on the basis of a finding that cholesterol is not usually present in the food and that such a statement would assist consumers in maintaining healthy dietary practices and the regulation requires that the statement disclose that cholesterol is not usually present in the food, and

(II) the label or labeling of the food discloses the level of such fat or saturated fat in immediate proximity to such claim and with appropriate prominence which shall be no less than one-half the size of the claim with respect to the level of cholesterol,

(iv) may not be made with respect to the level of saturated fat in the food if the food contains cholesterol unless the label or labeling of the food discloses the level of cholesterol in the food in immediate proximity to such claim and with appropriate prominence which shall be no less than one-half the size of the claim with respect to the level of saturated fat,

(v) may not state that a food is high in dietary fiber unless the food is low in total fat as defined by the Secretary or the label or labeling discloses the level of total fat in the food in immediate proximity to such statement and with appropriate prominence which shall be no less than one-half the size of the claim with respect to the level of dietary fiber, and

(vi) may not be made if the Secretary by regulation prohibits the claim because the claim is misleading in light of the level of another nutrient in the food.

(B) If a claim described in subparagraph (1)(A) is made with respect to a nutrient in a food and the Secretary makes a determination that the food contains a nutrient at a level that increases to persons in the general population the risk of a disease or health-related condition that is diet related, the label or labeling of such food shall contain, prominently and in immediate proximity to such claim, the following statement: "See nutrition information for _____ content." The blank shall identify the nutrient associated with the increased disease or health-related condition risk. In making the determination described in this clause, the Secretary shall take into account the significance of the food in the total daily diet.

(C) Subparagraph (2)(A) does not apply to a claim described in subparagraph (1)(A) and contained in the label or labeling of a food if such claim is contained in the brand name of such food and such brand name was in use on such food before October 25, 1989, unless the brand name contains a term defined by the Secretary under subparagraph (2)(A)(i). Such a claim is subject to paragraph (a).

(D) Subparagraph (2) does not apply to a claim described in subparagraph (1)(A) which uses the term "diet" and is contained in the label or labeling of a soft drink if (i) such claim is contained in the brand name of such soft drink, (ii) such brand name was in use on such soft drink before October 25, 1989, and (iii) the use of the term "diet" was in conformity with section 105.66 of title 21 of the Code of Federal Regulations. Such a claim is subject to paragraph (a).

(E) Subclauses (i) through (v) of subparagraph (2)(A) do not apply to a statement in the label or labeling of food which describes the percentage of vitamins and minerals in the food in relation to the amount of such vitamins and minerals recommended for daily consumption by the Secretary.

(F) Subclause (i) clause (A) does not apply to a statement in the labeling of a dietary supplement that characterizes the percentage level of a dietary ingredient for which the Secretary has not established a reference daily intake, daily recommended value, or other recommendation for daily consumption.

(G) A claim of the type described in subparagraph (1)(A) for a nutrient, for which the Secretary has not promulgated a regulation under clause (A)(i), shall be authorized and may be made with respect to a food if—

(i) a scientific body of the United States Government with official responsibility for public health protection or research directly relating to human nutrition (such as the National Institutes of Health or the Centers for Disease Control and Prevention) or the National Academy of Sciences or any of its subdivisions has published an authoritative statement, which is currently in effect, which identifies the nutrient level to which the claim refers;

(ii) a person has submitted to the Secretary, at least 120 days (during which the Secretary may notify any person who is making a claim as authorized by clause (C) that such person has not submitted all the information required by such clause) before the first introduction into interstate commerce of the food with a label containing the claim, (I) a notice of the claim, which shall include the exact words used in the claim and shall include a concise description of the basis upon which such person relied for determining that the requirements of subclause (i) have been satisfied, (II) a copy of the statement referred to in subclause (i) upon which such person relied in making the claim, and (III) a balanced representation of the scientific literature relating to the nutrient level to which the claim refers;

(iii) the claim and the food for which the claim is made are in compliance with clauses (A) and (B), and are otherwise in compliance with paragraph (a) and section 321(n) of this title; and

(iv) the claim is stated in a manner so that the claim is an accurate representation of the authoritative statement referred to in subclause (i) and so that the claim enables the public to comprehend the information provided in the claim and to understand the relative significance of such information in the context of a total daily diet.

For purposes of this clause, a statement shall be regarded as an authoritative statement of a scientific body described in subclause (i) only if the statement is published by the scientific body and shall not include a statement of an employee of the scientific body made in the individual capacity of the employee.

(H) A claim submitted under the requirements of clause (G) may be made until—

(i) such time as the Secretary issues a regulation—

(I) prohibiting or modifying the claim and the regulation has become effective, or

(II) finding that the requirements of clause (G) have not been met, including finding that the petitioner had not submitted all the information required by such clause; or

(ii) a district court of the United States in an enforcement proceeding under subchapter III has determined that the requirements of clause (G) have not been met.

(3)(A) Except as provided in subparagraph (5), a claim described in subparagraph (1)(B) may only be made—

(i) if the claim meets the requirements of the regulations of the Secretary promulgated under clause (B), and

(ii) if the food for which the claim is made does not contain, as determined by the Secretary by regulation, any nutrient in an amount which increases to persons in the general population the risk of a disease or health-related condition which is diet related, taking into account the significance of the food in the total daily diet, except that the Secretary may by regulation permit such a claim based on a finding that such a claim would assist consumers in maintaining healthy dietary practices and based on a requirement that the label contain a disclosure of the type required by subparagraph (2)(B).

(B)(i) The Secretary shall promulgate regulations authorizing claims of the type described in subparagraph (1)(B) only if the Secretary determines, based on the totality of publicly available scientific evidence (including evidence from well-designed studies conducted in a manner which is consistent with generally recognized scientific procedures and principles), that there is significant scientific agreement, among experts qualified by scientific training and experience to evaluate such claims, that the claim is supported by such evidence.

(ii) A regulation described in subclause (i) shall describe—

(I) the relationship between a nutrient of the type required in the label or labeling of food by paragraph (q)(1) or (q)(2) and a disease or health-related condition, and

(II) the significance of each such nutrient in affecting such disease or health-related condition.

(iii) A regulation described in subclause (i) shall require such claim to be stated in a manner so that the claim is an accurate representation of the matters set out in subclause (ii) and so that the claim enables the public to comprehend the information provided in the claim and to understand the relative significance of such information in the context of a total daily diet.

(C) Notwithstanding the provisions of clauses (A)(i) and (B), a claim of the type described in subparagraph (1)(B) which is not authorized by the Secretary in a regulation promulgated in accordance with clause (B) shall be authorized and may be made with respect to a food if—

(i) a scientific body of the United States Government with official responsibility for public health protection or research directly relating to human nutrition (such as the National Institutes of Health or the Centers for Disease Control and Prevention) or the National Academy of Sciences or any of its subdivisions has published an authoritative statement, which is currently in effect, about the relationship between a nutrient and a disease or health-related condition to which the claim refers;

(ii) a person has submitted to the Secretary, at least 120 days (during which the Secretary may notify any person who is making a claim as authorized by clause (C) that such person has not submitted all the information required by such clause) before the first introduction into interstate commerce of the food with a label containing the claim, (I) a notice of the claim, which shall include the exact words used in the claim and shall include a concise description of the basis upon which such person relied for determining that the requirements of subclause (i) have been satisfied, (II) a copy of the statement referred to in subclause (i) upon which such person relied in making the claim, and (III) a balanced representation of the scientific literature relating to the relationship between a nutrient and a disease or health-related condition to which the claim refers;

(iii) the claim and the food for which the claim is made are in compliance with clause (A)(ii) and are otherwise in compliance with paragraph (a) and section 321(n) of this title; and

(iv) the claim is stated in a manner so that the claim is an accurate representation of the authoritative statement referred to in subclause (i) and so that the claim enables the public to comprehend the

information provided in the claim and to understand the relative significance of such information in the context of a total daily diet.

For purposes of this clause, a statement shall be regarded as an authoritative statement of a scientific body described in subclause (i) only if the statement is published by the scientific body and shall not include a statement of an employee of the scientific body made in the individual capacity of the employee.

(D) A claim submitted under the requirements of clause (C) may be made until—

(i) such time as the Secretary issues a regulation under the standard in clause (B)(i)—

(I) prohibiting or modifying the claim and the regulation has become effective, or

(II) finding that the requirements of clause (C) have not been met, including finding that the petitioner has not submitted all the information required by such clause; or

(ii) a district court of the United States in an enforcement proceeding under subchapter III has determined that the requirements of clause (C) have not been met.

(4)(A)(i) Any person may petition the Secretary to issue a regulation under subparagraph (2)(A)(i) or (3)(B) relating to a claim described in subparagraph (1)(A) or (1)(B). Not later than 100 days after the petition is received by the Secretary, the Secretary shall issue a final decision denying the petition or file the petition for further action by the Secretary. If the Secretary does not act within such 100 days, the petition shall be deemed to be denied unless an extension is mutually agreed upon by the Secretary and the petitioner. If the Secretary denies the petition or the petition is deemed to be denied, the petition shall not be made available to the public. If the Secretary files the petition, the Secretary shall deny the petition or issue a proposed regulation to take the action requested in the petition not later than 90 days after the date of such decision. If the Secretary does not act within such 90 days, the petition shall be deemed to be denied unless an extension is mutually agreed upon by the Secretary and the petitioner. If the Secretary issues a proposed regulation, the rulemaking shall be completed within 540 days of the date the petition is received by the Secretary. If the Secretary does not issue a regulation within such 540 days, the Secretary shall provide the Committee on Commerce of the House of Representatives and the Committee on Labor and Human Resources of the Senate the reasons action on the regulation did not occur within such 540 days.

(ii) Any person may petition the Secretary for permission to use in a claim described in subparagraph (1)(A) terms that are consistent with the terms defined by the Secretary under subparagraph (2)(A)(i). Within 90 days of the submission of such a petition, the Secretary shall issue a final decision denying the petition or granting such permission.

(iii) Any person may petition the Secretary for permission to use an implied claim described in subparagraph (1)(A) in a brand name. After publishing notice of an opportunity to comment on the petition in the Federal Register and making the petition available to the public, the Secretary shall grant the petition if the Secretary finds that such claim is not misleading and is consistent with terms defined by the Secretary under subparagraph (2)(A)(i). The Secretary shall grant or deny the petition within 100 days of the date it is submitted to the Secretary and the petition shall be considered granted if the Secretary does not act on it within such 100 days.

(B) A petition under clause (A)(i) respecting a claim described in subparagraph (1)(A) or (1)(B) shall include an explanation of the reasons why the claim meets the requirements of this paragraph and a summary of the scientific data which supports such reasons.

(C) If a petition for a regulation under subparagraph (3)(B) relies on a report from an authoritative scientific body of the United States, the Secretary shall consider such report and shall justify any decision rejecting the conclusions of such report.

(5)(A) This paragraph does not apply to infant formulas subject to section 350a(h) of this title and medical foods as defined in section 360ee(b) of this title.

(B) Subclauses (iii) through (v) of subparagraph (2)(A) and subparagraph (2)(B) do not apply to food which is served in restaurants or other establishments in which food is served for immediate human consumption or which is sold for sale or use in such establishments.

(C) A subparagraph (1)(A) claim made with respect to a food which claim is required by a standard of identity issued under section 341 of this title shall not be subject to subparagraph (2)(A)(i) or (2)(B).

(D) A subparagraph (1)(B) claim made with respect to a dietary supplement of vitamins, minerals, herbs, or other similar nutritional substances shall not be subject to subparagraph (3) but shall be subject to a procedure and standard, respecting the validity of such claim, established by regulation of the Secretary.

(6) For purposes of paragraph (r)(1)(B), a statement for a dietary supplement may be made if—

(A) the statement claims a benefit related to a classical nutrient deficiency disease and discloses the prevalence of such disease in the United States, describes the role of a nutrient or dietary ingredient intended to affect the structure or function in humans, characterizes the documented mechanism by which a nutrient or dietary ingredient acts to maintain such structure or function, or describes general well-being from consumption of a nutrient or dietary ingredient,

(B) the manufacturer of the dietary supplement has substantiation that such statement is truthful and not misleading, and

(C) the statement contains, prominently displayed and in boldface type, the following: "This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.".

A statement under this subparagraph may not claim to diagnose, mitigate, treat, cure, or prevent a specific disease or class of diseases. If the manufacturer of a dietary supplement proposes to make a statement described in the first sentence of this subparagraph in the labeling of the dietary supplement, the manufacturer shall notify the Secretary no later than 30 days after the first marketing of the dietary supplement with such statement that such a statement is being made.

(7) The Secretary may make proposed regulations issued under this paragraph effective upon publication pending consideration of public comment and publication of a final regulation if the Secretary determines that such action is necessary—

(A) to enable the Secretary to review and act promptly on petitions the Secretary determines provide for information necessary to—

(i) enable consumers to develop and maintain healthy dietary practices;

(ii) enable consumers to be informed promptly and effectively of important new knowledge regarding nutritional and health benefits of food; or

(iii) ensure that scientifically sound nutritional and health information is provided to consumers as soon as possible; or

(B) to enable the Secretary to act promptly to ban or modify a claim under this paragraph.

Such proposed regulations shall be deemed final agency action for purposes of judicial review.

(s) Dietary supplements

If—

(1) it is a dietary supplement; and

(2)(A) the label or labeling of the supplement fails to list—

(i) the name of each ingredient of the supplement that is described in section 321(ff) of this title; and

(ii)(I) the quantity of each such ingredient; or

(II) with respect to a proprietary blend of such ingredients, the total quantity of all ingredients in the blend;

(B) the label or labeling of the dietary supplement fails to identify the product by using the term "dietary supplement", which term may be modified with the name of such an ingredient;

(C) the supplement contains an ingredient described in section 321(ff)(1)(C) of this title, and the label or labeling of the supplement fails to identify any part of the plant from which the ingredient is derived;

(D) the supplement—

(i) is covered by the specifications of an official compendium;

(ii) is represented as conforming to the specifications of an official compendium; and

(iii) fails to so conform; or

(E) the supplement—

(i) is not covered by the specifications of an official compendium; and

(ii)(I) fails to have the identity and strength that the supplement is represented to have; or

(II) fails to meet the quality (including tablet or capsule disintegration), purity, or compositional specifications, based on validated assay or other appropriate methods, that the supplement is represented to meet.

A dietary supplement shall not be deemed misbranded solely because its label or labeling contains directions or conditions of use or warnings.

(t) Catfish

If it purports to be or is represented as catfish, unless it is fish classified within the family Ictaluridae.

(u) Ginseng

If it purports to be or is represented as ginseng, unless it is an herb or herbal ingredient derived from a plant classified within the genus Panax.

(v) Failure to label; health threat

If—

(1) it fails to bear a label required by the Secretary under section 381(n)(1) of this title (relating to food refused admission into the United States);

(2) the Secretary finds that the food presents a threat of serious adverse health consequences or death to humans or animals; and

(3) upon or after notifying the owner or consignee involved that the label is required under section 381 of this title, the Secretary informs the owner or consignee that the food presents such a threat.

(w) Major food allergen labeling requirements

(1) If it is not a raw agricultural commodity and it is, or it contains an ingredient that bears or contains, a major food allergen, unless either—

(A) the word "Contains", followed by the name of the food source from which the major food allergen is derived, is printed immediately after or is adjacent to the list of ingredients (in a type size no smaller than the type size used in the list of ingredients) required under subsections (g) and (i); or

(B) the common or usual name of the major food allergen in the list of ingredients required under subsections (g) and (i) is followed in parentheses by the name of the food source from which the major food allergen is derived, except that the name of the food source is not required when—

(i) the common or usual name of the ingredient uses the name of the food source from which the major food allergen is derived; or

(ii) the name of the food source from which the major food allergen is derived appears elsewhere in the ingredient list, unless the name of the food source that appears elsewhere in the ingredient list appears as part of the name of a food ingredient that is not a major food allergen under section 321(qq)(2)(A) or (B) of this title.

(2) As used in this subsection, the term "name of the food source from which the major food allergen is derived" means the name described in section 321(qq)(1) of this title; provided that in the case of a tree nut, fish, or Crustacean shellfish, the term "name of the food source from which the major food allergen is derived" means the name of the specific type of nut or species of fish or Crustacean shellfish.

(3) The information required under this subsection may appear in labeling in lieu of appearing on the label only if the Secretary finds that such other labeling is sufficient to protect the public health. A finding by the Secretary under this paragraph (including any change in an earlier finding under this paragraph) is effective upon publication in the Federal Register as a notice.

(4) Notwithstanding subsection (g), (i), or (k), or any other law, a flavoring, coloring, or incidental additive that is, or that bears or contains, a major food allergen shall be subject to the labeling requirements of this subsection.

(5) The Secretary may by regulation modify the requirements of subparagraph (A) or (B) of paragraph (1), or eliminate either the requirement of subparagraph (A) or the requirements of subparagraph (B) of

paragraph (1), if the Secretary determines that the modification or elimination of the requirement of subparagraph (A) or the requirements of subparagraph (B) is necessary to protect the public health.

(6)(A) Any person may petition the Secretary to exempt a food ingredient described in section 321(qq)(2) of this title from the allergen labeling requirements of this subsection.

(B) The Secretary shall approve or deny such petition within 180 days of receipt of the petition or the petition shall be deemed denied, unless an extension of time is mutually agreed upon by the Secretary and the petitioner.

(C) The burden shall be on the petitioner to provide scientific evidence (including the analytical method used to produce the evidence) that demonstrates that such food ingredient, as derived by the method specified in the petition, does not cause an allergic response that poses a risk to human health.

(D) A determination regarding a petition under this paragraph shall constitute final agency action.

(E) The Secretary shall promptly post to a public site all petitions received under this paragraph within 14 days of receipt and the Secretary shall promptly post the Secretary's response to each.

(7)(A) A person need not file a petition under paragraph (6) to exempt a food ingredient described in section 321(qq)(2) of this title from the allergen labeling requirements of this subsection, if the person files with the Secretary a notification containing—

(i) scientific evidence (including the analytical method used) that demonstrates that the food ingredient (as derived by the method specified in the notification, where applicable) does not contain allergenic protein; or

(ii) a determination by the Secretary that the ingredient does not cause an allergic response that poses a risk to human health under a premarket approval or notification program under section 348 of this title.

(B) The food ingredient may be introduced or delivered for introduction into interstate commerce as a food ingredient that is not a major food allergen 90 days after the date of receipt of the notification by the Secretary, unless the Secretary determines within the 90-day period that the notification does not meet the requirements of this paragraph, or there is insufficient scientific evidence to determine that the food ingredient does not contain allergenic protein or does not cause an allergenic response that poses a risk to human health.

(C) The Secretary shall promptly post to a public site all notifications received under this subparagraph within 14 days of receipt and promptly post any objections thereto by the Secretary.

(x) Nonmajor food allergen labeling requirements

Notwithstanding subsection (g), (i), or (k), or any other law, a spice, flavoring, coloring, or incidental additive that is, or that bears or contains, a food allergen (other than a major food allergen), as determined by the Secretary by regulation, shall be disclosed in a manner specified by the Secretary by regulation.

(y) Dietary supplements

If it is a dietary supplement that is marketed in the United States, unless the label of such dietary supplement includes a domestic address or domestic phone number through which the responsible person (as described in section 379aa–1 of this title) may receive a report of a serious adverse event with such dietary supplement.

(June 25, 1938, ch. 675, §403, 52 Stat. 1047; Pub. L. 86–537, §1, June 29, 1960, 74 Stat. 251; Pub. L. 86–618, title I, §102(a)(3), July 12, 1960, 74 Stat. 398; Pub. L. 91–601, §6(c), formerly §7(c), Dec. 30, 1970, 84 Stat. 1673, renumbered Pub. L. 97–35, title XII, §1205(c), Aug. 13, 1981, 95 Stat. 716; Pub. L. 94–278, title V, §502(a)(1), Apr. 22, 1976, 90 Stat. 411; Pub. L. 95–203, §4(a)(1), (b)(1), Nov. 23, 1977, 91 Stat. 1452, 1453; Pub. L. 101–535, §§2(a), 3(a), 7, Nov. 8, 1990, 104 Stat. 2353, 2357, 2364; Pub. L. 102–108, §2(a), (c), Aug. 17, 1991, 105 Stat. 549; Pub. L. 102–571, title I, §107(5), (6), Oct. 29, 1992, 106 Stat. 4499; Pub. L. 103–80, §§2(b), 3(j), Aug. 13, 1993, 107 Stat. 773, 776; Pub. L. 103–417, §§6, 7(a)–(c), 10(c), Oct. 25, 1994, 108 Stat. 4329, 4330, 4332; Pub. L. 104–124, §1, Apr. 1, 1996, 110 Stat. 882; Pub. L. 105–115, title III, §§301–305, Nov. 21, 1997, 111 Stat. 2350–2353; Pub. L. 106–554, §1(a)(1) [title V, §517], Dec. 21, 2000, 114 Stat. 2763, 2763A-73; Pub. L. 107–171, title X, §§10806(a)(2), (b)(2), 10808(b), May 13, 2002, 116 Stat. 526, 527, 530; Pub. L. 107–188, title III, §308(b), June 12, 2002, 116 Stat. 672; Pub. L. 108–282, title II, §203(a), Aug. 2, 2004, 118 Stat. 906; Pub. L. 109–462, §3(c), Dec. 22, 2006, 120 Stat. 3475; Pub. L. 111–148, title IV, §4205(a), (b), Mar. 23, 2010, 124 Stat. 573.)

Editorial Notes

Amendments

2010—Par. (q)(5)(A)(i). Pub. L. 111–148, §4205(a)(1), inserted "except as provided in clause (H)(ii)(III)," before "which is served".

Par. (q)(5)(A)(ii). Pub. L. 111–148, §4205(a)(2), inserted "except as provided in clause (H)(ii)(III)," before "which is processed".

Par. (q)(5)(H). Pub. L. 111–148, §4205(b), added cl. (H).

2006—Par. (y). Pub. L. 109–462 added par. (y).

2004—Pars. (w), (x). Pub. L. 108–282 added pars. (w) and (x).

2002—Par. (h). Pub. L. 107–171, §10808(b), added subpar. (3) and concluding provisions.

Par. (t). Pub. L. 107–171, §10806(a)(2), added par. (t).

Par. (u). Pub. L. 107–171, §10806(b)(2), added par. (u).

Par. (v). Pub. L. 107–188 added par. (v).

2000—Par. (o). Pub. L. 106–554, which directed repeal of section 403(o) of the Food, Drug, and Cosmetic Act, was executed by repealing par. (o) of this section, which is section 403 of the Federal Food, Drug, and Cosmetic Act, to reflect the probable intent of Congress. Prior to repeal, par. (o) provided that a food containing saccharin was to be deemed misbranded unless a specified warning statement was placed in a conspicuous place on its label.

1997—Par. (r)(2)(B). Pub. L. 105–115, §305, amended cl. (B) generally. Prior to amendment, cl. (B) read as follows: "If a claim described in subparagraph (1)(A) is made with respect to a nutrient in a food, the label or labeling of such food shall contain, prominently and in immediate proximity to such claim, the following statement: 'See _____ for nutrition information.'. In the statement—

"(i) the blank shall identify the panel on which the information described in the statement may be found, and

"(ii) if the Secretary determines that the food contains a nutrient at a level which increases to persons in the general population the risk of a disease or health-related condition which is diet related, taking into account the significance of the food in the total daily diet, the statement shall also identify such nutrient."

Par. (r)(2)(G), (H). Pub. L. 105–115, §304, added cls. (G) and (H).

Par. (r)(3)(C), (D). Pub. L. 105–115, §303, added cls. (C) and (D).

Par. (r)(4)(A)(i). Pub. L. 105–115, §302, inserted after second sentence "If the Secretary does not act within such 100 days, the petition shall be deemed to be denied unless an extension is mutually agreed upon by the Secretary and the petitioner.", inserted "or the petition is deemed to be denied" after "If the Secretary denies the petition", and inserted at end "If the Secretary does not act within such 90 days, the petition shall be deemed to be denied unless an extension is mutually agreed upon by the Secretary and the petitioner. If the Secretary issues a proposed regulation, the rulemaking shall be completed within 540 days of the date the petition is received by the Secretary. If the Secretary does not issue a regulation within such 540 days, the Secretary shall provide the Committee on Commerce of the House of Representatives and the Committee on Labor and Human Resources of the Senate the reasons action on the regulation did not occur within such 540 days."

Par. (r)(7). Pub. L. 105–115, §301, added subpar. (7).

1996—Par. (p). Pub. L. 104–124 struck out par. (p), which deemed products containing saccharin and offered for sale, but not for immediate consumption, by retail establishment, to be misbranded, unless notice of information required by subsec. (o) was provided by manufacturer and prominently displayed near product.

1994—Par. (q)(5)(F). Pub. L. 103–417, §7(b), amended cl. (F) generally. Prior to amendment, cl. (F) read as follows: "If a food to which section 350 of this title applies (as defined in section 350(c) of this title) contains one or more of the nutrients required by subparagraph (1) or (2) to be in the label or labeling of the food, the label or labeling of such food shall comply with the requirements of subparagraphs (1) and (2) in a manner which is appropriate for such food and which is specified in regulations of the Secretary."

Par. (r)(2)(F). Pub. L. 103–417, §7(c), added cl. (F).

Par. (r)(6). Pub. L. 103–417, §6, added subpar. (6).

Par. (s). Pub. L. 103–417, §10(c), inserted at end: "A dietary supplement shall not be deemed misbranded solely because its label or labeling contains directions or conditions of use or warnings."

Pub. L. 103–417, §7(a), added par. (s).

1993—Par. (e). Pub. L. 103–80, §3(j)(1), substituted "count, except that" for "count: *Provided*, That".

Par. (i). Pub. L. 103–80, §3(j)(2), substituted "unless sold as spices, flavorings, or such colors" for ", other than those sold as such" and "naming each. To the extent" for "naming each: *Provided*, That, to the extent".

Par. (k). Pub. L. 103–80, §3(j)(3), substituted ", except that" for ": *Provided*, That".

Par. (l). Pub. L. 103–80, §3(j)(4), substituted "chemical, except that" for "chemical: *Provided, however*, That".

Par. (q)(5)(E) to (G). Pub. L. 103–80, §2(b), added cl. (E) and redesignated former cls. (E) and (F) as (F) and (G), respectively.

Par. (r)(1)(B). Pub. L. 103–80, §3(j)(5), substituted "(5)(D)" for "5(D)".

Par. (r)(4)(B). Pub. L. 103–80, §3(j)(6), substituted "paragraph" for "subsection".

1992—Par. (i). Pub. L. 102–571, §107(5), substituted "379e(c)" for "376(c)".

Par. (m). Pub. L. 102–571, §107(6), substituted "379e" for "376".

1991—Par. (i). Pub. L. 102–108, §2(c), amended directory language of Pub. L. 101–535, §7(1), (3). See 1990 Amendment note below.

Par. (q)(4)(A). Pub. L. 102–108, §2(a), substituted "(D)" for "(C)".

1990—Par. (i). Pub. L. 101–535, §7, as amended by Pub. L. 102–108, §2(c), substituted "Unless" for "If it is not subject to the provisions of paragraph (g) unless", inserted "and if the food purports to be a beverage containing vegetable or fruit juice, a statement with appropriate prominence on the information panel of the total percentage of such fruit or vegetable juice contained in the food", and substituted "colors not required to be certified under section 376(c) of this title" for "colorings" the first time appearing.

Par. (q). Pub. L. 101–535, §2(a), added par. (q).

Par. (r). Pub. L. 101–535, §3(a), added par. (r).

1977—Par. (o). Pub. L. 95–203, §4(a)(1), added par. (o).

Par. (p). Pub. L. 95–203, §4(b)(1), added par. (p).

1976—Par. (a). Pub. L. 94–278 inserted "(1)" after "If" and inserted ", or (2) in the case of a food to which section 350 of this title applies, its advertising is false or misleading in a material respect or its labeling is in violation of section 350(b)(2) of this title" after "any particular".

1970—Par. (n). Pub. L. 91–601 added par. (n).

1960—Par. (k). Pub. L. 86–537, §1(1), exempted pesticide chemicals when used in or on a raw agricultural commodity which is the produce of the soil.

Par. (l). Pub. L. 86–537, §1(2), added par. (l).

Par. (m). Pub. L. 86–618 added par. (m).

Statutory Notes and Related Subsidiaries

Change of Name

Committee on Commerce of House of Representatives changed to Committee on Energy and Commerce of House of Representatives, and jurisdiction over matters relating to securities and exchanges and insurance generally transferred to Committee on Financial Services of House of Representatives by House Resolution No. 5, One Hundred Seventh Congress, Jan. 3, 2001.

Committee on Labor and Human Resources of Senate changed to Committee on Health, Education, Labor, and Pensions of Senate by Senate Resolution No. 20, One Hundred Sixth Congress, Jan. 19, 1999.

Effective Date of 2006 Amendment

Pub. L. 109–462, §3(d)(1), (2), Dec. 22, 2006, 120 Stat. 3475, provided that:

"(1) In general.—Except as provided in paragraph (2), the amendments made by this section [enacting section 379aa–1 of this title and amending this section and section 331 of this title] shall take effect 1 year after the date of enactment of this Act [Dec. 22, 2006].

"(2) Misbranding.—Section 403(y) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(y)] (as added by this section) shall apply to any dietary supplement labeled on or after the date that is 1 year after the date of enactment of this Act [Dec. 22, 2006]."

Effective Date of 2004 Amendment

Amendment by Pub. L. 108–282 applicable to any food that is labeled on or after Jan. 1, 2006, see section 203(d) of Pub. L. 108–282, set out as a note under section 321 of this title.

Effective Date of 1997 Amendment

Amendment by Pub. L. 105–115 effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as a note under section 321 of this title.

Effective Date of 1994 Amendment

Pub. L. 103–417, §7(e), Oct. 25, 1994, 108 Stat. 4331, provided that: "Dietary supplements—

"(1) may be labeled after the date of the enactment of this Act [Oct. 25, 1994] in accordance with the amendments made by this section [amending this section and section 350 of this title], and

"(2) shall be labeled after December 31, 1996, in accordance with such amendments."

Effective Date of 1990 Amendment

Pub. L. 101–535, §10(a), Nov. 8, 1990, 104 Stat. 2365, as amended by Pub. L. 102–571, title II, §202(a)(3), Oct. 29, 1992, 106 Stat. 4501, provided that:

"(1) Except as provided in paragraph (2)—

"(A) the amendments made by section 2 [amending this section] shall take effect 6 months after—

"(i) the date of the promulgation of all final regulations required to implement section 403(q) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(q)], or

"(ii) if such regulations are not promulgated, the date proposed regulations are to be considered as such final regulations [Nov. 8, 1992, see 57 F.R. 56347],

except that section 403(q)(4) of such Act shall take effect as prescribed by such section,

"(B) the amendments made by section 3 [amending this section] shall take effect 6 months after—

"(i) the date of the promulgation of final regulations to implement section 403(r) of the Federal Food, Drug, and Cosmetic Act, or

"(ii) if such regulations are not promulgated, the date proposed regulations are to be considered as such final regulations [Nov. 8, 1992, see 57 F.R. 56347], except that any person marketing a food the brand name of which contains a term defined by the Secretary under section 403(r)(2)(A)(i) of the Federal Food, Drug, and Cosmetic Act shall be given an additional 6 months to comply with section 3,

"(C) the amendments made by section 4 [amending section 337 of this title] shall take effect 24 months after the date of the enactment of this Act [Nov. 8, 1990], except that such amendments shall take effect with respect to such dietary supplements [probably means dietary supplements of vitamins, minerals, herbs, or other similar nutritional substances, see section 202(a)(1) of Pub. L. 102–571, set out below] on December 31, 1993, and

"(D) the amendments made by section 5 [amending sections 321 and 345 of this title] shall take effect on the date the amendments made by section 3 take effect.

"(2) Section 403(q) of the Federal Food, Drug, and Cosmetic Act (as added by section 2) shall not apply with respect to food which was labeled before the effective date of the amendments made by section 2 and section 403(r) of the Federal Food, Drug, and Cosmetic Act (as added by section 3) shall not apply with respect to food which was labeled before the effective date of the amendments made by section 3.

"(3)(A) If the Secretary finds that a person who is subject to section 403(q)(4) of such Act is unable to comply with the requirements of such section upon the effective date of final regulations to implement section 403(q) of such Act or of proposed regulations to be considered as such final regulations because the Secretary has not made available to such person the information required by such section, the Secretary shall delay the application of such section to such person for such time as the Secretary may require to provide such information.

"(B) If the Secretary finds that compliance with section 403(q) or 403(r)(2) of such Act would cause an undue economic hardship, the Secretary may delay the application of such sections for no more than one year."

Pub. L. 101–535, §10(c), Nov. 8, 1990, 104 Stat. 2367, as amended by Pub. L. 102–108, §1, Aug. 17, 1991, 105 Stat. 549; Pub. L. 102–571, title I, §107(17), Oct. 29, 1992, 106 Stat. 4500, provided that:

"(1) Except as provided in paragraphs (2) and (3), the amendments made by section 7 [amending this section] shall take effect one year after the date of the enactment of this Act [Nov. 8, 1990].

"(2)(A) If a food subject to section 403(g) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(g)] or a food with one or more colors required to be certified under section 721(c) [of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 379e(c)] bears a label which was printed before July 1, 1991, and which is attached to the food before May 8, 1993, such food shall not be subject to the amendments made by section 7(1) and section 7(3) [amending this section].

"(B) If a food described in subparagraph (A)—

"(i) bears a label which was printed after July 1, 1991, but before the date the proposed regulation described in clause (ii) takes effect as a final regulation and which was attached to the food before May 8, 1993, and

"(ii) meets the requirements of the proposed regulation of the Secretary of Health and Human Services published in 56 Fed. Reg. 28592–28636 (June 21, 1991) as it pertains to the amendments made by this Act [see Short Title of 1990 Amendment note set out under section 301 of this title],

such food shall not be subject to the amendments made by section 7(1) and section 7(3) [amending this section].

"(3) A food purported to be a beverage containing a vegetable or fruit juice which bears a label attached to the food before May 8, 1993, shall not be subject to the amendments made by section 7(2) [amending this section]."

Effective Date of 1977 Amendment

Pub. L. 95–203, §4(a)(2), Nov. 23, 1977, 91 Stat. 1453, provided that: "The amendment made by paragraph (1) [amending this section] shall apply only with respect to food introduced or delivered for introduction in interstate commerce on and after the 90th day after the date of the enactment of this Act [Nov. 23, 1977]."

Pub. L. 95–203, §4(b)(2), Nov. 23, 1977, 91 Stat. 1453, provided that: "The amendment made by paragraph (1) [amending this section] shall apply with respect to food which is sold in retail establishments on or after the 90th day after the effective date of the regulations of the Secretary of Health, Education, and Welfare [now Secretary of Health and Human Services] under paragraph (p)(4) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(p)(4)]."

Effective Date of 1976 Amendment

Amendment by Pub. L. 94–278 effective 180 days after Apr. 22, 1976, see section 502(c) of Pub. L. 94–278, set out as a note under section 334 of this title.

Effective Date of 1970 Amendment

Amendment by Pub. L. 91–601 effective Dec. 30, 1970, and regulations establishing special packaging standards effective no sooner than 180 days or later than one year from date regulations are final, or an earlier date published in Federal Register, see section 8 of Pub. L. 91–601, set out as an Effective Date note under section 1471 of Title 15, Commerce and Trade.

Effective Date of 1960 Amendment

Amendment by Pub. L. 86–618 effective July 12, 1960, subject to the provisions of section 203 of Pub. L. 86–618, see section 202 of Pub. L. 86–618, set out as a note under section 379e of this title.

Effective Date; Postponement

Subsecs. (e)(1) and (g) to (k) effective Jan. 1, 1940, and such subsections effective July 1, 1940, as provided by regulations for certain lithographed labeling and containers bearing certain labeling, see act June 23, 1939, ch. 242, 53 Stat. 853, set out as an Effective Date; Postponement in Certain Cases note under section 301 of this title.

Construction of Amendment by Pub. L. 111–148

Pub. L. 111–148, title IV, §4205(d), Mar. 23, 2010, 124 Stat. 576, provided that: "Nothing in the amendments made by this section [amending this section and section 343–1 of this title] shall be construed—

"(1) to preempt any provision of State or local law, unless such provision establishes or continues into effect nutrient content disclosures of the type required under section 403(q)(5)(H) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(q)(5)(H)] (as added by subsection (b)) and is expressly preempted under subsection (a)(4) of such section;

"(2) to apply to any State or local requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component of the food; or

"(3) except as provided in section 403(q)(5)(H)(ix) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(q)(5)(H)(ix)] (as added by subsection (b)), to apply to any restaurant or similar retail food establishment other than a restaurant or similar retail food establishment described in section 403(q)(5)(H)(i) of such Act [21 U.S.C. 343(q)(5)(H)(i)]."

Construction of Amendment by Pub. L. 108–282

Pub. L. 108–282, title II, §203(b), Aug. 2, 2004, 118 Stat. 908, provided that: "The amendments made by this section [amending this section and sections 321 and 343–1 of this title] that require a label or labeling for major food allergens do not alter the authority of the Secretary of Health and Human Services under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) to require a label or labeling for other food allergens."

Construction of Amendment by Pub. L. 107–188

Nothing in amendment by Pub. L. 107–188 to be construed to limit authority of Secretary of Health and Human Services or Secretary of the Treasury to require marking of articles of food imported or offered for import into the United States which are refused admission, see section 308(c) of Pub. L. 107–188, set out as a note under section 381 of this title.

Construction of Amendments by Pub. L. 101–535

Pub. L. 101–535, §9, Nov. 8, 1990, 104 Stat. 2365, provided that: "The amendments made by this Act [enacting section 343–1 of this title and amending this section and sections 321, 337, 345, and 371 of this title] shall not be construed to alter the authority of the Secretary of Health and Human Services and the Secretary of Agriculture under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.], the Federal Meat Inspection Act [21 U.S.C. 601 et seq.], the Poultry Products Inspection Act [21 U.S.C. 451 et seq.], and the Egg Products Inspection Act [21 U.S.C. 1031 et seq.]."

Regulations

Pub. L. 101–535, §2(b), Nov. 8, 1990, 104 Stat. 2356, as amended by Pub. L. 102–571, title II, §202(a)(2)(A), (B), Oct. 29, 1992, 106 Stat. 4500, 4501, provided that:

"(1) The Secretary of Health and Human Services shall issue proposed regulations to implement section 403(q) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(q)] within 12 months after the date of the enactment of this Act [Nov. 8, 1990], except that the Secretary shall issue, not later than June 15, 1993, proposed regulations that are applicable to dietary supplements of vitamins, minerals, herbs, or other similar nutritional substances to implement such section. Not later than 24 months after the date of the enactment of this Act, the Secretary shall issue final regulations to implement the requirements of such section, except that the Secretary shall issue, not later than December 31, 1993, such a final regulation applicable to dietary supplements of vitamins, minerals, herbs, or other similar nutritional substances..[sic] Such regulations shall—

"(A) require the required information to be conveyed to the public in a manner which enables the public to readily observe and comprehend such information and to understand its relative significance in the context of a total daily diet,

"(B) include regulations which establish standards, in accordance with paragraph (1)(A), to define serving size or other unit of measure for food,

"(C) permit the label or labeling of food to include nutrition information which is in addition to the information required by such section 403(q) and which is of the type described in subparagraph (1) or (2) of such section, and

"(D) permit the nutrition information on the label or labeling of a food to remain the same or permit the information to be stated as a range even though (i) there are minor variations in the nutritional value of the food which occur in the normal course of the production or processing of the food, or (ii) the food is comprised of an assortment of similar foods which have variations in nutritional value.

"(2) If the Secretary of Health and Human Services does not promulgate final regulations under paragraph (1) upon the expiration of 24 months after the date of the enactment of this Act, the proposed regulations issued in accordance with paragraph (1) shall be considered as the final regulations upon the expiration of such 24 months, except that the proposed regulations applicable to dietary supplements of vitamins, minerals, herbs, or other similar nutritional substances shall not be considered to be final regulations until December 31, 1993. There shall be promptly published in the Federal Register notice of new status of the proposed regulations [see 57 F.R. 56347].

"(3) If the Secretary of Health and Human Services does not promulgate final regulations under section 403(q)(4) of the Federal Food, Drug, and Cosmetic Act upon the expiration of 6 months after the date on which the Secretary makes a finding that there has been no substantial compliance with section 403(q)(4)(C) of such Act, the proposed regulations issued in accordance with such section shall be considered as the final regulations upon the expiration of such 6 months. There shall be promptly published in the Federal Register notice of new status of the proposed regulations."

[Pub. L. 102–571, title II, §202(a)(2)(C), Oct. 29, 1992, 106 Stat. 4501, provided that: "The amendments made by subparagraph (B) [amending sections 2(b) and 3(b) of Pub. L. 101–535, set out above and below] shall not be construed to modify the effective date of final regulations under sections 2(b) and 3(b) of the Nutrition Labeling and Education Act of 1990 [Pub. L. 101–535] (21 U.S.C. 343 note) with respect to foods that are not such dietary supplements."]

Pub. L. 101–535, §3(b), Nov. 8, 1990, 104 Stat. 2360, as amended by Pub. L. 102–571, title II, §202(a)(2)(A), (B), Oct. 29, 1992, 106 Stat. 4500, 4501, provided that:

"(1)(A) Within 12 months of the date of the enactment of this Act [Nov. 8, 1990], the Secretary of Health and Human Services shall issue proposed regulations to implement section 403(r) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(r)], except that the Secretary shall issue, not later than June 15, 1993, proposed regulations that are applicable to dietary supplements of vitamins, minerals, herbs, or other similar nutritional substances to implement such section. Such regulations—

"(i) shall identify claims described in section 403(r)(1)(A) of such Act which comply with section 403(r)(2) of such Act,

"(ii) shall identify claims described in section 403(r)(1)(B) of such Act which comply with section 403(r)(3) of such Act,

"(iii) shall, in defining terms used to characterize the level of any nutrient in food under section 403(r)(2)(A)(i) of such Act, define—

"(I) free,

"(II) low,

"(III) light or lite,

"(IV) reduced,

"(V) less, and

"(VI) high,

unless the Secretary finds that the use of any such term would be misleading,

"(iv) shall permit statements describing the amount and percentage of nutrients in food which are not misleading and are consistent with the terms defined in section 403(r)(2)(A)(i) of such Act,

"(v) shall provide that if multiple claims subject to section 403(r)(1)(A) of such Act are made on a single panel of the food label or page of a labeling brochure, a single statement may be made to satisfy section 403(r)(2)(B) of such Act,

"(vi) shall determine whether claims respecting the following nutrients and diseases meet the requirements of section 403(r)(3) of such Act: Calcium and osteoporosis, dietary fiber and cancer, lipids and cardiovascular disease, lipids and cancer, sodium and hypertension, and dietary fiber and cardiovascular disease,

"(vii) shall not require a person who proposes to make a claim described in section 403(r)(1)(B) of such Act which is in compliance with such regulations to secure the approval of the Secretary before making such claim,

"(viii) may permit a claim described in section 403(r)(1)(A) of such Act to be made for butter,

"(ix) may, in defining terms under section 403(r)(2)(A)(i), include similar terms which are commonly understood to have the same meaning, and

"(x) shall establish, as required by section 403(r)(5)(D), the procedure and standard respecting the validity of claims made with respect to a dietary supplement of vitamins, minerals, herbs, or other similar nutritional substances and shall determine whether claims respecting the following nutrients and diseases meet the requirements of section 403(r)(5)(D) of such Act: folic acid and neural tube defects, antioxident [sic] vitamins and cancer, zinc and immune function in the elderly, and omega-3 fatty acids and heart disease.

"(B) Not later than 24 months after the date of the enactment of this Act, the Secretary shall issue final regulations to implement section 403(r) of the Federal Food, Drug, and Cosmetic Act, except that the Secretary shall issue, not later than December 31, 1993, such a final regulation applicable to dietary supplements of vitamins, minerals, herbs, or other similar nutritional substances..[sic]

"(2) If the Secretary does not promulgate final regulations under paragraph (1)(B) upon the expiration of 24 months after the date of the enactment of this Act, the proposed regulations issued in accordance with paragraph (1)(A) shall be considered as the final regulations upon the expiration of such 24 months, except that the proposed regulations applicable to dietary supplements of vitamins, minerals, herbs, or other similar nutritional substances shall not be considered to be final regulations until December 31, 1993. There shall be promptly published in the Federal Register notice of the new status of the proposed regulations [see 57 F.R. 56347]."

[For construction of amendment made by section 202(a)(2)(B) of Pub. L. 102–571 to section 3(b) of Pub. L. 101–535 set out above, see section 202(a)(2)(C) of Pub. L. 102–571 set out above following section 2(b) of Pub. L. 101–535.]

Transfer of Functions

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

Labeling Exemption for Single Ingredient Foods and Products

Pub. L. 115–334, title XII, §12516, Dec. 20, 2018, 132 Stat. 5000, provided that: "The food labeling requirements under section 403(q) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343(q)) shall not require that the nutrition facts label of any single-ingredient sugar, honey, agave, or syrup, including maple syrup, that is packaged and offered for sale as a single-ingredient food bear the declaration 'Includes X g Added Sugars.'."

Findings

Pub. L. 108–282, title II, §202, Aug. 2, 2004, 118 Stat. 905, provided that: "Congress finds that—

"(1) it is estimated that—

"(A) approximately 2 percent of adults and about 5 percent of infants and young children in the United States suffer from food allergies; and

"(B) each year, roughly 30,000 individuals require emergency room treatment and 150 individuals die because of allergic reactions to food;

"(2)(A) eight major foods or food groups—milk, eggs, fish, Crustacean shellfish, tree nuts, peanuts, wheat, and soybeans—account for 90 percent of food allergies;

"(B) at present, there is no cure for food allergies; and

"(C) a food allergic consumer must avoid the food to which the consumer is allergic;

"(3)(A) in a review of the foods of randomly selected manufacturers of baked goods, ice cream, and candy in Minnesota and Wisconsin in 1999, the Food and Drug Administration found that 25 percent of sampled foods failed to list peanuts or eggs as ingredients on the food labels; and

"(B) nationally, the number of recalls because of unlabeled allergens rose to 121 in 2000 from about 35 a decade earlier;

"(4) a recent study shows that many parents of children with a food allergy were unable to correctly identify in each of several food labels the ingredients derived from major food allergens;

"(5)(A) ingredients in foods must be listed by their 'common or usual name';

"(B) in some cases, the common or usual name of an ingredient may be unfamiliar to consumers, and many consumers may not realize the ingredient is derived from, or contains, a major food allergen; and

"(C) in other cases, the ingredients may be declared as a class, including spices, flavorings, and certain colorings, or are exempt from the ingredient labeling requirements, such as incidental additives; and

"(6)(A) celiac disease is an immune-mediated disease that causes damage to the gastrointestinal tract, central nervous system, and other organs;

"(B) the current recommended treatment is avoidance of glutens in foods that are associated with celiac disease; and

"(C) a multicenter, multiyear study estimated that the prevalence of celiac disease in the United States is 0.5 to 1 percent of the general population."

Rulemaking on Labeling

Pub. L. 108–282, title II, §206, Aug. 2, 2004, 118 Stat. 910, provided that: "Not later than 2 years after the date of enactment of this Act [Aug. 2, 2004], the Secretary of Health and Human Services, in consultation with appropriate experts and stakeholders, shall issue a proposed rule to define, and permit use of, the term 'gluten-free' on the labeling of foods. Not later than 4 years after the date of enactment of this Act, the Secretary shall issue a final rule to define, and permit use of, the term 'gluten-free' on the labeling of foods."

Pub. L. 107–171, title X, §10809, May 13, 2002, 116 Stat. 531, provided that: "The Secretary of Health and Human Services (referred to in this section as the 'Secretary') shall publish a proposed rule and, with due consideration to public comment, a final rule to revise, as appropriate, the current regulation governing the labeling of foods that have been treated to reduce pest infestation or pathogens by treatment by irradiation using radioactive isotope, electronic beam, or x-ray. Pending promulgation of the final rule required by this subsection [probably should be "this section"], any person may petition the Secretary for approval of labeling, which is not false or misleading in any material respect, of a food which has been treated by irradiation using radioactive isotope, electronic beam, or x-ray. The Secretary shall approve or deny such a petition within 180 days of receipt of the petition, or the petition shall be deemed denied, except to the extent additional agency review is mutually agreed upon by the Secretary and the petitioner. Any denial of a petition under this subsection shall constitute final agency action subject to judicial review by the United States Court of Appeals for the District of Columbia Circuit. Any labeling approved through the foregoing petition process shall be subject to the provisions of the final rule referred to in the first sentence of the subparagraph on the effective date of such final rule."

Commission on Dietary Supplement Labels

Pub. L. 103–417, §12, Oct. 25, 1994, 108 Stat. 4332, provided that:

"(a) Establishment.—There shall be established as an independent agency within the executive branch a commission to be known as the Commission on Dietary Supplement Labels (hereafter in this section referred to as the 'Commission').

"(b) Membership.—

"(1) Composition.—The Commission shall be composed of 7 members who shall be appointed by the President.

"(2) Expertise requirement.—The members of the Commission shall consist of individuals with expertise and experience in dietary supplements and in the manufacture, regulation, distribution, and use of such

supplements. At least three of the members of the Commission shall be qualified by scientific training and experience to evaluate the benefits to health of the use of dietary supplements and one of such three members shall have experience in pharmacognosy, medical botany, traditional herbal medicine, or other related sciences. Members and staff of the Commission shall be without bias on the issue of dietary supplements.

"(c) FUNCTIONS OF THE COMMISSION.—The Commission shall conduct a study on, and provide recommendations for, the regulation of label claims and statements for dietary supplements, including the use of literature in connection with the sale of dietary supplements and procedures for the evaluation of such claims. In making such recommendations, the Commission shall evaluate how best to provide truthful, scientifically valid, and not misleading information to consumers so that such consumers may make informed and appropriate health care choices for themselves and their families.

"(d) ADMINISTRATIVE POWERS OF THE COMMISSION.—

"(1) HEARINGS.—The Commission may hold hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers advisable to carry out the purposes of this section.

"(2) INFORMATION FROM FEDERAL AGENCIES.—The Commission may secure directly from any Federal department or agency such information as the Commission considers necessary to carry out the provisions of this section.

"(3) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to carry out this section.

"(e) REPORTS AND RECOMMENDATIONS.—

"(1) FINAL REPORT REQUIRED.—Not later than 24 months after the date of enactment of this Act [Oct. 25, 1994], the Commission shall prepare and submit to the President and to the Congress a final report on the study required by this section.

"(2) RECOMMENDATIONS.—The report described in paragraph (1) shall contain such recommendations, including recommendations for legislation, as the Commission deems appropriate.

"(3) ACTION ON RECOMMENDATIONS.—Within 90 days of the issuance of the report under paragraph (1), the Secretary of Health and Human Services shall publish in the Federal Register a notice of any recommendation of Commission for changes in regulations of the Secretary for the regulation of dietary supplements and shall include in such notice a notice of proposed rulemaking on such changes together with an opportunity to present views on such changes. Such rulemaking shall be completed not later than 2 years after the date of the issuance of such report. If such rulemaking is not completed on or before the expiration of such 2 years, regulations of the Secretary published in 59 FR 395–426 on January 4, 1994, shall not be in effect."

EXTENSION OF COMPLIANCE DEADLINE FOR CERTAIN FOOD PRODUCTS PACKAGED PRIOR TO AUGUST 8, 1994

Pub. L. 103–261, May 26, 1994, 108 Stat. 705, provided: "That before August 8, 1994, sections 403(q) and 403(r)(2) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(q), (r)(2)] and the provision of section 403(i) of such Act added by section 7(2) of the Nutrition Labeling and Education Act of 1990 [Pub. L. 101–535], shall not apply with respect to a food product which is contained in a package for which the label was printed before May 8, 1994 (or before August 8, 1994, in the case of a juice or milk food product if the person responsible for the labeling of such food product exercised due diligence in obtaining before such date labels which are in compliance with such sections 403(q) and 403(r)(2) and such provision of section 403(i)), if, before June 15, 1994, the person who introduces or delivers for introduction such food product into interstate commerce submits to the Secretary of Health and Human Services a certification that such person will comply with this section and will comply with such sections 403(q) and 403(r)(2) and such provision of section 403(i) after August 8, 1994."

LIMITATIONS ON APPLICATION OF SMALL BUSINESS EXEMPTION

Pub. L. 103–80, §2(a), Aug. 13, 1993, 107 Stat. 773, provided that:

"(1) BEFORE MAY 8, 1995.—Before May 8, 1995, the exemption provided by section 403(q)(5)(D) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(q)(5)(D)] shall be available in accordance with the regulations of the Secretary of Health and Human Services published at 21 C.F.R. 101.9(j)(1)(i)(1993).

"(2) AFTER MAY 8, 1995.—After May 8, 1995, the exemption provided by section 403(q)(5)(D) of the Federal Food, Drug, and Cosmetic Act shall only be available with respect to food when it is sold to consumers."

PROHIBITION ON IMPLEMENTATION OF PUB. L. 101–535 WITH RESPECT TO DIETARY SUPPLEMENTS

Pub. L. 102–571, title II, §202(a)(1), Oct. 29, 1992, 106 Stat. 4500, provided that: "Notwithstanding any other provision of law and except as provided in subsection (b) [set out as a note below] and in the amendment made by paragraph (2)(A) [amending provisions set out as notes above], the Secretary of Health and Human Services may not implement the Nutrition Labeling and Education Act of 1990 (Public Law 101–535; 104 Stat. 2353) [see Short Title of 1990 Amendments note set out under section 301 of this title], or any amendment made by such Act, earlier than December 15, 1993, with respect to dietary supplements of vitamins, minerals, herbs, or other similar nutritional substances."

Health Claims Made With Respect to Dietary Supplements

Pub. L. 102–571, title II, §202(b), Oct. 29, 1992, 106 Stat. 4501, provided that: "Notwithstanding section 403(r)(5)(D) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343(r)(5)(D)) and subsection (a) [enacting provisions set out as notes above and amending provisions set out as notes above and under section 343–1 of this title], the Secretary of Health and Human Services may, earlier than December 15, 1993, approve claims made with respect to dietary supplements of vitamins, minerals, herbs, or other similar nutritional substances that are claims described in clauses (vi) and (x) of section 3(b)(1)(A) of the Nutrition Labeling and Education Act of 1990 [Pub. L. 101–535] (21 U.S.C. 343 note)."

United States Recommended Daily Allowances of Vitamins or Minerals

Pub. L. 102–571, title II, §203, Oct. 29, 1992, 106 Stat. 4502, provided that: "Notwithstanding any other provision of Federal law, no regulations that require the use of, or are based upon, recommended daily allowances of vitamins or minerals may be promulgated before November 8, 1993 (other than regulations establishing the United States recommended daily allowances specified at section 101.9(c)(7)(iv) of title 21, Code of Federal Regulations, as in effect on October 6, 1992, or regulations under section 403(r)(1)(A) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343(r)(1)(A)) that are based on such recommended daily allowances)."

Consumer Education

Pub. L. 101–535, §2(c), Nov. 8, 1990, 104 Stat. 2357, provided that: "The Secretary of Health and Human Services shall carry out activities which educate consumers about—

"(1) the availability of nutrition information in the label or labeling of food, and

"(2) the importance of that information in maintaining healthy dietary practices."

Studies Concerning Carcinogenic and Other Toxic Substances in Food and Impurities in and Toxicity of Saccharin

Pub. L. 95–203, §2, Nov. 23, 1977, 91 Stat. 1451, directed Secretary of Health, Education, and Welfare to conduct a study concerning carcinogenic and other toxic substances in food and impurities in and toxicity of saccharin and make a report respecting the carcinogenic and other substances to Committee on Human Resources of the Senate within 12 months of Nov. 23, 1977, and a report respecting saccharin to such committee within 15 months of Nov. 23, 1977.

Report to Congressional Committees Respecting Action Taken Pursuant to Former Par. (o)(2)

Pub. L. 95–203, §4(a)(3), Nov. 23, 1977, 91 Stat. 1453, provided that the Secretary was to report to specified congressional committees any action taken under former par. (o)(2) of this section.

State or Territorial Requirements

Pub. L. 86–537, §2, June 29, 1960, 74 Stat. 251, provided that: "Nothing in the amendments made by the first section of this Act [amending this section] shall affect any requirement of the laws of any State or Territory."

[1] *So in original. Probably should be followed by a comma.*

§343–1. National uniform nutrition labeling

(a) Except as provided in subsection (b), no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce—

(1) any requirement for a food which is the subject of a standard of identity established under section 341 of this title that is not identical to such standard of identity or that is not identical to the requirement

of section 343(g) of this title, except that this paragraph does not apply to a standard of identity of a State or political subdivision of a State for maple syrup that is of the type required by sections 341 and 343(g) of this title,

(2) any requirement for the labeling of food of the type required by section 343(c), 343(e), 343(i)(2), 343(w), or 343(x) of this title that is not identical to the requirement of such section, except that this paragraph does not apply to a requirement of a State or political subdivision of a State that is of the type required by section 343(c) of this title and that is applicable to maple syrup,

(3) any requirement for the labeling of food of the type required by section 343(b), 343(d), 343(f), 343(h), 343(i)(1), or 343(k) of this title that is not identical to the requirement of such section, except that this paragraph does not apply to a requirement of a State or political subdivision of a State that is of the type required by section 343(h)(1) of this title and that is applicable to maple syrup,

(4) any requirement for nutrition labeling of food that is not identical to the requirement of section 343(q) of this title, except that this paragraph does not apply to food that is offered for sale in a restaurant or similar retail food establishment that is not part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items unless such restaurant or similar retail food establishment complies with the voluntary provision of nutrition information requirements under section 343(q)(5)(H)(ix) of this title, or

(5) any requirement respecting any claim of the type described in section 343(r)(1) of this title made in the label or labeling of food that is not identical to the requirement of section 343(r) of this title, except a requirement respecting a claim made in the label or labeling of food which is exempt under section 343(r)(5)(B) of this title.

Paragraph (3) shall take effect in accordance with section 6(b) of the Nutrition Labeling and Education Act of 1990.

(b) Upon petition of a State or a political subdivision of a State, the Secretary may exempt from subsection (a), under such conditions as may be prescribed by regulation, any State or local requirement that—

(1) would not cause any food to be in violation of any applicable requirement under Federal law,

(2) would not unduly burden interstate commerce, and

(3) is designed to address a particular need for information which need is not met by the requirements of the sections referred to in subsection (a).

(June 25, 1938, ch. 675, §403A, as added Pub. L. 101–535, §6(a), Nov. 8, 1990, 104 Stat. 2362; amended Pub. L. 102–108, §2(b), Aug. 17, 1991, 105 Stat. 549; Pub. L. 103–396, §3(a), Oct. 22, 1994, 108 Stat. 4154; Pub. L. 108–282, title II, §203(c)(2), Aug. 2, 2004, 118 Stat. 908; Pub. L. 111–148, title IV, §4205(c), Mar. 23, 2010, 124 Stat. 576.)

Editorial Notes

References in Text

Section 6(b) of the Nutrition Labeling and Education Act of 1990 [Pub. L. 101–535], referred to in subsec. (a), is set out below.

Amendments

2010—Subsec. (a)(4). Pub. L. 111–148 substituted "except that this paragraph does not apply to food that is offered for sale in a restaurant or similar retail food establishment that is not part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items unless such restaurant or similar retail food establishment complies with the voluntary provision of nutrition information requirements under section 343(q)(5)(H)(ix) of this title" for "except a requirement for nutrition labeling of food which is exempt under subclause (i) or (ii) of section 343(q)(5)(A) of this title".

2004—Subsec. (a)(2). Pub. L. 108–282 substituted "343(i)(2), 343(w), or 343(x)" for "or 343(i)(2)".

1994—Subsec. (a)(1). Pub. L. 103–396, §3(a)(1), inserted at end "except that this paragraph does not apply to a standard of identity of a State or political subdivision of a State for maple syrup that is of the type required by

sections 341 and 343(g) of this title,".

Subsec. (a)(2). Pub. L. 103–396, §3(a)(2), inserted at end "except that this paragraph does not apply to a requirement of a State or political subdivision of a State that is of the type required by section 343(c) of this title and that is applicable to maple syrup,".

Subsec. (a)(3). Pub. L. 103–396, §3(a)(3), inserted at end "except that this paragraph does not apply to a requirement of a State or political subdivision of a State that is of the type required by section 343(h)(1) of this title and that is applicable to maple syrup,".

1991—Subsec. (a)(5). Pub. L. 102–108 substituted "section 343(r)(5)(B) of this title" for "clause (B) of such section".

Statutory Notes and Related Subsidiaries

Effective Date of 2004 Amendment

Amendment by Pub. L. 108–282 applicable to any food that is labeled on or after Jan. 1, 2006, see section 203(d) of Pub. L. 108–282, set out as a note under section 321 of this title.

Effective Date

Pub. L. 101–535, §10(b), Nov. 8, 1990, 104 Stat. 2366, as amended by Pub. L. 102–571, title I, §107(16), title II, §202(a)(4), Oct. 29, 1992, 106 Stat. 4499, 4501, provided that:

"(1) In general.—Except as provided in paragraph (2), the amendments made by section 6 [enacting this section] shall take effect—

"(A) with respect to a requirement of a State or political subdivision described in paragraph (1) of section 403A(a) of the Federal Food, Drug, and Cosmetic Act [subsec. (a)(1) of this section], on the date of the enactment of this Act [Nov. 8, 1990],

"(B) with respect to a requirement of a State or political subdivision described in paragraph (2) of section 403A(a) of the Federal Food, Drug, and Cosmetic Act, one year after the date of the enactment of this Act,

"(C) with respect to a requirement of a State or political subdivision described in paragraph (3) of section 403A(a) of the Federal Food, Drug, and Cosmetic Act, as prescribed by section 6(b) of the Nutrition Labeling and Education Act of 1990 [Pub. L. 101–535, set out below],

"(D) with respect to a requirement of a State or political subdivision described in paragraph (4) of section 403A(a) of the Federal Food, Drug, and Cosmetic Act, on the date regulations to implement section 403(q) of such Act [21 U.S.C. 343(q)] take effect, and

"(E) with respect to a requirement of a State or political subdivision described in paragraph (5) of section 403A(a) of the Federal Food, Drug, and Cosmetic Act, on the date regulations to implement section 403(r) of such Act take effect.

"(2) Exception.—If a State or political subdivision submits a petition under section 403A(b) of the Federal Food, Drug, and Cosmetic Act for a requirement described in section 403A(a) of such Act within 18 months of the date of the enactment of this Act, paragraphs (3) through (5) of such section 403A(a) shall not apply with respect to such State or political subdivision requirement until—

"(A) 24 months after the date of the enactment of this Act, or

"(B) action on the petition,

whichever occurs later.

"(3) Requirements pertaining to certain claims.—Notwithstanding subparagraphs (D) and (E) of paragraph (1) and except with respect to claims approved in accordance with section 202(b) of the Dietary Supplement Act of 1992 [Pub. L. 102–571, set out as a note under section 343 of this title], the requirements described in paragraphs (4) and (5) of section 403A(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343–1(a)(4) and (5)) that pertain to dietary supplements of vitamins, minerals, herbs, or other similar nutritional substances shall not take effect until the date final regulations take effect to implement subsection (q) or (r), as appropriate, of section 403 of such Act with respect to such dietary supplements."

Pub. L. 101–535, §6(b), Nov. 8, 1990, 104 Stat. 2363, provided that:

"(1) For the purpose of implementing section 403A(a)(3) [21 U.S.C. 343–1(a)(3)], the Secretary of Health and Human Services shall enter into a contract with a public or nonprofit private entity to conduct a study of—

"(A) State and local laws which require the labeling of food that is of the type required by sections 403(b), 403(d), 403(f), 403(h), 403(i)(1), and 403(k) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343(b), (d), (f), (h), (i)(1), (k)], and

"(B) the sections of the Federal Food, Drug, and Cosmetic Act referred to in subparagraph (A) and the regulations issued by the Secretary to enforce such sections to determine whether such sections and regulations adequately implement the purposes of such sections.

"(2) The contract under paragraph (1) shall provide that the study required by such paragraph shall be completed within 6 months of the date of the enactment of this Act [Nov. 8, 1990].

"(3)(A) Within 9 months of the date of the enactment of this Act, the Secretary shall publish a proposed list of sections which are adequately being implemented by regulations as determined under paragraph (1)(B) and sections which are not adequately being implemented by regulations as so determined. After publication of the lists, the Secretary shall provide 60 days for comments on such lists.

"(B) Within 24 months of the date of the enactment of this Act, the Secretary shall publish a final list of sections which are adequately being implemented by regulations and a list of sections which are not adequately being implemented by regulations. With respect to a section which is found by the Secretary to be adequately implemented, no State or political subdivision of a State may establish or continue in effect as to any food in interstate commerce any requirement which is not identical to the requirement of such section.

"(C) Within 24 months of the date of the enactment of this Act, the Secretary shall publish proposed revisions to the regulations found to be inadequate under subparagraph (B) and within 30 months of such date shall issue final revisions. Upon the effective date of such final revisions, no State or political subdivision may establish or continue in effect any requirement which is not identical to the requirement of the section which had its regulations revised in accordance with this subparagraph.

"(D)(i) If the Secretary does not issue a final list in accordance with subparagraph (B), the proposed list issued under subparagraph (A) shall be considered the final list and States and political subdivisions shall be preempted with respect to sections found to be adequate in such proposed list in accordance with subparagraph (B).

"(ii) If the Secretary does not issue final revisions of regulations in accordance with subparagraph (C), the proposed revisions issued under such subparagraph shall be considered the final revisions and States and political subdivisions shall be preempted with respect to sections the regulations of which are revised by the proposed revisions.

"(E) Subsection (b) of section 403A of the Federal Food, Drug, and Cosmetic Act shall apply with respect to the prohibition prescribed by subparagraphs (B) and (C)."

Construction of Pub. L. 101–535

Pub. L. 101–535, §6(c), Nov. 8, 1990, 104 Stat. 2364, provided that:

"(1) The Nutrition Labeling and Education Act of 1990 [Pub. L. 101–535, see Short Title of 1990 Amendment note set out under section 301 of this title] shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under section 403A of the Federal Food, Drug, and Cosmetic Act [this section].

"(2) The amendment made by subsection (a) [enacting this section] and the provisions of subsection (b) [set out as a note above] shall not be construed to apply to any requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component of the food.

"(3) The amendment made by subsection (a), the provisions of subsection (b) and paragraphs (1) and (2) of this subsection shall not be construed to affect preemption, express or implied, of any such requirement of a State or political subdivision, which may arise under the Constitution, any provision of the Federal Food, Drug, and Cosmetic Act [this chapter] not amended by subsection (a), any other Federal law, or any Federal regulation, order, or other final agency action reviewable under chapter 7 of title 5, United States Code."

Amendments by Pub. L. 101–535 not to be construed to alter the authority of the Secretary of Health and Human Services and the Secretary of Agriculture under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), the Federal Meat Inspection Act (21 U.S.C. 601 et seq.), the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), and the Egg Products Inspection Act (21 U.S.C. 1031 et seq.), see section 9 of Pub. L. 101–535, set out as a note under section 343 of this title.

Delayed Applicability of Certain Provisions

Pub. L. 102–408, title III, §310, Oct. 13, 1992, 106 Stat. 2090, provided that: "Notwithstanding any other provision of law, section 403A(a)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343–1(a)(1)) shall not apply with respect to any requirement of any State or political subdivision regarding maple syrup until September 1, 1994."

§343–2. Dietary supplement labeling exemptions

(a) In general

A publication, including an article, a chapter in a book, or an official abstract of a peer-reviewed scientific publication that appears in an article and was prepared by the author or the editors of the publication, which is reprinted in its entirety, shall not be defined as labeling when used in connection with the sale of a dietary supplement to consumers when it—

(1) is not false or misleading;

(2) does not promote a particular manufacturer or brand of a dietary supplement;

(3) is displayed or presented, or is displayed or presented with other such items on the same subject matter, so as to present a balanced view of the available scientific information on a dietary supplement;

(4) if displayed in an establishment, is physically separate from the dietary supplements; and

(5) does not have appended to it any information by sticker or any other method.

(b) Application

Subsection (a) shall not apply to or restrict a retailer or wholesaler of dietary supplements in any way whatsoever in the sale of books or other publications as a part of the business of such retailer or wholesaler.

(c) Burden of proof

In any proceeding brought under subsection (a), the burden of proof shall be on the United States to establish that an article or other such matter is false or misleading.

(June 25, 1938, ch. 675, §403B, as added Pub. L. 103–417, §5, Oct. 25, 1994, 108 Stat. 4328.)

§343–3. Disclosure

(a) No provision of section 321(n), 343(a), or 348 of this title shall be construed to require on the label or labeling of a food a separate radiation disclosure statement that is more prominent than the declaration of ingredients required by section 343(i)(2) of this title.

(b) In this section, the term "radiation disclosure statement" means a written statement that discloses that a food has been intentionally subject to radiation.

(June 25, 1938, ch. 675, §403C, as added Pub. L. 105–115, title III, §306, Nov. 21, 1997, 111 Stat. 2353.)

Statutory Notes and Related Subsidiaries

Effective Date

Section effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as an Effective Date of 1997 Amendment note under section 321 of this title.

§343a. Repealed. Pub. L. 106–554, §1(a)(1) [title V, §517], Dec. 21, 2000, 114 Stat. 2763, 2763A-73

Section, Pub. L. 95–203, §4(c), (d), Nov. 23, 1977, 91 Stat. 1453, 1454, related to distribution of information on health risks of saccharin.

§344. Emergency permit control

(a) Conditions on manufacturing, processing, etc., as health measure

Whenever the Secretary finds after investigation that the distribution in interstate commerce of any class of food may, by reason of contamination with micro-organisms during the manufacture, processing, or packing thereof in any locality, be injurious to health, and that such injurious nature cannot be adequately determined after such articles have entered interstate commerce, he then, and in such case only, shall promulgate regulations providing for the issuance, to manufacturers, processors, or packers of such class of food in such locality, of permits to which shall be attached such conditions governing the manufacture, processing, or packing of such class of food, for such temporary period of time, as may be necessary to protect the public health; and after the effective date of such regulations, and during such

temporary period, no person shall introduce or deliver for introduction into interstate commerce any such food manufactured, processed, or packed by any such manufacturer, processor, or packer unless such manufacturer, processor, or packer holds a permit issued by the Secretary as provided by such regulations.

(b) Violation of permit; suspension and reinstatement

The Secretary is authorized to suspend immediately upon notice any permit issued under authority of this section if it is found that any of the conditions of the permit have been violated. The holder of a permit so suspended shall be privileged at any time to apply for the reinstatement of such permit, and the Secretary shall, immediately after prompt hearing and an inspection of the establishment, reinstate such permit if it is found that adequate measures have been taken to comply with and maintain the conditions of the permit, as originally issued or as amended.

(c) Inspection of permit-holding establishments

Any officer or employee duly designated by the Secretary shall have access to any factory or establishment, the operator of which holds a permit from the Secretary, for the purpose of ascertaining whether or not the conditions of the permit are being complied with, and denial of access for such inspection shall be ground for suspension of the permit until such access is freely given by the operator.

(June 25, 1938, ch. 675, §404, 52 Stat. 1048.)

Statutory Notes and Related Subsidiaries

Transfer of Functions

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

§345. Regulations making exemptions

The Secretary shall promulgate regulations exempting from any labeling requirement of this chapter (1) small open containers of fresh fruits and fresh vegetables and (2) food which is, in accordance with the practice of the trade, to be processed, labeled, or repacked in substantial quantities at establishments other than those where originally processed or packed, on condition that such food is not adulterated or misbranded under the provisions of this chapter upon removal from such processing, labeling, or repacking establishment. This section does not apply to the labeling requirements of sections 343(q) and 343(r) of this title.

(June 25, 1938, ch. 675, §405, 52 Stat. 1049; Pub. L. 101–535, §5(a), Nov. 8, 1990, 104 Stat. 2362.)

Editorial Notes

Amendments

1990—Pub. L. 101–535 inserted at end "This section does not apply to the labeling requirements of sections 343(q) and 343(r) of this title."

Statutory Notes and Related Subsidiaries

Effective Date of 1990 Amendment

Amendment by Pub. L. 101–535 effective six months after the date of the promulgation of final regulations to implement section 343(r) of this title, or if such regulations are not promulgated, the date proposed regulations are to be considered as such final regulations (Nov. 8, 1992), with exception for persons marketing food the brand name of which contains a term defined by the Secretary under section 343(r)(2)(A)(i) of this title, see section 10(a) of Pub. L. 101–535, set out as a note under section 343 of this title.

Construction of Amendments by Pub. L. 101–535

Amendments by Pub. L. 101–535 not to be construed to alter authority of Secretary of Health and Human Services and Secretary of Agriculture under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), the Federal Meat Inspection Act (21 U.S.C. 601 et seq.), the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), and the Egg Products Inspection Act (21 U.S.C. 1031 et seq.), see section 9 of Pub. L. 101–535, set out as a note under section 343 of this title.

Transfer of Functions

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

§346. Tolerances for poisonous or deleterious substances in food; regulations

Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2)(A) of section 342(a) of this title; but when such substance is so required or cannot be so avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2)(A) of section 342(a) of this title. While such a regulation is in effect limiting the quantity of any such substance in the case of any food, such food shall not, by reason of bearing or containing any added amount of such substance, be considered to be adulterated within the meaning of clause (1) of section 342(a) of this title. In determining the quantity of such added substance to be tolerated in or on different articles of food the Secretary shall take into account the extent to which the use of such substance is required or cannot be avoided in the production of each such article, and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances.

(June 25, 1938, ch. 675, §406, 52 Stat. 1049; Pub. L. 85–929, §3(c), Sept. 6, 1958, 72 Stat. 1785; Pub. L. 86–618, title I, §103(a)(1), July 12, 1960, 74 Stat. 398.)

Editorial Notes

Amendments

1960—Pub. L. 86–618 repealed subsec. (b) which required Secretary to promulgate regulations for listing of coal-tar colors.

1958—Subsec. (a). Pub. L. 85–929 substituted "clause (2)(A)" for "clause (2)" in first sentence.

Statutory Notes and Related Subsidiaries

Effective Date of 1960 Amendment

Amendment by Pub. L. 86–618 effective July 12, 1960, subject to the provisions of section 203 of Pub. L. 86–618, see section 202 of Pub. L. 86–618, set out as a note under section 379e of this title.

Effective Date of Nematocide, Plant Regulator, Defoliant, and Desiccant Amendment of 1959

Effective date of subsec. (a) as in force prior to July 22, 1954, with respect to particular commercial use of a nematocide, plant regulator, defoliant, or desiccant in or on a raw agricultural commodity made before Jan. 1, 1958, see section 3(b) of Pub. L. 86–139, Aug. 7, 1959, 73 Stat. 288.

Effective Date of 1958 Amendment

For effective date of amendment by Pub. L. 85–929, see section 6(b), (c) of Pub. L. 85–929, set out as a note under section 342 of this title.

Transfer of Functions

Functions vested in Secretary of Health, Education, and Welfare [now Health and Human Services] in establishing tolerances for pesticide chemicals under this section together with authority to monitor compliance with tolerances and effectiveness of surveillance and enforcement and to provide technical assistance to States and conduct research under this chapter and section 201 et seq. of Title 42, The Public Health and Welfare, transferred to Administrator of Environmental Protection Agency by Reorg. Plan No. 3 of 1970, §2(a)(4), eff. Dec. 2, 1970, 35 F.R. 15623, 84 Stat. 2086, set out in the Appendix to Title 5, Government Organization and Employees.

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration to Federal Security Agency, see notes set out under section 321 of this title.

§346a. Tolerances and exemptions for pesticide chemical residues

(a) Requirement for tolerance or exemption

(1) General rule

Except as provided in paragraph (2) or (3), any pesticide chemical residue in or on a food shall be deemed unsafe for the purpose of section 342(a)(2)(B) of this title unless—

(A) a tolerance for such pesticide chemical residue in or on such food is in effect under this section and the quantity of the residue is within the limits of the tolerance; or

(B) an exemption from the requirement of a tolerance is in effect under this section for the pesticide chemical residue.

For the purposes of this section, the term "food", when used as a noun without modification, shall mean a raw agricultural commodity or processed food.

(2) Processed food

Notwithstanding paragraph (1)—

(A) if a tolerance is in effect under this section for a pesticide chemical residue in or on a raw agricultural commodity, a pesticide chemical residue that is present in or on a processed food because the food is made from that raw agricultural commodity shall not be considered unsafe within the meaning of section 342(a)(2)(B) of this title despite the lack of a tolerance for the pesticide chemical residue in or on the processed food if the pesticide chemical has been used in or on the raw agricultural commodity in conformity with a tolerance under this section, such residue in or on the raw agricultural commodity has been removed to the extent possible in good manufacturing practice, and the concentration of the pesticide chemical residue in the processed food is not greater than the tolerance prescribed for the pesticide chemical residue in the raw agricultural commodity; or

(B) if an exemption for the requirement for a tolerance is in effect under this section for a pesticide chemical residue in or on a raw agricultural commodity, a pesticide chemical residue that is present in or on a processed food because the food is made from that raw agricultural commodity shall not be considered unsafe within the meaning of section 342(a)(2)(B) of this title.

(3) Residues of degradation products

If a pesticide chemical residue is present in or on a food because it is a metabolite or other degradation product of a precursor substance that itself is a pesticide chemical or pesticide chemical residue, such a residue shall not be considered to be unsafe within the meaning of section 342(a)(2)(B) of this title despite the lack of a tolerance or exemption from the need for a tolerance for such residue in or on such food if—

(A) the Administrator has not determined that the degradation product is likely to pose any potential health risk from dietary exposure that is of a different type than, or of a greater significance than, any risk posed by dietary exposure to the precursor substance;

(B) either—

(i) a tolerance is in effect under this section for residues of the precursor substance in or on the food, and the combined level of residues of the degradation product and the precursor substance in or on the food is at or below the stoichiometrically equivalent level that would be permitted by the

tolerance if the residue consisted only of the precursor substance rather than the degradation product; or

(ii) an exemption from the need for a tolerance is in effect under this section for residues of the precursor substance in or on the food; and

(C) the tolerance or exemption for residues of the precursor substance does not state that it applies only to particular named substances and does not state that it does not apply to residues of the degradation product.

(4) Effect of tolerance or exemption

While a tolerance or exemption from the requirement for a tolerance is in effect under this section for a pesticide chemical residue with respect to any food, the food shall not by reason of bearing or containing any amount of such a residue be considered to be adulterated within the meaning of section 342(a)(1) of this title.

(b) Authority and standard for tolerance

(1) Authority

The Administrator may issue regulations establishing, modifying, or revoking a tolerance for a pesticide chemical residue in or on a food—

(A) in response to a petition filed under subsection (d); or

(B) on the Administrator's own initiative under subsection (e).

As used in this section, the term "modify" shall not mean expanding the tolerance to cover additional foods.

(2) Standard

(A) General rule

(i) Standard

The Administrator may establish or leave in effect a tolerance for a pesticide chemical residue in or on a food only if the Administrator determines that the tolerance is safe. The Administrator shall modify or revoke a tolerance if the Administrator determines it is not safe.

(ii) Determination of safety

As used in this section, the term "safe", with respect to a tolerance for a pesticide chemical residue, means that the Administrator has determined that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.

(iii) Rule of construction

With respect to a tolerance, a pesticide chemical residue meeting the standard under clause (i) is not an eligible pesticide chemical residue for purposes of subparagraph (B).

(B) Tolerances for eligible pesticide chemical residues

(i) Definition

As used in this subparagraph, the term "eligible pesticide chemical residue" means a pesticide chemical residue as to which—

(I) the Administrator is not able to identify a level of exposure to the residue at which the residue will not cause or contribute to a known or anticipated harm to human health (referred to in this section as a "nonthreshold effect");

(II) the lifetime risk of experiencing the nonthreshold effect is appropriately assessed by quantitative risk assessment; and

(III) with regard to any known or anticipated harm to human health for which the Administrator is able to identify a level at which the residue will not cause such harm (referred to in this section as a "threshold effect"), the Administrator determines that the level of aggregate exposure is safe.

(ii) Determination of tolerance

Notwithstanding subparagraph (A)(i), a tolerance for an eligible pesticide chemical residue may be left in effect or modified under this subparagraph if—

(I) at least one of the conditions described in clause (iii) is met; and

(II) both of the conditions described in clause (iv) are met.

(iii) Conditions regarding use

For purposes of clause (ii), the conditions described in this clause with respect to a tolerance for an eligible pesticide chemical residue are the following:

(I) Use of the pesticide chemical that produces the residue protects consumers from adverse effects on health that would pose a greater risk than the dietary risk from the residue.

(II) Use of the pesticide chemical that produces the residue is necessary to avoid a significant disruption in domestic production of an adequate, wholesome, and economical food supply.

(iv) Conditions regarding risk

For purposes of clause (ii), the conditions described in this clause with respect to a tolerance for an eligible pesticide chemical residue are the following:

(I) The yearly risk associated with the nonthreshold effect from aggregate exposure to the residue does not exceed 10 times the yearly risk that would be allowed under subparagraph (A) for such effect.

(II) The tolerance is limited so as to ensure that the risk over a lifetime associated with the nonthreshold effect from aggregate exposure to the residue is not greater than twice the lifetime risk that would be allowed under subparagraph (A) for such effect.

(v) Review

Five years after the date on which the Administrator makes a determination to leave in effect or modify a tolerance under this subparagraph, and thereafter as the Administrator deems appropriate, the Administrator shall determine, after notice and opportunity for comment, whether it has been demonstrated to the Administrator that a condition described in clause (iii)(I) or clause (iii)(II) continues to exist with respect to the tolerance and that the yearly and lifetime risks from aggregate exposure to such residue continue to comply with the limits specified in clause (iv). If the Administrator determines by such date that such demonstration has not been made, the Administrator shall, not later than 180 days after the date of such determination, issue a regulation under subsection (e)(1) to modify or revoke the tolerance.

(vi) Infants and children

Any tolerance under this subparagraph shall meet the requirements of subparagraph (C).

(C) Exposure of infants and children

In establishing, modifying, leaving in effect, or revoking a tolerance or exemption for a pesticide chemical residue, the Administrator—

(i) shall assess the risk of the pesticide chemical residue based on—

(I) available information about consumption patterns among infants and children that are likely to result in disproportionately high consumption of foods containing or bearing such residue among infants and children in comparison to the general population;

(II) available information concerning the special susceptibility of infants and children to the pesticide chemical residues, including neurological differences between infants and children and adults, and effects of in utero exposure to pesticide chemicals; and

(III) available information concerning the cumulative effects on infants and children of such residues and other substances that have a common mechanism of toxicity; and

(ii) shall—

(I) ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue; and

(II) publish a specific determination regarding the safety of the pesticide chemical residue for infants and children.

The Secretary of Health and Human Services and the Secretary of Agriculture, in consultation with the Administrator, shall conduct surveys to document dietary exposure to pesticides among infants and children. In the case of threshold effects, for purposes of clause (ii)(I) an additional tenfold margin of safety for the pesticide chemical residue and other sources of exposure shall be applied for infants and children to take into account potential pre- and post-natal toxicity and completeness of the data with respect to exposure and toxicity to infants and children. Notwithstanding such requirement for an additional margin of safety, the Administrator may use a different margin of safety for the pesticide chemical residue only if, on the basis of reliable data, such margin will be safe for infants and children.

(D) Factors

In establishing, modifying, leaving in effect, or revoking a tolerance or exemption for a pesticide chemical residue, the Administrator shall consider, among other relevant factors—

(i) the validity, completeness, and reliability of the available data from studies of the pesticide chemical and pesticide chemical residue;

(ii) the nature of any toxic effect shown to be caused by the pesticide chemical or pesticide chemical residue in such studies;

(iii) available information concerning the relationship of the results of such studies to human risk;

(iv) available information concerning the dietary consumption patterns of consumers (and major identifiable subgroups of consumers);

(v) available information concerning the cumulative effects of such residues and other substances that have a common mechanism of toxicity;

(vi) available information concerning the aggregate exposure levels of consumers (and major identifiable subgroups of consumers) to the pesticide chemical residue and to other related substances, including dietary exposure under the tolerance and all other tolerances in effect for the pesticide chemical residue, and exposure from other non-occupational sources;

(vii) available information concerning the variability of the sensitivities of major identifiable subgroups of consumers;

(viii) such information as the Administrator may require on whether the pesticide chemical may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen or other endocrine effects; and

(ix) safety factors which in the opinion of experts qualified by scientific training and experience to evaluate the safety of food additives are generally recognized as appropriate for the use of animal experimentation data.

(E) Data and information regarding anticipated and actual residue levels

(i) Authority

In establishing, modifying, leaving in effect, or revoking a tolerance for a pesticide chemical residue, the Administrator may consider available data and information on the anticipated residue levels of the pesticide chemical in or on food and the actual residue levels of the pesticide chemical that have been measured in food, including residue data collected by the Food and Drug Administration.

(ii) Requirement

If the Administrator relies on anticipated or actual residue levels in establishing, modifying, or leaving in effect a tolerance, the Administrator shall pursuant to subsection (f)(1) require that data be provided five years after the date on which the tolerance is established, modified, or left in effect, and thereafter as the Administrator deems appropriate, demonstrating that such residue levels are not above the levels so relied on. If such data are not so provided, or if the data do not demonstrate that the residue levels are not above the levels so relied on, the Administrator shall, not later than 180 days after the date on which the data were required to be provided, issue a regulation under subsection (e)(1), or an order under subsection (f)(2), as appropriate, to modify or revoke the tolerance.

(F) Percent of food actually treated

In establishing, modifying, leaving in effect, or revoking a tolerance for a pesticide chemical residue, the Administrator may, when assessing chronic dietary risk, consider available data and information on the percent of food actually treated with the pesticide chemical (including aggregate pesticide use data collected by the Department of Agriculture) only if the Administrator—

(i) finds that the data are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain such pesticide chemical residue;

(ii) finds that the exposure estimate does not understate exposure for any significant subpopulation group;

(iii) finds that, if data are available on pesticide use and consumption of food in a particular area, the population in such area is not dietarily exposed to residues above those estimated by the Administrator; and

(iv) provides for the periodic reevaluation of the estimate of anticipated dietary exposure.

(3) Detection methods

(A) General rule

A tolerance for a pesticide chemical residue in or on a food shall not be established or modified by the Administrator unless the Administrator determines, after consultation with the Secretary, that there is a practical method for detecting and measuring the levels of the pesticide chemical residue in or on the food.

(B) Detection limit

A tolerance for a pesticide chemical residue in or on a food shall not be established at or modified to a level lower than the limit of detection of the method for detecting and measuring the pesticide chemical residue specified by the Administrator under subparagraph (A).

(4) International standards

In establishing a tolerance for a pesticide chemical residue in or on a food, the Administrator shall determine whether a maximum residue level for the pesticide chemical has been established by the Codex Alimentarius Commission. If a Codex maximum residue level has been established for the pesticide chemical and the Administrator does not propose to adopt the Codex level, the Administrator shall publish for public comment a notice explaining the reasons for departing from the Codex level.

(c) Authority and standard for exemptions

(1) Authority

The Administrator may issue a regulation establishing, modifying, or revoking an exemption from the requirement for a tolerance for a pesticide chemical residue in or on food—

(A) in response to a petition filed under subsection (d); or

(B) on the Administrator's initiative under subsection (e).

(2) Standard

(A) General rule

(i) Standard

The Administrator may establish or leave in effect an exemption from the requirement for a tolerance for a pesticide chemical residue in or on food only if the Administrator determines that the exemption is safe. The Administrator shall modify or revoke an exemption if the Administrator determines it is not safe.

(ii) Determination of safety

The term "safe", with respect to an exemption for a pesticide chemical residue, means that the Administrator has determined that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.

(B) Factors

In making a determination under this paragraph, the Administrator shall take into account, among other relevant considerations, the considerations set forth in subparagraphs (C) and (D) of subsection

(b)(2).

(3) Limitation

An exemption from the requirement for a tolerance for a pesticide chemical residue in or on food shall not be established or modified by the Administrator unless the Administrator determines, after consultation with the Secretary—

(A) that there is a practical method for detecting and measuring the levels of such pesticide chemical residue in or on food; or

(B) that there is no need for such a method, and states the reasons for such determination in issuing the regulation establishing or modifying the exemption.

(d) Petition for tolerance or exemption

(1) Petitions and petitioners

Any person may file with the Administrator a petition proposing the issuance of a regulation—

(A) establishing, modifying, or revoking a tolerance for a pesticide chemical residue in or on a food; or

(B) establishing, modifying, or revoking an exemption from the requirement of a tolerance for such a residue.

(2) Petition contents

(A) Establishment

A petition under paragraph (1) to establish a tolerance or exemption for a pesticide chemical residue shall be supported by such data and information as are specified in regulations issued by the Administrator, including—

(i)(I) an informative summary of the petition and of the data, information, and arguments submitted or cited in support of the petition; and

(II) a statement that the petitioner agrees that such summary or any information it contains may be published as a part of the notice of filing of the petition to be published under this subsection and as part of a proposed or final regulation issued under this section;

(ii) the name, chemical identity, and composition of the pesticide chemical residue and of the pesticide chemical that produces the residue;

(iii) data showing the recommended amount, frequency, method, and time of application of that pesticide chemical;

(iv) full reports of tests and investigations made with respect to the safety of the pesticide chemical, including full information as to the methods and controls used in conducting those tests and investigations;

(v) full reports of tests and investigations made with respect to the nature and amount of the pesticide chemical residue that is likely to remain in or on the food, including a description of the analytical methods used;

(vi) a practical method for detecting and measuring the levels of the pesticide chemical residue in or on the food, or for exemptions, a statement why such a method is not needed;

(vii) a proposed tolerance for the pesticide chemical residue, if a tolerance is proposed;

(viii) if the petition relates to a tolerance for a processed food, reports of investigations conducted using the processing method(s) used to produce that food;

(ix) such information as the Administrator may require to make the determination under subsection (b)(2)(C);

(x) such information as the Administrator may require on whether the pesticide chemical may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen or other endocrine effects;

(xi) information regarding exposure to the pesticide chemical residue due to any tolerance or exemption already granted for such residue;

(xii) practical methods for removing any amount of the residue that would exceed any proposed tolerance; and

(xiii) such other data and information as the Administrator requires by regulation to support the petition.

If information or data required by this subparagraph is available to the Administrator, the person submitting the petition may cite the availability of the information or data in lieu of submitting it. The Administrator may require a petition to be accompanied by samples of the pesticide chemical with respect to which the petition is filed.

(B) Modification or revocation

The Administrator may by regulation establish the requirements for information and data to support a petition to modify or revoke a tolerance or to modify or revoke an exemption from the requirement for a tolerance.

(3) Notice

A notice of the filing of a petition that the Administrator determines has met the requirements of paragraph (2) shall be published by the Administrator within 30 days after such determination. The notice shall announce the availability of a description of the analytical methods available to the Administrator for the detection and measurement of the pesticide chemical residue with respect to which the petition is filed or shall set forth the petitioner's statement of why such a method is not needed. The notice shall include the summary required by paragraph (2)(A)(i)(I).

(4) Actions by the Administrator

(A) In general

The Administrator shall, after giving due consideration to a petition filed under paragraph (1) and any other information available to the Administrator—

(i) issue a final regulation (which may vary from that sought by the petition) establishing, modifying, or revoking a tolerance for the pesticide chemical residue or an exemption of the pesticide chemical residue from the requirement of a tolerance (which final regulation shall be issued without further notice and without further period for public comment);

(ii) issue a proposed regulation under subsection (e), and thereafter issue a final regulation under such subsection; or

(iii) issue an order denying the petition.

(B) Priorities

The Administrator shall give priority to petitions for the establishment or modification of a tolerance or exemption for a pesticide chemical residue that appears to pose a significantly lower risk to human health from dietary exposure than pesticide chemical residues that have tolerances in effect for the same or similar uses.

(C) Expedited review of certain petitions

(i) Date certain for review

If a person files a complete petition with the Administrator proposing the issuance of a regulation establishing a tolerance or exemption for a pesticide chemical residue that presents a lower risk to human health than a pesticide chemical residue for which a tolerance has been left in effect or modified under subsection (b)(2)(B), the Administrator shall complete action on such petition under this paragraph within 1 year.

(ii) Required determinations

If the Administrator issues a final regulation establishing a tolerance or exemption for a safer pesticide chemical residue under clause (i), the Administrator shall, not later than 180 days after the date on which the regulation is issued, determine whether a condition described in subclause (I) or (II) of subsection (b)(2)(B)(iii) continues to exist with respect to a tolerance that has been left in effect or modified under subsection (b)(2)(B). If such condition does not continue to exist, the Administrator shall, not later than 180 days after the date on which the determination under the preceding sentence is made, issue a regulation under subsection (e)(1) to modify or revoke the tolerance.

(e) Action on Administrator's own initiative

(1) General rule

The Administrator may issue a regulation—

(A) establishing, modifying, suspending under subsection (l)(3), or revoking a tolerance for a pesticide chemical or a pesticide chemical residue;

(B) establishing, modifying, suspending under subsection (l)(3), or revoking an exemption of a pesticide chemical residue from the requirement of a tolerance; or

(C) establishing general procedures and requirements to implement this section.

(2) Notice

Before issuing a final regulation under paragraph (1), the Administrator shall issue a notice of proposed rulemaking and provide a period of not less than 60 days for public comment on the proposed regulation, except that a shorter period for comment may be provided if the Administrator for good cause finds that it would be in the public interest to do so and states the reasons for the finding in the notice of proposed rulemaking.

(f) Special data requirements

(1) Requiring submission of additional data

If the Administrator determines that additional data or information are reasonably required to support the continuation of a tolerance or exemption that is in effect under this section for a pesticide chemical residue on a food, the Administrator shall—

(A) issue a notice requiring the person holding the pesticide registrations associated with such tolerance or exemption to submit the data or information under section 3(c)(2)(B) of the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136a(c)(2)(B)];

(B) issue a rule requiring that testing be conducted on a substance or mixture under section 4 of the Toxic Substances Control Act [15 U.S.C. 2603]; or

(C) publish in the Federal Register, after first providing notice and an opportunity for comment of not less than 60 days' duration, an order—

(i) requiring the submission to the Administrator by one or more interested persons of a notice identifying the person or persons who will submit the required data and information;

(ii) describing the type of data and information required to be submitted to the Administrator and stating why the data and information could not be obtained under the authority of section 3(c)(2)(B) of the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136a(c)(2)(B)] or section 4 of the Toxic Substances Control Act [15 U.S.C. 2603];

(iii) describing the reports of the Administrator required to be prepared during and after the collection of the data and information;

(iv) requiring the submission to the Administrator of the data, information, and reports referred to in clauses (ii) and (iii); and

(v) establishing dates by which the submissions described in clauses (i) and (iv) must be made.

The Administrator may under subparagraph (C) revise any such order to correct an error. The Administrator may under this paragraph require data or information pertaining to whether the pesticide chemical may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen or other endocrine effects.

(2) Noncompliance

If a submission required by a notice issued in accordance with paragraph (1)(A), a rule issued under paragraph (1)(B), or an order issued under paragraph (1)(C) is not made by the time specified in such notice, rule, or order, the Administrator may by order published in the Federal Register modify or revoke the tolerance or exemption in question. In any review of such an order under subsection (g)(2), the only material issue shall be whether a submission required under paragraph (1) was not made by the time specified.

(g) Effective date, objections, hearings, and administrative review

(1) Effective date

A regulation or order issued under subsection (d)(4), (e)(1), or (f)(2) shall take effect upon publication unless the regulation or order specifies otherwise. The Administrator may stay the effectiveness of the regulation or order if, after issuance of such regulation or order, objections are filed with respect to such regulation or order pursuant to paragraph (2).

(2) Further proceedings

(A) Objections

Within 60 days after a regulation or order is issued under subsection (d)(4), (e)(1)(A), (e)(1)(B), (f)(2), (n)(3), or (n)(5)(C), any person may file objections thereto with the Administrator, specifying with particularity the provisions of the regulation or order deemed objectionable and stating reasonable grounds therefor. If the regulation or order was issued in response to a petition under subsection (d)(1), a copy of each objection filed by a person other than the petitioner shall be served by the Administrator on the petitioner.

(B) Hearing

An objection may include a request for a public evidentiary hearing upon the objection. The Administrator shall, upon the initiative of the Administrator or upon the request of an interested person and after due notice, hold a public evidentiary hearing if and to the extent the Administrator determines that such a public hearing is necessary to receive factual evidence relevant to material issues of fact raised by the objections. The presiding officer in such a hearing may authorize a party to obtain discovery from other persons and may upon a showing of good cause made by a party issue a subpoena to compel testimony or production of documents from any person. The presiding officer shall be governed by the Federal Rules of Civil Procedure in making any order for the protection of the witness or the content of documents produced and shall order the payment of reasonable fees and expenses as a condition to requiring testimony of the witness. On contest, such a subpoena may be enforced by a Federal district court.

(C) Final decision

As soon as practicable after receiving the arguments of the parties, the Administrator shall issue an order stating the action taken upon each such objection and setting forth any revision to the regulation or prior order that the Administrator has found to be warranted. If a hearing was held under subparagraph (B), such order and any revision to the regulation or prior order shall, with respect to questions of fact at issue in the hearing, be based only on substantial evidence of record at such hearing, and shall set forth in detail the findings of facts and the conclusions of law or policy upon which the order or regulation is based.

(h) Judicial review

(1) Petition

In a case of actual controversy as to the validity of any regulation issued under subsection (e)(1)(C), or any order issued under subsection (f)(1)(C) or (g)(2)(C), or any regulation that is the subject of such an order, any person who will be adversely affected by such order or regulation may obtain judicial review by filing in the United States Court of Appeals for the circuit wherein that person resides or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit, within 60 days after publication of such order or regulation, a petition praying that the order or regulation be set aside in whole or in part.

(2) Record and jurisdiction

A copy of the petition under paragraph (1) shall be forthwith transmitted by the clerk of the court to the Administrator, or any officer designated by the Administrator for that purpose, and thereupon the Administrator shall file in the court the record of the proceedings on which the Administrator based the order or regulation, as provided in section 2112 of title 28. Upon the filing of such a petition, the court shall have exclusive jurisdiction to affirm or set aside the order or regulation complained of in whole or in part. As to orders issued following a public evidentiary hearing, the findings of the Administrator with respect to questions of fact shall be sustained only if supported by substantial evidence when considered on the record as a whole.

(3) Additional evidence

If a party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the proceeding before the Administrator, the court may order that the additional evidence (and evidence in rebuttal thereof) shall be taken before the Administrator in the manner and upon the terms and conditions the court deems proper. The Administrator may modify prior findings as to the facts by reason of the additional evidence so taken and may modify the order or regulation accordingly. The Administrator shall file with the court any such modified finding, order, or regulation.

(4) Final judgment; Supreme Court review

The judgment of the court affirming or setting aside, in whole or in part, any regulation or any order and any regulation which is the subject of such an order shall be final, subject to review by the Supreme Court of the United States as provided in section 1254 of title 28. The commencement of proceedings under this subsection shall not, unless specifically ordered by the court to the contrary, operate as a stay of a regulation or order.

(5) Application

Any issue as to which review is or was obtainable under this subsection shall not be the subject of judicial review under any other provision of law.

(i) Confidentiality and use of data

(1) General rule

Data and information that are or have been submitted to the Administrator under this section or section 348 of this title in support of a tolerance or an exemption from a tolerance shall be entitled to confidential treatment for reasons of business confidentiality and to exclusive use and data compensation to the same extent provided by sections 3 and 10 of the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136a, 136h].

(2) Exceptions

(A) In general

Data and information that are entitled to confidential treatment under paragraph (1) may be disclosed, under such security requirements as the Administrator may provide by regulation, to—

(i) employees of the United States authorized by the Administrator to examine such data and information in the carrying out of their official duties under this chapter or other Federal statutes intended to protect the public health; or

(ii) contractors with the United States authorized by the Administrator to examine such data and information in the carrying out of contracts under this chapter or such statutes.

(B) Congress

This subsection does not authorize the withholding of data or information from either House of Congress or from, to the extent of matter within its jurisdiction, any committee or subcommittee of such committee or any joint committee of Congress or any subcommittee of such joint committee.

(3) Summaries

Notwithstanding any provision of this subsection or other law, the Administrator may publish the informative summary required by subsection (d)(2)(A)(i) and may, in issuing a proposed or final regulation or order under this section, publish an informative summary of the data relating to the regulation or order.

(j) Status of previously issued regulations

(1) Regulations under section 346

Regulations affecting pesticide chemical residues in or on raw agricultural commodities promulgated, in accordance with section 371(e) of this title, under the authority of section 346(a) [1] of this title upon the basis of public hearings instituted before January 1, 1953, shall be deemed to be regulations issued

under this section and shall be subject to modification or revocation under subsections (d) and (e), and shall be subject to review under subsection (q).

(2) Regulations under section 348

Regulations that established tolerances for substances that are pesticide chemical residues in or on processed food, or that otherwise stated the conditions under which such pesticide chemicals could be safely used, and that were issued under section 348 of this title on or before August 3, 1996, shall be deemed to be regulations issued under this section and shall be subject to modification or revocation under subsection (d) or (e), and shall be subject to review under subsection (q).

(3) Regulations under section 346a

Regulations that established tolerances or exemptions under this section that were issued on or before August 3, 1996, shall remain in effect unless modified or revoked under subsection (d) or (e), and shall be subject to review under subsection (q).

(4) Certain substances

With respect to a substance that is not included in the definition of the term "pesticide chemical" under section 321(q)(1) of this title but was so included on the day before October 30, 1998, the following applies as of October 30, 1998:

(A) Notwithstanding paragraph (2), any regulation applying to the use of the substance that was in effect on the day before October 30, 1998, and was on such day deemed in such paragraph to have been issued under this section, shall be considered to have been issued under section 348 of this title.

(B) Notwithstanding paragraph (3), any regulation applying to the use of the substance that was in effect on such day and was issued under this section (including any such regulation issued before August 3, 1996) is deemed to have been issued under section 348 of this title.

(k) Transitional provision

If, on the day before August 3, 1996, a substance that is a pesticide chemical was, with respect to a particular pesticidal use of the substance and any resulting pesticide chemical residue in or on a particular food—

(1) regarded by the Administrator or the Secretary as generally recognized as safe for use within the meaning of the provisions of subsection (a) or section 321(s) of this title as then in effect; or

(2) regarded by the Secretary as a substance described by section 321(s)(4) of this title;

such a pesticide chemical residue shall be regarded as exempt from the requirement for a tolerance, as of August 3, 1996. The Administrator shall by regulation indicate which substances are described by this subsection. Any exemption under this subsection may be modified or revoked as if it had been issued under subsection (c).

(l) Harmonization with action under other laws

(1) Coordination with FIFRA

To the extent practicable and consistent with the review deadlines in subsection (q), in issuing a final rule under this subsection that suspends or revokes a tolerance or exemption for a pesticide chemical residue in or on food, the Administrator shall coordinate such action with any related necessary action under the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136 et seq.].

(2) Revocation of tolerance or exemption following cancellation of associated registrations

If the Administrator, acting under the Federal Insecticide, Fungicide, and Rodenticide Act, cancels the registration of each pesticide that contains a particular pesticide chemical and that is labeled for use on a particular food, or requires that the registration of each such pesticide be modified to prohibit its use in connection with the production, storage, or transportation of such food, due in whole or in part to dietary risks to humans posed by residues of that pesticide chemical on that food, the Administrator shall revoke any tolerance or exemption that allows the presence of the pesticide chemical, or any pesticide chemical residue that results from its use, in or on that food. Subsection (e) shall apply to actions taken under this paragraph. A revocation under this paragraph shall become effective not later than 180 days after—

(A) the date by which each such cancellation of a registration has become effective; or

(B) the date on which the use of the canceled pesticide becomes unlawful under the terms of the cancellation, whichever is later.

(3) Suspension of tolerance or exemption following suspension of associated registrations

(A) Suspension

If the Administrator, acting under the Federal Insecticide, Fungicide, and Rodenticide Act, suspends the use of each registered pesticide that contains a particular pesticide chemical and that is labeled for use on a particular food, due in whole or in part to dietary risks to humans posed by residues of that pesticide chemical on that food, the Administrator shall suspend any tolerance or exemption that allows the presence of the pesticide chemical, or any pesticide chemical residue that results from its use, in or on that food. Subsection (e) shall apply to actions taken under this paragraph. A suspension under this paragraph shall become effective not later than 60 days after the date by which each such suspension of use has become effective.

(B) Effect of suspension

The suspension of a tolerance or exemption under subparagraph (A) shall be effective as long as the use of each associated registration of a pesticide is suspended under the Federal Insecticide, Fungicide, and Rodenticide Act. While a suspension of a tolerance or exemption is effective the tolerance or exemption shall not be considered to be in effect. If the suspension of use of the pesticide under that Act is terminated, leaving the registration of the pesticide for such use in effect under that Act, the Administrator shall rescind any associated suspension of tolerance or exemption.

(4) Tolerances for unavoidable residues

In connection with action taken under paragraph (2) or (3), or with respect to pesticides whose registrations were suspended or canceled prior to August 3, 1996, under the Federal Insecticide, Fungicide, and Rodenticide Act, if the Administrator determines that a residue of the canceled or suspended pesticide chemical will unavoidably persist in the environment and thereby be present in or on a food, the Administrator may establish a tolerance for the pesticide chemical residue. In establishing such a tolerance, the Administrator shall take into account both the factors set forth in subsection (b)(2) and the unavoidability of the residue. Subsection (e) shall apply to the establishment of such tolerance. The Administrator shall review any such tolerance periodically and modify it as necessary so that it allows no greater level of the pesticide chemical residue than is unavoidable.

(5) Pesticide residues resulting from lawful application of pesticide

Notwithstanding any other provision of this chapter, if a tolerance or exemption for a pesticide chemical residue in or on a food has been revoked, suspended, or modified under this section, an article of that food shall not be deemed unsafe solely because of the presence of such pesticide chemical residue in or on such food if it is shown to the satisfaction of the Secretary that—

(A) the residue is present as the result of an application or use of a pesticide at a time and in a manner that was lawful under the Federal Insecticide, Fungicide, and Rodenticide Act; and

(B) the residue does not exceed a level that was authorized at the time of that application or use to be present on the food under a tolerance, exemption, food additive regulation, or other sanction then in effect under this chapter;

unless, in the case of any tolerance or exemption revoked, suspended, or modified under this subsection or subsection (d) or (e), the Administrator has issued a determination that consumption of the legally treated food during the period of its likely availability in commerce will pose an unreasonable dietary risk.

(6) Tolerance for use of pesticides under an emergency exemption

If the Administrator grants an exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136p) for a pesticide chemical, the Administrator shall establish a tolerance or exemption from the requirement for a tolerance for the pesticide chemical residue. Such a tolerance or exemption from a tolerance shall have an expiration date. The Administrator may establish such a tolerance or exemption without providing notice or a period for comment on the tolerance or

exemption. The Administrator shall promulgate regulations within 365 days after August 3, 1996, governing the establishment of tolerances and exemptions under this paragraph. Such regulations shall be consistent with the safety standard under subsections (b)(2) and (c)(2) and with section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act.

(m) Fees

(1) Amount

The Administrator shall by regulation require the payment of such fees as will in the aggregate, in the judgment of the Administrator, be sufficient over a reasonable term to provide, equip, and maintain an adequate service for the performance of the Administrator's functions under this section. Under the regulations, the performance of the Administrator's services or other functions under this section, including—

(A) the acceptance for filing of a petition submitted under subsection (d);

(B) establishing, modifying, leaving in effect, or revoking a tolerance or establishing, modifying, leaving in effect, or revoking an exemption from the requirement for a tolerance under this section;

(C) the acceptance for filing of objections under subsection (g); or

(D) the certification and filing in court of a transcript of the proceedings and the record under subsection (h);

may be conditioned upon the payment of such fees. The regulations may further provide for waiver or refund of fees in whole or in part when in the judgment of the Administrator such a waiver or refund is equitable and not contrary to the purposes of this subsection.

(2) Deposit

All fees collected under paragraph (1) shall be deposited in the Reregistration and Expedited Processing Fund created by section 4(k) of the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136a–1(k)]. Such fees shall be available to the Administrator, without fiscal year limitation, for the performance of the Administrator's services or functions as specified in paragraph (1).

(3) Prohibition

During the period beginning on October 1, 2007, and ending on September 30, 2023, the Administrator shall not collect any tolerance fees under paragraph (1).

(n) National uniformity of tolerances

(1) "Qualifying pesticide chemical residue" defined

For purposes of this subsection, the term "qualifying pesticide chemical residue" means a pesticide chemical residue resulting from the use, in production, processing, or storage of a food, of a pesticide chemical that is an active ingredient and that—

(A) was first approved for such use in a registration of a pesticide issued under section 3(c)(5) of the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136a(c)(5)] on or after April 25, 1985, on the basis of data determined by the Administrator to meet all applicable requirements for data prescribed by regulations in effect under that Act [7 U.S.C. 136 et seq.] on April 25, 1985; or

(B) was approved for such use in a reregistration eligibility determination issued under section 4(g) of that Act [7 U.S.C. 136a–1(g)] on or after August 3, 1996.

(2) "Qualifying Federal determination" defined

For purposes of this subsection, the term "qualifying Federal determination" means a tolerance or exemption from the requirement for a tolerance for a qualifying pesticide chemical residue that—

(A) is issued under this section after August 3, 1996, and determined by the Administrator to meet the standard under subsection (b)(2)(A) (in the case of a tolerance) or (c)(2) (in the case of an exemption); or

(B)(i) pursuant to subsection (j) is remaining in effect or is deemed to have been issued under this section, or is regarded under subsection (k) as exempt from the requirement for a tolerance; and

(ii) is determined by the Administrator to meet the standard under subsection (b)(2)(A) (in the case of a tolerance) or (c)(2) (in the case of an exemption).

(3) Limitation

The Administrator may make the determination described in paragraph (2)(B)(ii) only by issuing a rule in accordance with the procedure set forth in subsection (d) or (e) and only if the Administrator issues a proposed rule and allows a period of not less than 30 days for comment on the proposed rule. Any such rule shall be reviewable in accordance with subsections (g) and (h).

(4) State authority

Except as provided in paragraphs (5), (6), and (8) no State or political subdivision may establish or enforce any regulatory limit on a qualifying pesticide chemical residue in or on any food if a qualifying Federal determination applies to the presence of such pesticide chemical residue in or on such food, unless such State regulatory limit is identical to such qualifying Federal determination. A State or political subdivision shall be deemed to establish or enforce a regulatory limit on a pesticide chemical residue in or on a food if it purports to prohibit or penalize the production, processing, shipping, or other handling of a food because it contains a pesticide residue (in excess of a prescribed limit).

(5) Petition procedure

(A) In general

Any State may petition the Administrator for authorization to establish in such State a regulatory limit on a qualifying pesticide chemical residue in or on any food that is not identical to the qualifying Federal determination applicable to such qualifying pesticide chemical residue.

(B) Petition requirements

Any petition under subparagraph (A) shall—

(i) satisfy any requirements prescribed, by rule, by the Administrator; and

(ii) be supported by scientific data about the pesticide chemical residue that is the subject of the petition or about chemically related pesticide chemical residues, data on the consumption within such State of food bearing the pesticide chemical residue, and data on exposure of humans within such State to the pesticide chemical residue.

(C) Authorization

The Administrator may, by order, grant the authorization described in subparagraph (A) if the Administrator determines that the proposed State regulatory limit—

(i) is justified by compelling local conditions; and

(ii) would not cause any food to be a violation of Federal law.

(D) Treatment

In lieu of any action authorized under subparagraph (C), the Administrator may treat a petition under this paragraph as a petition under subsection (d) to modify or revoke a tolerance or an exemption. If the Administrator determines to treat a petition under this paragraph as a petition under subsection (d), the Administrator shall thereafter act on the petition pursuant to subsection (d).

(E) Review

Any order of the Administrator granting or denying the authorization described in subparagraph (A) shall be subject to review in the manner described in subsections (g) and (h).

(6) Urgent petition procedure

Any State petition to the Administrator pursuant to paragraph (5) that demonstrates that consumption of a food containing such pesticide residue level during the period of the food's likely availability in the State will pose a significant public health threat from acute exposure shall be considered an urgent petition. If an order by the Administrator to grant or deny the requested authorization in an urgent petition is not made within 30 days of receipt of the petition, the petitioning State may establish and enforce a temporary regulatory limit on a qualifying pesticide chemical residue in or on the food. The temporary regulatory limit shall be validated or terminated by the Administrator's final order on the petition.

(7) Residues from lawful application

No State or political subdivision may enforce any regulatory limit on the level of a pesticide chemical residue that may appear in or on any food if, at the time of the application of the pesticide that resulted in such residue, the sale of such food with such residue level was lawful under this section and under the law of such State, unless the State demonstrates that consumption of the food containing such pesticide residue level during the period of the food's likely availability in the State will pose an unreasonable dietary risk to the health of persons within such State.

(8) Savings

Nothing in this chapter preempts the authority of any State or political subdivision to require that a food containing a pesticide chemical residue bear or be the subject of a warning or other statement relating to the presence of the pesticide chemical residue in or on such food.

(o) Consumer right to know

Not later than 2 years after August 3, 1996, and annually thereafter, the Administrator shall, in consultation with the Secretary of Agriculture and the Secretary of Health and Human Services, publish in a format understandable to a lay person, and distribute to large retail grocers for public display (in a manner determined by the grocer), the following information, at a minimum:

(1) A discussion of the risks and benefits of pesticide chemical residues in or on food purchased by consumers.

(2) A listing of actions taken under subparagraph (B) of subsection (b)(2) that may result in pesticide chemical residues in or on food that present a yearly or lifetime risk above the risk allowed under subparagraph (A) of such subsection, and the food on which the pesticide chemicals producing the residues are used.

(3) Recommendations to consumers for reducing dietary exposure to pesticide chemical residues in a manner consistent with maintaining a healthy diet, including a list of food that may reasonably substitute for food listed under paragraph (2).

Nothing in this subsection shall prevent retail grocers from providing additional information.

(p) Estrogenic substances screening program

(1) Development

Not later than 2 years after August 3, 1996, the Administrator shall in consultation with the Secretary of Health and Human Services develop a screening program, using appropriate validated test systems and other scientifically relevant information, to determine whether certain substances may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or such other endocrine effect as the Administrator may designate.

(2) Implementation

Not later than 3 years after August 3, 1996, after obtaining public comment and review of the screening program described in paragraph (1) by the scientific advisory panel established under section 25(d) of the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136w(d)] or the science advisory board established by section 4365 [1] of title 42, the Administrator shall implement the program.

(3) Substances

In carrying out the screening program described in paragraph (1), the Administrator—

(A) shall provide for the testing of all pesticide chemicals; and

(B) may provide for the testing of any other substance that may have an effect that is cumulative to an effect of a pesticide chemical if the Administrator determines that a substantial population may be exposed to such substance.

(4) Exemption

Notwithstanding paragraph (3), the Administrator may, by order, exempt from the requirements of this section a biologic substance or other substance if the Administrator determines that the substance is anticipated not to produce any effect in humans similar to an effect produced by a naturally occurring estrogen.

(5) Collection of information

(A) In general

The Administrator shall issue an order to a registrant of a substance for which testing is required under this subsection, or to a person who manufactures or imports a substance for which testing is required under this subsection, to conduct testing in accordance with the screening program described in paragraph (1), and submit information obtained from the testing to the Administrator, within a reasonable time period that the Administrator determines is sufficient for the generation of the information.

(B) Procedures

To the extent practicable the Administrator shall minimize duplicative testing of the same substance for the same endocrine effect, develop, as appropriate, procedures for fair and equitable sharing of test costs, and develop, as necessary, procedures for handling of confidential business information.

(C) Failure of registrants to submit information

(i) Suspension

If a registrant of a substance referred to in paragraph (3)(A) fails to comply with an order under subparagraph (A) of this paragraph, the Administrator shall issue a notice of intent to suspend the sale or distribution of the substance by the registrant. Any suspension proposed under this paragraph shall become final at the end of the 30-day period beginning on the date that the registrant receives the notice of intent to suspend, unless during that period a person adversely affected by the notice requests a hearing or the Administrator determines that the registrant has complied fully with this paragraph.

(ii) Hearing

If a person requests a hearing under clause (i), the hearing shall be conducted in accordance with section 554 of title 5. The only matter for resolution at the hearing shall be whether the registrant has failed to comply with an order under subparagraph (A) of this paragraph. A decision by the Administrator after completion of a hearing shall be considered to be a final agency action.

(iii) Termination of suspensions

The Administrator shall terminate a suspension under this subparagraph issued with respect to a registrant if the Administrator determines that the registrant has complied fully with this paragraph.

(D) Noncompliance by other persons

Any person (other than a registrant) who fails to comply with an order under subparagraph (A) shall be liable for the same penalties and sanctions as are provided under section 16 of the Toxic Substances Control Act [15 U.S.C. 2615] in the case of a violation referred to in that section. Such penalties and sanctions shall be assessed and imposed in the same manner as provided in such section 16.

(6) Agency action

In the case of any substance that is found, as a result of testing and evaluation under this section, to have an endocrine effect on humans, the Administrator shall, as appropriate, take action under such statutory authority as is available to the Administrator, including consideration under other sections of this chapter, as is necessary to ensure the protection of public health.

(7) Report to Congress

Not later than 4 years after August 3, 1996, the Administrator shall prepare and submit to Congress a report containing—

(A) the findings of the Administrator resulting from the screening program described in paragraph (1);

(B) recommendations for further testing needed to evaluate the impact on human health of the substances tested under the screening program; and

(C) recommendations for any further actions (including any action described in paragraph (6)) that the Administrator determines are appropriate based on the findings.

(q) Schedule for review

(1) In general

The Administrator shall review tolerances and exemptions for pesticide chemical residues in effect on the day before August 3, 1996, as expeditiously as practicable, assuring that—

(A) 33 percent of such tolerances and exemptions are reviewed within 3 years of August 3, 1996;

(B) 66 percent of such tolerances and exemptions are reviewed within 6 years of August 3, 1996; and

(C) 100 percent of such tolerances and exemptions are reviewed within 10 years of August 3, 1996.

In conducting a review of a tolerance or exemption, the Administrator shall determine whether the tolerance or exemption meets the requirements of subsections [2] (b)(2) or (c)(2) and shall, by the deadline for the review of the tolerance or exemption, issue a regulation under subsection (d)(4) or (e)(1) to modify or revoke the tolerance or exemption if the tolerance or exemption does not meet such requirements.

(2) Priorities

In determining priorities for reviewing tolerances and exemptions under paragraph (1), the Administrator shall give priority to the review of the tolerances or exemptions that appear to pose the greatest risk to public health.

(3) Publication of schedule

Not later than 12 months after August 3, 1996, the Administrator shall publish a schedule for review of tolerances and exemptions established prior to August 3, 1996. The determination of priorities for the review of tolerances and exemptions pursuant to this subsection is not a rulemaking and shall not be subject to judicial review, except that failure to take final action pursuant to the schedule established by this paragraph shall be subject to judicial review.

(r) Temporary tolerance or exemption

The Administrator may, upon the request of any person who has obtained an experimental permit for a pesticide chemical under the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136 et seq.] or upon the Administrator's own initiative, establish a temporary tolerance or exemption for the pesticide chemical residue for the uses covered by the permit. Subsections (b)(2), (c)(2), (d), and (e) shall apply to actions taken under this subsection.

(s) Savings clause

Nothing in this section shall be construed to amend or modify the provisions of the Toxic Substances Control Act [15 U.S.C. 2601 et seq.] or the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136 et seq.].

(June 25, 1938, ch. 675, §408, as added July 22, 1954, ch. 559, §3, 68 Stat. 511; amended Pub. L. 85–791, §20, Aug. 28, 1958, 72 Stat. 947; Pub. L. 91–515, title VI, §601(d)(1), Oct. 30, 1970, 84 Stat. 1311; Pub. L. 92–157, title III, §303(a), Nov. 18, 1971, 85 Stat. 464; Pub. L. 92–516, §3(3), Oct. 21, 1972, 86 Stat. 998; Pub. L. 98–620, title IV, §402(25)(A), Nov. 8, 1984, 98 Stat. 3359; Pub. L. 102–300, §6(b)(1), June 16, 1992, 106 Stat. 240; Pub. L. 102–571, title I, §107(7), Oct. 29, 1992, 106 Stat. 4499; Pub. L. 103–80, §3(k), Aug. 13, 1993, 107 Stat. 776; Pub. L. 104–170, title IV, §405, Aug. 3, 1996, 110 Stat. 1514; Pub. L. 105–324, §2(b), Oct. 30, 1998, 112 Stat. 3036; Pub. L. 110–94, §4(d)(2), Oct. 9, 2007, 121 Stat. 1002; Pub. L. 112–177, §2(a)(3), Sept. 28, 2012, 126 Stat. 1329; Pub. L. 116–8, §2(c), Mar. 8, 2019, 133 Stat. 485.)

Editorial Notes

References in Text

The Federal Rules of Civil Procedure, referred to in subsec. (g)(2)(B), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Section 346 of this title, referred to in subsec. (j)(1), originally consisted of subsecs. (a) and (b). Subsec. (a) was redesignated as the entire section 346 and subsec. (b) was repealed by Pub. L. 86–618, title I, §103(a)(1), 74 Stat. 398.

The Federal Insecticide, Fungicide, and Rodenticide Act, referred to in subsecs. (l), (n)(1)(A), (r), and (s), is act June 25, 1947, ch. 125, as amended generally by Pub. L. 92–516, Oct. 21, 1972, 86 Stat. 973, which is classified generally to subchapter II (§136 et seq.) of chapter 6 of Title 7, Agriculture. For complete classification of this Act to the Code, see Short Title note set out under section 136 of Title 7 and Tables.

Section 4365 of title 42, referred to in subsec. (p)(2), was in the original "section 8 of the Environmental Research, Development, and Demonstration Act of 1978", and was translated as meaning section 8 of the Environmental Research, Development, and Demonstration Authorization Act of 1978, to reflect the probable intent of Congress.

The Toxic Substances Control Act, referred to in subsec. (s), is Pub. L. 94–469, Oct. 11, 1976, 90 Stat. 2003, as amended, which is classified generally to chapter 53 (§2601 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 2601 of Title 15 and Tables.

Codification

August 3, 1996, referred to in subsecs. (k), (n)(1)(B), (2)(A), and (p)(1), (2), (7), was in the original references to the date of enactment of this subsection and the date of enactment of this section, which was translated as meaning the date of enactment of Pub. L. 104–170, which amended this section generally, to reflect the probable intent of Congress.

Amendments

2019—Subsec. (m)(3). Pub. L. 116–8 substituted "2023" for "2017".

2012—Subsec. (m)(3). Pub. L. 112–177 substituted "September 30, 2017" for "September 30, 2012".

2007—Subsec. (m)(3). Pub. L. 110–94 added par. (3).

1998—Subsec. (j)(4). Pub. L. 105–324 added par. (4).

1996—Pub. L. 104–170 amended section generally, substituting, in subsec. (a), provisions relating to requirement for tolerance or exemption for provisions relating to conditions for safety; in subsec. (b), provisions relating to authority and standard for tolerance for provisions relating to establishment of tolerances; in subsec. (c), provisions relating to authority and standard for exemptions for provisions relating to exemptions; in subsec. (d), provisions relating to petition for tolerance or exemption for provisions relating to regulations pursuant to petition, publication of notice, time for issuance, referral to advisory committees, effective date, and hearings; in subsec. (e), provisions relating to action on Administrator's own initiative for provisions relating to regulations pursuant to Administrator's proposals; in subsec. (f), provisions relating to special data requirements for provisions relating to data submitted as confidential; in subsec. (g), provisions relating to effective date, objections, hearings, and administrative review for provisions relating to advisory committees and their appointment, composition, compensation, and clerical assistance; in subsec. (h), provisions relating to judicial review for provisions relating to right of consultation; in subsec. (i), provisions relating to confidentiality and use of data for provisions relating to judicial review; in subsec. (j), provisions relating to status of previously issued regulations for provisions relating to temporary tolerances; in subsec. (k), provisions relating to transitions for provisions relating to regulations based on public hearings before January 1, 1953; in subsec. (l), provisions relating to harmonization with action under other laws for provisions relating to pesticides under Federal Insecticide, Fungicide, and Rodenticide Act, functions of Administrator of Environmental Protection Agency, certifications, hearings, time limitations, opinions, and regulations; in subsec. (m), provisions relating to fees for provisions relating to amendment of regulations; in subsec. (n), provisions relating to national uniformity of tolerances for provisions relating to guaranties; in subsec. (o), provisions relating to consumer right to know for provisions relating to payment of fees, services or functions conditioned on payment, and waiver or refund of fees; and adding subsecs. (p) to (s).

1993—Pub. L. 103–80, §3(k)(6), substituted "Administrator" for "Secretary" wherever appearing except when followed by "of Agriculture".

Subsec. (a)(1). Pub. L. 103–80, §3(k)(1), substituted "Administrator of the Environmental Protection Agency (hereinafter in this section referred to as the 'Administrator')" for "Secretary of Health and Human Services".

Subsec. (d)(5). Pub. L. 103–80, §3(k)(2), substituted "section 556(c) of title 5" for "section 7(c) of the Administrative Procedure Act (5 U.S.C., sec. 1006(c))".

Subsec. (l). Pub. L. 103–80, §3(k)(3), substituted "In the event" for "It the event" before "a hearing is requested".

Subsec. (n). Pub. L. 103–80, §3(k)(4), made technical amendment to reference to section 333(c) of this title to reflect amendment of corresponding provision of original act.

Subsec. (o). Pub. L. 103–80, §3(k)(5), which directed the substitution of "Administrator" for "Secretary of Health and Human Services" wherever appearing in the original text, was executed by making the substitution in the first sentence before "shall by regulation require", the only place "Secretary of Health and Human Services" appeared in the original text.

1992—Subsecs. (a), (d), (h), (i), (l), (m), (o). Pub. L. 102–300 substituted "Health and Human Services" for "Health, Education, and Welfare" wherever appearing in the original statutory text.

Subsec. (g). Pub. L. 102–571 substituted "379e" for "376".

1984—Subsec. (i)(5). Pub. L. 98–620 struck out provision that required the court to advance on the docket and expedite the disposition of all causes filed therein pursuant to this section.

1972—Subsecs. (d)(1), (e), (l). Pub. L. 92–516 substituted references to pesticide for references to economic poison wherever appearing therein.

1971—Subsec. (g). Pub. L. 92–157 struck out ", which the Secretary shall by rules and regulations prescribe," after "as compensation for their services a reasonable per diem" prior to amendment in 1970, by Pub. L. 91–515, which overlooked such language when amending subsec. (g) as provided in 1970 Amendment note.

1970—Subsec. (g). Pub. L. 91–515 substituted provisions authorizing members of an advisory committee to receive compensation and travel expenses in accordance with section 376(b)(5)(D) of this title, for provisions authorizing such members to receive as compensation a reasonable per diem for time actually spent on committee work, and necessary traveling and subsistence expenses while serving away from their places of residence.

1958—Subsec. (i)(2). Pub. L. 85–791, §20(a), in first sentence, substituted "transmitted by the clerk of the court to the Secretary, or" for "served upon the Secretary, or upon", substituted "file in the court the record of the proceedings" for "certify and file in the court a transcript of the proceedings and the record", and inserted "as provided in section 2112 of title 28", and which, in second sentence, substituted "the filing of such petition" for "such filing".

Subsec. (i)(3). Pub. L. 85–791, §20(b), in first sentence, substituted "transmitted by the clerk of the court to the Secretary of Agriculture, or" for "served upon the Secretary of Agriculture, or upon", substituted "file in the court the record of the proceedings" for "certify and file in the court a transcript of the proceedings and the record", and inserted "as provided in section 2112 of title 28", and, in second sentence, substituted "the filing of such petition" for "such filing".

Statutory Notes and Related Subsidiaries

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–177 effective Oct. 1, 2012, see section 2(c) of Pub. L. 112–177, set out as a note under section 136a–1 of Title 7, Agriculture.

Effective Date of 2007 Amendment

Amendment by Pub. L. 110–94 effective Oct. 1, 2007, see section 6 of Pub. L. 110–94, set out as a note under section 136a of Title 7, Agriculture.

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98–620, set out as an Effective Date note under section 1657 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1972 Amendment

Amendment by Pub. L. 92–516 effective at close of Oct. 21, 1972, except if regulations are necessary for implementation of any provision that becomes effective on Oct. 21, 1972, and continuation in effect of subchapter I of chapter 6 of Title 7, Agriculture, and regulations thereunder, relating to control of economic poisons, as in existence prior to Oct. 21, 1972, until superseded by provisions of Pub. L. 92–516 and regulations thereunder, see section 4 of Pub. L. 92–516, set out as an Effective Date note under section 136 of Title 7.

Extension of Prohibition of Tolerance Fees

Pub. L. 115–141, div. M, title IV, §401(c), Mar. 23, 2018, 132 Stat. 1050, provided that: "Section 408(m)(3) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 346a(m)(3)) shall be applied by substituting 'September 30, 2018' for 'September 30, 2017'."

Regulation of Sulfuryl Fluoride

Pub. L. 113–79, title X, §10015, Feb. 7, 2014, 128 Stat. 952, provided that: "Notwithstanding any other provision of law, the Administrator of the Environmental Protection Agency shall exclude nonpesticideal sources of fluoride from any aggregate exposure assessment required under section 408 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 346a) when assessing tolerances associated with residues from the pesticide."

Tolerance Fees

Pub. L. 108–199, div. G, title V, §501(d)(2), Jan. 23, 2004, 118 Stat. 422, provided that: "Notwithstanding section 408(m)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 346a(m)(1)), during the period beginning on October 1, 2003, and ending on September 30, 2008, the Administrator of the Environmental Protection Agency shall not collect any tolerance fees under that section."

Data Collection Activities To Assure Health of Infants and Children

Pub. L. 104–170, title III, §301, Aug. 3, 1996, 110 Stat. 1511, provided that:

"(a) In General.—The Secretary of Agriculture, in consultation with the Administrator of the Environmental Protection Agency and the Secretary of Health and Human Services, shall coordinate the development and implementation of survey procedures to ensure that adequate data on food consumption patterns of infants and children are collected.

"(b) Procedures.—To the extent practicable, the procedures referred to in subsection (a) shall include the collection of data on food consumption patterns of a statistically valid sample of infants and children.

"(c) Residue Data Collection.—The Secretary of Agriculture shall ensure that the residue data collection activities conducted by the Department of Agriculture in cooperation with the Environmental Protection Agency and the Department of Health and Human Services, provide for the improved data collection of pesticide residues, including guidelines for the use of comparable analytical and standardized reporting methods, and the increased sampling of foods most likely consumed by infants and children."

[1] *See References in Text note below.*

[2] *So in original. Probably should be "subsection".*

§346b. Authorization of appropriations

There are authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary for the purpose and administration of sections 321(q), (r), 342(a)(2), and 346a of this title.

(July 22, 1954, ch. 559, §4, 68 Stat. 517.)

Editorial Notes

Codification

Section was not enacted as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

§347. Intrastate sales of colored oleomargarine

(a) Law governing

Colored oleomargarine or colored margarine which is sold in the same State or Territory in which it is produced shall be subject in the same manner and to the same extent to the provisions of this chapter as if it had been introduced in interstate commerce.

(b) Labeling and packaging requirements

No person shall sell, or offer for sale, colored oleomargarine or colored margarine unless—

(1) such oleomargarine or margarine is packaged,

(2) the net weight of the contents of any package sold in a retail establishment is one pound or less,

(3) there appears on the label of the package (A) the word "oleomargarine" or "margarine" in type or lettering at least as large as any other type or lettering on such label, and (B) a full and accurate

statement of all the ingredients contained in such oleomargarine or margarine, and

(4) each part of the contents of the package is contained in a wrapper which bears the word "oleomargarine" or "margarine" in type or lettering not smaller than 20-point type.

The requirements of this subsection shall be in addition to and not in lieu of any of the other requirements of this chapter.

(c) Sales in public eating places

No person shall possess in a form ready for serving colored oleomargarine or colored margarine at a public eating place unless a notice that oleomargarine or margarine is served is displayed prominently and conspicuously in such place and in such manner as to render it likely to be read and understood by the ordinary individual being served in such eating place or is printed or is otherwise set forth on the menu in type or lettering not smaller than that normally used to designate the serving of other food items. No person shall serve colored oleomargarine or colored margarine at a public eating place, whether or not any charge is made therefor, unless (1) each separate serving bears or is accompanied by labeling identifying it as oleomargarine or margarine, or (2) each separate serving thereof is triangular in shape.

(d) Exemption from labeling requirements

Colored oleomargarine or colored margarine when served with meals at a public eating place shall at the time of such service be exempt from the labeling requirements of section 343 of this title (except paragraphs (a) and (f)) if it complies with the requirements of subsection (b) of this section.

(e) Color content of oleomargarine

For the purpose of this section colored oleomargarine or colored margarine is oleomargarine or margarine having a tint or shade containing more than one and six-tenths degrees of yellow, or of yellow and red collectively, but with an excess of yellow over red, measured in terms of Lovibond tintometer scale or its equivalent.

(June 25, 1938, ch. 675, §407, as added Mar. 16, 1950, ch. 61, §3(c), 64 Stat. 20.)

Statutory Notes and Related Subsidiaries

Effective Date

Act Mar. 16, 1950, ch. 61, §7, 64 Stat. 22, provided that: "This Act [enacting this section and sections 347a and 347b of this title and amending sections 331 and 342 of this title and sections 45 and 55 of Title 15, Commerce and Trade] shall become effective on July 1, 1950."

Transfer of Appropriations

Act Mar. 16, 1950, ch. 61, §5, 64 Stat. 22, provided that: "So much of the unexpended balances of appropriations, allocations, or other funds (including funds available for the fiscal year ending June 30, 1950) for the use of the Bureau of Internal Revenue of the Treasury Department in the exercise of functions under the Oleomargarine Tax Act (26 U.S.C., §2300, subchapter A) [now section 4591 et seq. of Title 26, Internal Revenue Code], as the Director of the Bureau of the Budget [now Director of the Office of Management and Budget] may determine, shall be transferred to the Federal Security Agency (Food and Drug Administration) [now the Department of Health and Human Services] for use in the enforcement of this Act [see Effective Date note above]."

§347a. Congressional declaration of policy regarding oleomargarine sales

The Congress hereby finds and declares that the sale, or the serving in public eating places, of colored oleomargarine or colored margarine without clear identification as such or which is otherwise adulterated or misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.] depresses the market in interstate commerce for butter and for oleomargarine or margarine clearly identified and neither adulterated nor misbranded, and constitutes a burden on interstate commerce in such articles. Such burden exists, irrespective of whether such oleomargarine or margarine originates from an interstate source or from the State in which it is sold.

(Mar. 16, 1950, ch. 61, §3(a), 64 Stat. 20.)

Editorial Notes

References in Text

The Federal Food, Drug, and Cosmetic Act, referred to in text, is act June 25, 1938, ch. 675, 52 Stat. 1040, which is classified generally to this chapter. For complete classification of this Act to the Code, see section 301 of this title and Tables.

Codification

Section was not enacted as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

Statutory Notes and Related Subsidiaries

Effective Date

Section effective July 1, 1950, see section 7 of act Mar. 16, 1950, set out as a note under section 347 of this title.

§347b. Contravention of State laws

Nothing in this Act shall be construed as authorizing the possession, sale, or serving of colored oleomargarine or colored margarine in any State or Territory in contravention of the laws of such State or Territory.

(Mar. 16, 1950, ch. 61, §6, 64 Stat. 22.)

Editorial Notes

References in Text

This Act, referred to in text, is act Mar. 16, 1950, ch. 61, 64 Stat. 20, which is classified to sections 331, 342, 347 to 347b of this title, and sections 45 and 55 of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Tables.

Codification

Section was not enacted as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

Statutory Notes and Related Subsidiaries

Effective Date

Section effective July 1, 1950, see section 7 of act Mar. 16, 1950, set out as a note under section 347 of this title.

§348. Food additives

(a) Unsafe food additives; exception for conformity with exemption or regulation

A food additive shall, with respect to any particular use or intended use of such additives, be deemed to be unsafe for the purposes of the application of clause (2)(C) of section 342(a) of this title, unless—

(1) it and its use or intended use conform to the terms of an exemption which is in effect pursuant to subsection (j) of this section;

(2) there is in effect, and it and its use or intended use are in conformity with, a regulation issued under this section prescribing the conditions under which such additive may be safely used; or

(3) in the case of a food additive as defined in this chapter that is a food contact substance, there is—

(A) in effect, and such substance and the use of such substance are in conformity with, a regulation issued under this section prescribing the conditions under which such additive may be safely used; or

(B) a notification submitted under subsection (h) that is effective.

While such a regulation relating to a food additive, or such a notification under subsection (h)(1) relating to a food additive that is a food contact substance, is in effect, and has not been revoked pursuant to subsection (i), a food shall not, by reason of bearing or containing such a food additive in accordance with the regulation or notification, be considered adulterated under section 342(a)(1) of this title.

(b) Petition for regulation prescribing conditions of safe use; contents; description of production methods and controls; samples; notice of regulation

(1) Any person may, with respect to any intended use of a food additive, file with the Secretary a petition proposing the issuance of a regulation prescribing the conditions under which such additive may be safely used.

(2) Such petition shall, in addition to any explanatory or supporting data, contain—

(A) the name and all pertinent information concerning such food additive, including, where available, its chemical identity and composition;

(B) a statement of the conditions of the proposed use of such additive, including all directions, recommendations, and suggestions proposed for the use of such additive, and including specimens of its proposed labeling;

(C) all relevant data bearing on the physical or other technical effect such additive is intended to produce, and the quantity of such additive required to produce such effect;

(D) a description of practicable methods for determining the quantity of such additive in or on food, and any substance formed in or on food, because of its use; and

(E) full reports of investigations made with respect to the safety for use of such additive, including full information as to the methods and controls used in conducting such investigations.

(3) Upon request of the Secretary, the petitioner shall furnish (or, if the petitioner is not the manufacturer of such additive, the petitioner shall have the manufacturer of such additive furnish, without disclosure to the petitioner) a full description of the methods used in, and the facilities and controls used for, the production of such additive.

(4) Upon request of the Secretary, the petitioner shall furnish samples of the food additive involved, or articles used as components thereof, and of the food in or on which the additive is proposed to be used.

(5) Notice of the regulation proposed by the petitioner shall be published in general terms by the Secretary within thirty days after filing.

(c) Approval or denial of petition; time for issuance of order; evaluation of data; factors

(1) The Secretary shall—

(A) by order establish a regulation (whether or not in accord with that proposed by the petitioner) prescribing, with respect to one or more proposed uses of the food additive involved, the conditions under which such additive may be safely used (including, but not limited to, specifications as to the particular food or classes of food in or in which such additive may be used, the maximum quantity which may be used or permitted to remain in or on such food, the manner in which such additive may be added to or used in or on such food, and any directions or other labeling or packaging requirements for such additive deemed necessary by him to assure the safety of such use), and shall notify the petitioner of such order and the reasons for such action; or

(B) by order deny the petition, and shall notify the petitioner of such order and of the reasons for such action.

(2) The order required by paragraph (1)(A) or (B) of this subsection shall be issued within ninety days after the date of filing of the petition, except that the Secretary may (prior to such ninetieth day), by written notice to the petitioner, extend such ninety-day period to such time (not more than one hundred and eighty days after the date of filing of the petition) as the Secretary deems necessary to enable him to study and investigate the petition.

(3) No such regulation shall issue if a fair evaluation of the data before the Secretary—

(A) fails to establish that the proposed use of the food additive, under the conditions of use to be specified in the regulation, will be safe: *Provided*, That no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal, except

that this proviso shall not apply with respect to the use of a substance as an ingredient of feed for animals which are raised for food production, if the Secretary finds (i) that, under the conditions of use and feeding specified in proposed labeling and reasonably certain to be followed in practice, such additive will not adversely affect the animals for which such feed is intended, and (ii) that no residue of the additive will be found (by methods of examination prescribed or approved by the Secretary by regulations, which regulations shall not be subject to subsections (f) and (g)) in any edible portion of such animal after slaughter or in any food yielded by or derived from the living animal; or

(B) shows that the proposed use of the additive would promote deception of the consumer in violation of this chapter or would otherwise result in adulteration or in misbranding of food within the meaning of this chapter.

(4) If, in the judgment of the Secretary, based upon a fair evaluation of the data before him, a tolerance limitation is required in order to assure that the proposed use of an additive will be safe, the Secretary—

(A) shall not fix such tolerance limitation at a level higher than he finds to be reasonably required to accomplish the physical or other technical effect for which such additive is intended; and

(B) shall not establish a regulation for such proposed use if he finds upon a fair evaluation of the data before him that such data do not establish that such use would accomplish the intended physical or other technical effect.

(5) In determining, for the purposes of this section, whether a proposed use of a food additive is safe, the Secretary shall consider among other relevant factors—

(A) the probable consumption of the additive and of any substance formed in or on food because of the use of the additive;

(B) the cumulative effect of such additive in the diet of man or animals, taking into account any chemically or pharmacologically related substance or substances in such diet; and

(C) safety factors which in the opinion of experts qualified by scientific training and experience to evaluate the safety of food additives are generally recognized as appropriate for the use of animal experimentation data.

(d) Regulation issued on Secretary's initiative

The Secretary may at any time, upon his own initiative, propose the issuance of a regulation prescribing, with respect to any particular use of a food additive, the conditions under which such additive may be safely used, and the reasons therefor. After the thirtieth day following publication of such a proposal, the Secretary may by order establish a regulation based upon the proposal.

(e) Publication and effective date of orders

Any order, including any regulation established by such order, issued under subsection (c) or (d) of this section, shall be published and shall be effective upon publication, but the Secretary may stay such effectiveness if, after issuance of such order, a hearing is sought with respect to such order pursuant to subsection (f).

(f) Objections and public hearing; basis and contents of order; statement

(1) Within thirty days after publication of an order made pursuant to subsection (c) or (d) of this section, any person adversely affected by such an order may file objections thereto with the Secretary, specifying with particularity the provisions of the order deemed objectionable, stating reasonable grounds therefor, and requesting a public hearing upon such objections. The Secretary shall, after due notice, as promptly as possible hold such public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections. As soon as practicable after completion of the hearing, the Secretary shall by order act upon such objections and make such order public.

(2) Such order shall be based upon a fair evaluation of the entire record at such hearing, and shall include a statement setting forth in detail the findings and conclusions upon which the order is based.

(3) The Secretary shall specify in the order the date on which it shall take effect, except that it shall not be made to take effect prior to the ninetieth day after its publication, unless the Secretary finds that emergency conditions exist necessitating an earlier effective date, in which event the Secretary shall specify in the order his findings as to such conditions.

(g) Judicial review

(1) In a case of actual controversy as to the validity of any order issued under subsection (f), including any order thereunder with respect to amendment or repeal of a regulation issued under this section, any person who will be adversely affected by such order may obtain judicial review by filing in the United States Court of Appeals for the circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit, within sixty days after the entry of such order, a petition praying that the order be set aside in whole or in part.

(2) A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary, or any officer designated by him for that purpose, and thereupon the Secretary shall file in the court the record of the proceedings on which he based his order, as provided in section 2112 of title 28. Upon the filing of such petition the court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm or set aside the order complained of in whole or in part. Until the filing of the record the Secretary may modify or set aside his order. The findings of the Secretary with respect to questions of fact shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(3) The court, on such judicial review, shall not sustain the order of the Secretary if he failed to comply with any requirement imposed on him by subsection (f)(2) of this section.

(4) If application is made to the court for leave to adduce additional evidence, the court may order such additional evidence to be taken before the Secretary and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper, if such evidence is material and there were reasonable grounds for failure to adduce such evidence in the proceedings below. The Secretary may modify his findings as to the facts and order by reason of the additional evidence so taken, and shall file with the court such modified findings and order.

(5) The judgment of the court affirming or setting aside, in whole or in part, any order under this section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28. The commencement of proceedings under this section shall not, unless specifically ordered by the court to the contrary, operate as a stay of an order.

(h) Notification relating to food contact substance

(1) Subject to such regulations as may be promulgated under paragraph (3), a manufacturer or supplier of a food contact substance may, at least 120 days prior to the introduction or delivery for introduction into interstate commerce of the food contact substance, notify the Secretary of the identity and intended use of the food contact substance, and of the determination of the manufacturer or supplier that the intended use of such food contact substance is safe under the standard described in subsection (c)(3)(A). The notification shall contain the information that forms the basis of the determination and all information required to be submitted by regulations promulgated by the Secretary.

(2)(A) A notification submitted under paragraph (1) shall become effective 120 days after the date of receipt by the Secretary and the food contact substance may be introduced or delivered for introduction into interstate commerce, unless the Secretary makes a determination within the 120-day period that, based on the data and information before the Secretary, such use of the food contact substance has not been shown to be safe under the standard described in subsection (c)(3)(A), and informs the manufacturer or supplier of such determination.

(B) A decision by the Secretary to object to a notification shall constitute final agency action subject to judicial review.

(C) In this paragraph, the term "food contact substance" means the substance that is the subject of a notification submitted under paragraph (1), and does not include a similar or identical substance manufactured or prepared by a person other than the manufacturer identified in the notification.

(3)(A) The process in this subsection shall be utilized for authorizing the marketing of a food contact substance except where the Secretary determines that submission and review of a petition under subsection (b) is necessary to provide adequate assurance of safety, or where the Secretary and any manufacturer or supplier agree that such manufacturer or supplier may submit a petition under subsection (b).

(B) The Secretary is authorized to promulgate regulations to identify the circumstances in which a petition shall be filed under subsection (b), and shall consider criteria such as the probable consumption of

such food contact substance and potential toxicity of the food contact substance in determining the circumstances in which a petition shall be filed under subsection (b).

(4) The Secretary shall keep confidential any information provided in a notification under paragraph (1) for 120 days after receipt by the Secretary of the notification. After the expiration of such 120 days, the information shall be available to any interested party except for any matter in the notification that is a trade secret or confidential commercial information.

(5)(A)(i) Except as provided in clause (ii), the notification program established under this subsection shall not operate in any fiscal year unless—

(I) an appropriation equal to or exceeding the applicable amount under clause (iv) is made for such fiscal year for carrying out such program in such fiscal year; and

(II) the Secretary certifies that the amount appropriated for such fiscal year for the Center for Food Safety and Applied Nutrition of the Food and Drug Administration (exclusive of the appropriation referred to in subclause (I)) equals or exceeds the amount appropriated for the Center for fiscal year 1997, excluding any amount appropriated for new programs.

(ii) The Secretary shall, not later than April 1, 1999, begin accepting and reviewing notifications submitted under the notification program established under this subsection if—

(I) an appropriation equal to or exceeding the applicable amount under clause (iii) is made for the last six months of fiscal year 1999 for carrying out such program during such period; and

(II) the Secretary certifies that the amount appropriated for such period for the Center for Food Safety and Applied Nutrition of the Food and Drug Administration (exclusive of the appropriation referred to in subclause (I)) equals or exceeds an amount equivalent to one-half the amount appropriated for the Center for fiscal year 1997, excluding any amount appropriated for new programs.

(iii) For the last six months of fiscal year 1999, the applicable amount under this clause is $1,500,000, or the amount specified in the budget request of the President for the six-month period involved for carrying out the notification program in fiscal year 1999, whichever is less.

(iv) For fiscal year 2000 and subsequent fiscal years, the applicable amount under this clause is $3,000,000, or the amount specified in the budget request of the President for the fiscal year involved for carrying out the notification program under this subsection, whichever is less.

(B) For purposes of carrying out the notification program under this subsection, there are authorized to be appropriated such sums as may be necessary for each of the fiscal years 1999 through fiscal year 2003, except that such authorization of appropriations is not effective for a fiscal year for any amount that is less than the applicable amount under clause (iii) or (iv) of subparagraph (A), whichever is applicable.

(C) Not later than April 1 of fiscal year 1998 and February 1 of each subsequent fiscal year, the Secretary shall submit a report to the Committees on Appropriations of the House of Representatives and the Senate, the Committee on Commerce of the House of Representatives, and the Committee on Labor and Human Resources of the Senate that provides an estimate of the Secretary of the costs of carrying out the notification program established under this subsection for the next fiscal year.

(6) In this section, the term "food contact substance" means any substance intended for use as a component of materials used in manufacturing, packing, packaging, transporting, or holding food if such use is not intended to have any technical effect in such food.

(i) Amendment or repeal of regulations

The Secretary shall by regulation prescribe the procedure by which regulations under the foregoing provisions of this section may be amended or repealed, and such procedure shall conform to the procedure provided in this section for the promulgation of such regulations. The Secretary shall by regulation prescribe the procedure by which the Secretary may deem a notification under subsection (h) to no longer be effective.

(j) Exemptions for investigational use

Without regard to subsections (b) to (i), inclusive, of this section, the Secretary shall by regulation provide for exempting from the requirements of this section any food additive, and any food bearing or containing such additive, intended solely for investigational use by qualified experts when in his opinion such exemption is consistent with the public health.

(k) Food additives intended for use in animal food

(1) In taking action on a petition under subsection (c) for, or for recognition of, a food additive intended for use in animal food, the Secretary shall review reports of investigations conducted in foreign countries, provided by the petitioner.

(2) Not later than 12 months after August 14, 2018, the Secretary shall post on the internet website of the Food and Drug Administration—

(A) the number of petitions for food additives intended for use in animal food filed under subsection (b) that are pending;

(B) how long each such petition submitted under subsection (b) has been pending, including such petitions the Secretary has extended under subsection (c)(2); and

(C) the number of study protocols that have been pending review for over 50 days, and the number that have received an extension.

(3) In the case of a food additive petition intended for use in animal food, the Secretary shall provide information to the petitioner on the required contents of such petition. If the Secretary requires additional studies beyond what the petitioner proposed, the Secretary shall provide the scientific rationale for such requirement.

(June 25, 1938, ch. 675, §409, as added Pub. L. 85–929, §4, Sept. 6, 1958, 72 Stat. 1785; amended Pub. L. 86–546, §2, June 29, 1960, 74 Stat. 255; Pub. L. 87–781, title I, §104(f)(1), Oct. 10, 1962, 76 Stat. 785; Pub. L. 98–620, title IV, §402(25)(B), Nov. 8, 1984, 98 Stat. 3359; Pub. L. 105–115, title III, §309, Nov. 21, 1997, 111 Stat. 2354; Pub. L. 115–234, title III, §306(a), Aug. 14, 2018, 132 Stat. 2440.)

Editorial Notes

Amendments

2018—Subsec. (k). Pub. L. 115–234 added subsec. (k).

1997—Subsec. (a). Pub. L. 105–115, §309(a)(4), in closing provisions, substituted "While such a regulation relating to a food additive, or such a notification under subsection (h)(1) relating to a food additive that is a food contact substance, is in effect, and has not been revoked pursuant to subsection (i), a food shall not, by reason of bearing or containing such a food additive in accordance with the regulation or notification, be considered adulterated under section 342(a)(1) of this title." for "While such a regulation relating to a food additive is in effect, a food shall not, by reason of bearing or containing such an additive in accordance with the regulation, be considered adulterated within the meaning of clause (1) of section 342(a) of this title."

Subsec. (a)(1). Pub. L. 105–115, §309(a)(1), substituted "subsection (j)" for "subsection (i)".

Subsec. (a)(3). Pub. L. 105–115, §309(a)(1)(B), (2), (3), added par. (3).

Subsec. (h). Pub. L. 105–115, §309(b)(2), added subsec. (h). Former subsec. (h) redesignated (i).

Subsec. (i). Pub. L. 105–115, §309(b)(1), (3), redesignated subsec. (h) as (i) and inserted at end "The Secretary shall by regulation prescribe the procedure by which the Secretary may deem a notification under subsection (h) to no longer be effective."

Subsec. (j). Pub. L. 105–115, §309(b)(1), (4), redesignated subsec. (i) as (j) and substituted "subsections (b) to (i)" for "subsections (b) to (h)".

1984—Subsec. (g)(2). Pub. L. 98–620 struck out provision that required the court to advance on the docket and expedite the disposition of all causes filed therein pursuant to this section.

1962—Subsec. (c)(3)(A). Pub. L. 87–781 excepted proviso from applying to use of a substance as an ingredient of feed for animals raised for food production, if under conditions of use specified in proposed labeling, and which conditions are reasonably certain to be followed in practice, such additive will not adversely affect the animals and no residue will be found in any edible portion of such animal after slaughter, or in any food from the living animal.

1960—Subsec. (g)(2). Pub. L. 86–546 substituted "forthwith transmitted by the clerk of the court to the Secretary, or any officer" for "served upon the Secretary, or upon any officer", "shall file in the court the record of the proceedings on which he based his order, as provided in section 2112 of title 28" for "shall certify and file in the court a transcript of the proceedings and the record on which he based his order", and "Upon the filing of such petition the court shall have jurisdiction, which upon the filing of the record with it shall be exclusive," for "Upon such filing, the court shall have exclusive jurisdiction", and inserted sentence authorizing the Secretary to modify or set aside his order until the filing of the record.

Statutory Notes and Related Subsidiaries

Change of Name

Committee on Commerce of House of Representatives changed to Committee on Energy and Commerce of House of Representatives, and jurisdiction over matters relating to securities and exchanges and insurance generally transferred to Committee on Financial Services of House of Representatives by House Resolution No. 5, One Hundred Seventh Congress, Jan. 3, 2001.

Committee on Labor and Human Resources of Senate changed to Committee on Health, Education, Labor, and Pensions of Senate by Senate Resolution No. 20, One Hundred Sixth Congress, Jan. 19, 1999.

Effective Date of 1997 Amendment

Amendment by Pub. L. 105–115 effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as a note under section 321 of this title.

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98–620, set out as an Effective Date note under section 1657 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1962 Amendment; Exceptions

Amendment by Pub. L. 87–781 effective Oct. 10, 1962, see section 107 of Pub. L. 87–781, set out as an Effective Date of 1962 Amendment note under section 321 of this title.

Effective Date

Section effective Sept. 6, 1958, see section 6(a) of Pub. L. 85–929, set out as an Effective Date of 1958 Amendment note under section 342 of this title.

Guidance on Pre-Petition Consultation Process for Animal Food Additives

Pub. L. 115–234, title III, §306(c), Aug. 14, 2018, 132 Stat. 2441, provided that:

"(1) In general.—Not later than 18 months after the date of enactment of this Act [Aug. 14, 2018], the Secretary of Health and Human Services (referred to in this subsection as the 'Secretary') shall publish draft guidance relating to the voluntary pre-petition consultation process for food additives intended for use in animal food.

"(2) Contents.—The guidance under paragraph (1) shall include—

"(A) the recommended format to submit to the Food and Drug Administration existing data, including any applicable foreign data, for assessment prior to submission of a food additive petition for animal food under section 409(b) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 348(b)];

"(B) the manner and the number of days by which the Food and Drug Administration intends to review and respond to such existing data, including with respect to providing a scientific rationale for any additional data request;

"(C) circumstances under which the submission of study protocols is recommended prior to submission of a food additive petition under such section 409(b);

"(D) the manner in which the Secretary intends to inform the person submitting a study protocol for a food additive if the review of such study protocol will take longer than 50 days; and

"(E) best practices for communication between the Food and Drug Administration and industry on the development of pre-petition submissions of study protocols and existing data for food additives.

"(3) Final guidance.—The guidance under paragraph (1) shall be finalized, withdrawn, or reissued not later than 1 year after the close of the comment period on the draft guidance."

Glass and Ceramic Ware

Pub. L. 105–115, title III, §308, Nov. 21, 1997, 111 Stat. 2353, provided that:

"(a) In General.—The Secretary may not implement any requirement which would ban, as an unapproved food additive, lead and cadmium based enamel in the lip and rim area of glass and ceramic ware before the expiration of one year after the date such requirement is published.

"(b) Lead and Cadmium Based Enamel.—Unless the Secretary determines, based on available data, that lead and cadmium based enamel on glass and ceramic ware—

"(1) which has less than 60 millimeters of decorating area below the external rim, and

"(2) which is not, by design, representation, or custom of usage intended for use by children,

is unsafe, the Secretary shall not take any action before January 1, 2003, to ban lead and cadmium based enamel on such glass and ceramic ware. Any action taken after January 1, 2003, to ban such enamel on such glass and ceramic ware as an unapproved food additive shall be taken by regulation and such regulation shall provide that such products shall not be removed from the market before 1 year after publication of the final regulation."

Moratorium on Authority of Secretary With Respect to Saccharin

Pub. L. 95–203, §3, Nov. 23, 1977, 91 Stat. 1452, as amended by Pub. L. 96–88, title V, §509(b), Oct. 17, 1979, 93 Stat. 695; Pub. L. 96–273, June 17, 1980, 94 Stat. 536; Pub. L. 97–42, §2, Aug. 14, 1981, 95 Stat. 946; Pub. L. 98–22, §2, Apr. 22, 1983, 97 Stat. 173; Pub. L. 99–46, May 24, 1985, 99 Stat. 81; Pub. L. 100–71, title I, §101, July 11, 1987, 101 Stat. 431; Pub. L. 102–142, title VI, Oct. 28, 1991, 105 Stat. 910; Pub. L. 104–180, title VI, §602, Aug. 6, 1996, 110 Stat. 1594, provided that: "During the period ending May 1, 2002, the Secretary—

"(1) may not amend or revoke the interim food additive regulation of the Food and Drug Administration of the Department of Health and Human Services applicable to saccharin and published on March 15, 1977 (section 180.37 of part 180, subchapter B, chapter 1, title 21, Code of Federal Regulations (42 Fed. Reg. 14638)), or

"(2) may, except as provided in section 4 [enacting section 343a of this title, amending sections 321 and 343 of this title, and enacting provisions set out as notes under section 343 of this title] and the amendments made by such section, not take any other action under the Federal Food, Drug, and Cosmetic Act [this chapter] to prohibit or restrict the sale or distribution of saccharin, any food permitted by such interim food additive regulation to contain saccharin, or any drug or cosmetic containing saccharin,

solely on the basis of the carcinogenic or other toxic effect of saccharin as determined by any study made available to the Secretary before the date of the enactment of this Act [Nov. 23, 1977] which involved human studies or animal testing, or both."

[Definition of "saccharin" as used in section 3 of Pub. L. 95–203, set out above, to include calcium saccharin, sodium saccharin, and ammonium saccharin, see Pub. L. 95–203, §2(d), Nov. 23, 1997, 91 Stat. 1452.]

§349. Bottled drinking water standards; publication in Federal Register

(a) Except as provided in subsection (b), whenever the Administrator of the Environmental Protection Agency prescribes interim or revised national primary drinking water regulations under section 1412 of the Public Health Service Act [42 U.S.C. 300g–1], the Secretary shall consult with the Administrator and within 180 days after the promulgation of such drinking water regulations either promulgate amendments to regulations under this chapter applicable to bottled drinking water or publish in the Federal Register his reasons for not making such amendments.

(b)(1) Not later than 180 days before the effective date of a national primary drinking water regulation promulgated by the Administrator of the Environmental Protection Agency for a contaminant under section 1412 of the Safe Drinking Water Act (42 U.S.C. 300g–1), the Secretary shall promulgate a standard of quality regulation under this subsection for that contaminant in bottled water or make a finding that such a regulation is not necessary to protect the public health because the contaminant is contained in water in public water systems (as defined under section 1401(4) of such Act (42 U.S.C. 300f(4))) but not in water used for bottled drinking water. The effective date for any such standard of quality regulation shall be the same as the effective date for such national primary drinking water regulation, except for any standard of quality of regulation promulgated by the Secretary before August 6, 1996, for which (as of August 6, 1996) an effective date had not been established. In the case of a standard of quality regulation to which such exception applies, the Secretary shall promulgate monitoring requirements for the contaminants covered by the regulation not later than 2 years after August 6, 1996.

(2) A regulation issued by the Secretary as provided in this subsection shall include any monitoring requirements that the Secretary determines appropriate for bottled water.

(3) A regulation issued by the Secretary as provided in this subsection shall require the following:

(A) In the case of contaminants for which a maximum contaminant level is established in a national primary drinking water regulation under section 1412 of the Safe Drinking Water Act (42 U.S.C. 300g–1), the regulation under this subsection shall establish a maximum contaminant level for the contaminant in bottled water which is no less stringent than the maximum contaminant level provided in the national primary drinking water regulation.

(B) In the case of contaminants for which a treatment technique is established in a national primary drinking water regulation under section 1412 of the Safe Drinking Water Act (42 U.S.C. 300g–1), the

regulation under this subsection shall require that bottled water be subject to requirements no less protective of the public health than those applicable to water provided by public water systems using the treatment technique required by the national primary drinking water regulation.

(4)(A) If the Secretary does not promulgate a regulation under this subsection within the period described in paragraph (1), the national primary drinking water regulation referred to in paragraph (1) shall be considered, as of the date on which the Secretary is required to establish a regulation under paragraph (1), as the regulation applicable under this subsection to bottled water.

(B) In the case of a national primary drinking water regulation that pursuant to subparagraph (A) is considered to be a standard of quality regulation, the Secretary shall, not later than the applicable date referred to in such subparagraph, publish in the Federal Register a notice—

(i) specifying the contents of such regulation, including monitoring requirements; and

(ii) providing that for purposes of this paragraph the effective date for such regulation is the same as the effective date for the regulation for purposes of the Safe Drinking Water Act [42 U.S.C. 300f et seq.] (or, if the exception under paragraph (1) applies to the regulation, that the effective date for the regulation is not later than 2 years and 180 days after August 6, 1996).

(June 25, 1938, ch. 675, §410, as added Pub. L. 93–523, §4, Dec. 16, 1974, 88 Stat. 1694; amended Pub. L. 104–182, title III, §305, Aug. 6, 1996, 110 Stat. 1684.)

Editorial Notes

References in Text

The Safe Drinking Water Act, referred to in subsec. (b)(4)(B)(ii), is title XIV of act July 1, 1944, as added Dec. 16, 1974, Pub. L. 93–523, §2(a), 88 Stat. 1660, as amended, which is classified generally to subchapter XII (§300f et seq.) of chapter 6A of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 201 of Title 42 and Tables.

Amendments

1996—Pub. L. 104–182 substituted "(a) Except as provided in subsection (b), whenever" for "Whenever" and added subsec. (b).

Statutory Notes and Related Subsidiaries

Bottled Water Study

Pub. L. 104–182, title I, §114(b), Aug. 6, 1996, 110 Stat. 1641, provided that not later than 18 months after Aug. 6, 1996, the Administrator of the Food and Drug Administration would publish for public notice and comment a draft study on the feasibility of appropriate methods, if any, of informing customers of the contents of bottled water, and publish a final study not later than 30 months after Aug. 6, 1996.

§350. Vitamins and minerals

(a) Authority and limitations of Secretary; applicability

(1) Except as provided in paragraph (2)—

(A) the Secretary may not establish, under section 321(n), 341, or 343 of this title, maximum limits on the potency of any synthetic or natural vitamin or mineral within a food to which this section applies;

(B) the Secretary may not classify any natural or synthetic vitamin or mineral (or combination thereof) as a drug solely because it exceeds the level of potency which the Secretary determines is nutritionally rational or useful;

(C) the Secretary may not limit, under section 321(n), 341, or 343 of this title, the combination or number of any synthetic or natural—

(i) vitamin,

(ii) mineral, or

(iii) other ingredient of food,

within a food to which this section applies.

(2) Paragraph (1) shall not apply in the case of a vitamin, mineral, other ingredient of food, or food, which is represented for use by individuals in the treatment or management of specific diseases or disorders, by children, or by pregnant or lactating women. For purposes of this subparagraph,[1] the term "children" means individuals who are under the age of twelve years.

(b) Labeling and advertising requirements for foods

(1) A food to which this section applies shall not be deemed under section 343 of this title to be misbranded solely because its label bears, in accordance with section 343(i)(2) of this title, all the ingredients in the food or its advertising contains references to ingredients in the food which are not vitamins or minerals.

(2) The labeling for any food to which this section applies may not list its ingredients which are not dietary supplement ingredients described in section 321(ff) of this title (i) except as a part of a list of all the ingredients of such food, and (ii) unless such ingredients are listed in accordance with applicable regulations under section 343 of this title. To the extent that compliance with clause (i) of this subparagraph is impracticable or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the Secretary.

(c) Definitions

(1) For purposes of this section, the term "food to which this section applies" means a food for humans which is a food for special dietary use—

(A) which is or contains any natural or synthetic vitamin or mineral, and

(B) which—

(i) is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or

(ii) if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet.

(2) For purposes of paragraph (1)(B)(i), a food shall be considered as intended for ingestion in liquid form only if it is formulated in a fluid carrier and it is intended for ingestion in daily quantities measured in drops or similar small units of measure.

(3) For purposes of paragraph (1) and of section 343(j) of this title insofar as that section is applicable to food to which this section applies, the term "special dietary use" as applied to food used by man means a particular use for which a food purports or is represented to be used, including but not limited to the following:

(A) Supplying a special dietary need that exists by reason of a physical, physiological, pathological, or other condition, including but not limited to the condition of disease, convalescence, pregnancy, lactation, infancy, allergic hypersensitivity to food, underweight, overweight, or the need to control the intake of sodium.

(B) Supplying a vitamin, mineral, or other ingredient for use by man to supplement his diet by increasing the total dietary intake.

(C) Supplying a special dietary need by reason of being a food for use as the sole item of the diet.

(June 25, 1938, ch. 675, §411, as added Pub. L. 94–278, title V, §501(a), Apr. 22, 1976, 90 Stat. 410; amended Pub. L. 103–417, §§3(c), 7(d), Oct. 25, 1994, 108 Stat. 4328, 4331.)

Editorial Notes

Amendments

1994—Subsec. (b)(2). Pub. L. 103–417, §7(d), redesignated subpar. (A) as par. (2), substituted "dietary supplement ingredients described in section 321(ff) of this title" for "vitamins or minerals", and struck out former subpar. (B), which read as follows: "Notwithstanding the provisions of subparagraph (A), the labeling and

advertising for any food to which this section applies may not give prominence to or emphasize ingredients which are not—

"(i) vitamins,

"(ii) minerals, or

"(iii) represented as a source of vitamins or minerals."

Subsec. (c)(1)(B)(i). Pub. L. 103–417, §3(c)(1), inserted "powder, softgel, gelcap," after "capsule,".

Subsec. (c)(1)(B)(ii). Pub. L. 103–417, §3(c)(2), struck out "does not simulate and" after "in such a form,".

Statutory Notes and Related Subsidiaries

Effective Date of 1994 Amendment

For provision that dietary supplements may be labeled after Oct. 25, 1994, in accordance with amendments made by section 7(d) of Pub. L. 103–417, and shall be so labeled after Dec. 31, 1996, see section 7(e) of Pub. L. 103–417, set out as a note under section 343 of this title.

Amendment of Inconsistent Regulations by Secretary

Pub. L. 94–278, title V, §501(b), Apr. 22, 1976, 90 Stat. 411, as amended by Pub. L. 96–88, title V, §509(b), Oct. 17, 1979, 93 Stat. 695, provided that: "The Secretary of Health and Human Services shall amend any regulation promulgated under the Federal Food, Drug, and Cosmetic Act [this chapter] which is inconsistent with section 411 of such Act [section 350 of this title] (as added by subsection (a)) and such amendments shall be promulgated in accordance with section 553 of title 5, United States Code."

[1] *So in original. Probably should be "paragraph".*

§350a. Infant formulas

(a) Adulteration

An infant formula, including an infant formula powder, shall be deemed to be adulterated if—

(1) such infant formula does not provide nutrients as required by subsection (i),

(2) such infant formula does not meet the quality factor requirements prescribed by the Secretary under subsection (b)(1), or

(3) the processing of such infant formula is not in compliance with the good manufacturing practices and the quality control procedures prescribed by the Secretary under subsection (b)(2).

(b) Requirements for quality factors, good manufacturing practices, and retention of records

(1) The Secretary shall by regulation establish requirements for quality factors for infant formulas to the extent possible consistent with current scientific knowledge, including quality factor requirements for the nutrients required by subsection (i).

(2)(A) The Secretary shall by regulation establish good manufacturing practices for infant formulas, including quality control procedures that the Secretary determines are necessary to assure that an infant formula provides nutrients in accordance with this subsection and subsection (i) and is manufactured in a manner designed to prevent adulteration of the infant formula.

(B) The good manufacturing practices and quality control procedures prescribed by the Secretary under subparagraph (A) shall include requirements for—

(i) the testing, in accordance with paragraph (3) and by the manufacturer of an infant formula or an agent of such manufacturer, of each batch of infant formula for each nutrient required by subsection (i) before the distribution of such batch,

(ii) regularly scheduled testing, by the manufacturer of an infant formula or an agent of such manufacturer, of samples of infant formulas during the shelf life of such formulas to ensure that such formulas are in compliance with this section,

(iii) in-process controls including, where necessary, testing required by good manufacturing practices designed to prevent adulteration of each batch of infant formula, and

(iv) the conduct by the manufacturer of an infant formula or an agent of such manufacturer of regularly scheduled audits to determine that such manufacturer has complied with the regulations

prescribed under subparagraph (A).

In prescribing requirements for audits under clause (iv), the Secretary shall provide that such audits be conducted by appropriately trained individuals who do not have any direct responsibility for the manufacture or production of infant formula.

(3)(A) At the final product stage, each batch of infant formula shall be tested for vitamin A, vitamin B1, vitamin C, and vitamin E to ensure that such infant formula is in compliance with the requirements of this subsection and subsection (i) relating to such vitamins.

(B) Each nutrient premix used in the manufacture of an infant formula shall be tested for each relied upon nutrient required by subsection (i) which is contained in such premix to ensure that such premix is in compliance with its specifications or certifications by a premix supplier.

(C) During the manufacturing process or at the final product stage and before distribution of an infant formula, an infant formula shall be tested for all nutrients required to be included in such formula by subsection (i) for which testing has not been conducted pursuant to subparagraph (A) or (B). Testing under this subparagraph shall be conducted to—

(i) ensure that each batch of such infant formula is in compliance with the requirements of subsection (i) relating to such nutrients, and

(ii) confirm that nutrients contained in any nutrient premix used in such infant formula are present in each batch of such infant formula in the proper concentration.

(D) If the Secretary adds a nutrient to the list of nutrients in the table in subsection (i), the Secretary shall by regulation require that the manufacturer of an infant formula test each batch of such formula for such new nutrient in accordance with subparagraph (A), (B), or (C).

(E) For purposes of this paragraph, the term "final product stage" means the point in the manufacturing process, before distribution of an infant formula, at which an infant formula is homogenous and is not subject to further degradation.

(4)(A) The Secretary shall by regulation establish requirements respecting the retention of records. Such requirements shall provide for—

(i) the retention of all records necessary to demonstrate compliance with the good manufacturing practices and quality control procedures prescribed by the Secretary under paragraph (2), including records containing the results of all testing required under paragraph (2)(B),

(ii) the retention of all certifications or guarantees of analysis by premix suppliers,

(iii) the retention by a premix supplier of all records necessary to confirm the accuracy of all premix certifications and guarantees of analysis,

(iv) the retention of—

(I) all records pertaining to the microbiological quality and purity of raw materials used in infant formula powder and in finished infant formula, and

(II) all records pertaining to food packaging materials which show that such materials do not cause an infant formula to be adulterated within the meaning of section 342(a)(2)(C) of this title,

(v) the retention of all records of the results of regularly scheduled audits conducted pursuant to the requirements prescribed by the Secretary under paragraph (2)(B)(iv), and

(vi) the retention of all complaints and the maintenance of files with respect to, and the review of, complaints concerning infant formulas which may reveal the possible existence of a hazard to health.

(B)(i) Records required under subparagraph (A) with respect to an infant formula shall be retained for at least one year after the expiration of the shelf life of such infant formula. Except as provided in clause (ii), such records shall be made available to the Secretary for review and duplication upon request of the Secretary.

(ii) A manufacturer need only provide written assurances to the Secretary that the regularly scheduled audits required by paragraph (2)(B)(iv) are being conducted by the manufacturer, and need not make available to the Secretary the actual written reports of such audits.

(c) Registration of persons distributing new infant formula

(1) No person shall introduce or deliver for introduction into interstate commerce any new infant formula unless—

(A) such person has, before introducing such new infant formula, or delivering such new infant formula for introduction, into interstate commerce, registered with the Secretary the name of such person, the place of business of such person, and all establishments at which such person intends to manufacture such new infant formula, and

(B) such person has at least 90 days before marketing such new infant formula, made the submission to the Secretary required by subsection (c)(1).

(2) For purposes of paragraph (1), the term "new infant formula" includes—

(A) an infant formula manufactured by a person which has not previously manufactured an infant formula, and

(B) an infant formula manufactured by a person which has previously manufactured infant formula and in which there is a major change, in processing or formulation, from a current or any previous formulation produced by such manufacturer.

For purposes of this paragraph, the term "major change" has the meaning given to such term in section 106.30(c)(2) of title 21, Code of Federal Regulations (as in effect on August 1, 1986), and guidelines issued thereunder.

(d) Submission of information about new infant formula required

(1) A person shall, with respect to any infant formula subject to subsection (c), make a submission to the Secretary which shall include—

(A) the quantitative formulation of the infant formula,

(B) a description of any reformulation of the formula or change in processing of the infant formula,

(C) assurances that the infant formula will not be marketed unless it meets the requirements of subsections (b)(1) and (i), as demonstrated by the testing required under subsection (b)(3), and

(D) assurances that the processing of the infant formula complies with subsection (b)(2).

(2) After the first production of an infant formula subject to subsection (c), and before the introduction into interstate commerce of such formula, the manufacturer of such formula shall submit to the Secretary, in such form as may be prescribed by the Secretary, a written verification which summarizes test results and records demonstrating that such formula complies with the requirements of subsections (b)(1), (b)(2)(A), (b)(2)(B)(i), (b)(2)(B)(iii), (b)(3)(A), (b)(3)(C), and (i).

(3) If the manufacturer of an infant formula for commercial or charitable distribution for human consumption determines that a change in the formulation of the formula or a change in the processing of the formula may affect whether the formula is adulterated under subsection (a), the manufacturer shall, before the first processing of such formula, make the submission to the Secretary required by paragraph (1).

(e) Additional notice requirements for manufacturer

(1) If the manufacturer of an infant formula has knowledge which reasonably supports the conclusion that an infant formula which has been processed by the manufacturer and which has left an establishment subject to the control of the manufacturer—

(A) may not provide the nutrients required by subsection (i), or

(B) may be otherwise adulterated or misbranded,

the manufacturer shall promptly notify the Secretary of such knowledge. If the Secretary determines that the infant formula presents a risk to human health, the manufacturer shall immediately take all actions necessary to recall shipments of such infant formula from all wholesale and retail establishments, consistent with recall regulations and guidelines issued by the Secretary.

(2) For purposes of paragraph (1), the term "knowledge" as applied to a manufacturer means (A) the actual knowledge that the manufacturer had, or (B) the knowledge which a reasonable person would have had under like circumstances or which would have been obtained upon the exercise of due care.

(f) Procedures applicable to recalls by manufacturer; regulatory oversight

(1) If a recall of infant formula is begun by a manufacturer, the recall shall be carried out in accordance with such requirements as the Secretary shall prescribe under paragraph (2) and—

(A) the Secretary shall, not later than the 15th day after the beginning of such recall and at least once every 15 days thereafter until the recall is terminated, review the actions taken under the recall to determine whether the recall meets the requirements prescribed under paragraph (2), and

(B) the manufacturer shall, not later than the 14th day after the beginning of such recall and at least once every 14 days thereafter until the recall is terminated, report to the Secretary the actions taken to implement the recall.

(2) The Secretary shall by regulation prescribe the scope and extent of recalls of infant formulas necessary and appropriate for the degree of risks to human health presented by the formula subject to the recall.

(3) The Secretary shall by regulation require each manufacturer of an infant formula who begins a recall of such formula because of a risk to human health to request each retail establishment at which such formula is sold or available for sale to post at the point of purchase of such formula a notice of such recall at such establishment for such time that the Secretary determines necessary to inform the public of such recall.

(g) Recordkeeping requirements for manufacturer; regulatory oversight and enforcement

(1) Each manufacturer of an infant formula shall make and retain such records respecting the distribution of the infant formula through any establishment owned or operated by such manufacturer as may be necessary to effect and monitor recalls of the formula. Such records shall be retained for at least one year after the expiration of the shelf life of the infant formula.

(2) To the extent that the Secretary determines that records are not being made or maintained in accordance with paragraph (1), the Secretary may by regulation prescribe the records required to be made under paragraph (1) and requirements respecting the retention of such records under such paragraph. Such regulations shall take effect on such date as the Secretary prescribes but not sooner than the 180th day after the date such regulations are promulgated. Such regulations shall apply only with respect to distributions of infant formulas made after such effective date.

(h) Exemptions; regulatory oversight

(1) Any infant formula which is represented and labeled for use by an infant—

(A) who has an inborn error of metabolism or a low birth weight, or

(B) who otherwise has an unusual medical or dietary problem,

is exempt from the requirements of subsections (a), (b), and (c). The manufacturer of an infant formula exempt under this paragraph shall, in the case of the exempt formula, be required to provide the notice required by subsection (e)(1) only with respect to adulteration or misbranding described in subsection (e)(1)(B) and to comply with the regulations prescribed by the Secretary under paragraph (2).

(2) The Secretary may by regulation establish terms and conditions for the exemption of an infant formula from the requirements of subsections (a), (b), and (c). An exemption of an infant formula under paragraph (1) may be withdrawn by the Secretary if such formula is not in compliance with applicable terms and conditions prescribed under this paragraph.

(i) Nutrient requirements

(1) An infant formula shall contain nutrients in accordance with the table set out in this subsection or, if revised by the Secretary under paragraph (2), as so revised.

(2) The Secretary may by regulation—

(A) revise the list of nutrients in the table in this subsection, and

(B) revise the required level for any nutrient required by the table.

NUTRIENTS

Nutrient	Minimum [a]	Maximum [a]

Protein (gm)	1.8 [b]		4.5.
Fat:			
gm	3.3		6.0.
percent cal	30.0		54.0.
Essential fatty acids (linoleate):			
percent cal	2.7		
mg	300.0		
Vitamins:			
A (IU)	250.0	(75 µg)[c]	750.0 (225 µg).[c]
D (IU)	40.0		100.0.
K (µg)	4.0		
E (IU)	0.7	(with 0.7 IU/gm linoleic acid)	
C (ascorbic acid) (mg)	8.0		
B**1** (thiamine) (µg)	40.0		
B**2** (riboflavin) (µg)	60.0		
B**6** (pyridoxine) (µg)	35.0	(with 15 µg/gm of protein in formula)	
B**12** (µg)	0.15		
Niacin (µg)	250.0		
Folic acid (µg)	4.0		
Pantothenic acid (µg)	300.0		
Biotin (µg)	1.5 [d]		
Choline (mg)	7.0 [d]		
Inositol (mg)	4.0 [d]		
Minerals:			
Calcium (mg)	50.0 [e]		
Phosphorus (mg)	25.0 [e]		
Magnesium (mg)	6.0		
Iron (mg)	0.15		
Iodine (µg)	5.0		
Zinc (mg)	0.5		
Copper (µg)	60.0		
Manganese (µg)	5.0		
Sodium (mg)	20.0		60.0.
Potassium (mg)	80.0		200.0.
Chloride (mg)	55.0		150.0.

[a] Stated per 100 kilocalories.

[b] The source of protein shall be at least nutritionally equivalent to casein.

[c] Retinol equivalents.

[d] Required to be included in this amount only in formulas which are not milk-based.

[e] Calcium to phosphorus ratio must be no less than 1.1 nor more than 2.0.

(June 25, 1938, ch. 675, §412, as added Pub. L. 96–359, §2, Sept. 26, 1980, 94 Stat. 1190; amended Pub. L. 99–570, title IV, §4014(a), (b)(1), Oct. 27, 1986, 100 Stat. 3207–116, 3207-120; Pub. L. 103–80, §3(l), Aug. 13, 1993, 107 Stat. 777.)

EDITORIAL NOTES

Amendments

1993—Subsec. (h)(1). Pub. L. 103–80 substituted "(e)(1)(B)" for "(c)(1)(B)," in concluding provisions.

1986—Subsecs. (a) to (d). Pub. L. 99–570, §4014(a)(7), added subsecs. (a) to (d) and struck out former subsecs. (a) relating to adulteration and regulatory oversight, (b) relating to notice to the Secretary by a manufacturer and requirements and scope of that notice, (c) relating to additional notice requirements for the manufacturer, and (d) relating to procedures applicable to recalls by a manufacturer.

Subsecs. (e), (f). Pub. L. 99–570, §4014(a)(1), (7), added subsecs. (e) and (f) and redesignated former subsecs. (e) and (f) as (g) and (h), respectively.

Subsec. (g). Pub. L. 99–570, §4014(a)(1), (2), redesignated subsec. (e) as (g) and substituted "Such records shall be retained for at least one year after the expiration of the shelf life of the infant formula" for "No manufacturer shall be required under this subsection to retain any record respecting the distribution of an infant formula for a period of longer than 2 years from the date the record was made". Former subsec. (g) redesignated (i).

Subsec. (h). Pub. L. 99–570, §4014(a)(1), redesignated subsec. (f) as (h).

Subsec. (h)(1). Pub. L. 99–570, §4014(a)(3), (4), substituted "(a), (b), and (c)" for "(a) and (b)" and "(e)(1)" for "(c)(1)".

Pub. L. 99–570, §4014(a)(5), which directed that "(d)(1)(B)" be substituted for "(e)(1)(B)" in second sentence could not be executed because "(e)(1)(B)" did not appear. See 1993 Amendment note above.

Subsec. (h)(2). Pub. L. 99–570, §4014(a)(6), substituted "(a), (b), and (c)" for "(a) and (b)".

Subsec. (i). Pub. L. 99–570, §4014(a)(1), (b)(1), redesignated subsec. (g) as (i), designated existing provisions as par. (1), substituted "paragraph (2)" for "subsection (a)(2) of this section", substituted a period for the colon after "as so revised", and added par. (2).

Statutory Notes and Related Subsidiaries

Effective Date of 1980 Amendment

Pub. L. 96–359, §6, Sept. 26, 1980, 94 Stat. 1193, provided that: "Section 412 of the Federal Food, Drug, and Cosmetic Act (added by section 2) [this section] shall apply with respect to infant formulas manufactured on or after the 90th day after the date of the enactment of this Act [Sept. 26, 1980]."

§350b. New dietary ingredients

(a) In general

A dietary supplement which contains a new dietary ingredient shall be deemed adulterated under section 342(f) of this title unless it meets one of the following requirements:

(1) The dietary supplement contains only dietary ingredients which have been present in the food supply as an article used for food in a form in which the food has not been chemically altered.

(2) There is a history of use or other evidence of safety establishing that the dietary ingredient when used under the conditions recommended or suggested in the labeling of the dietary supplement will reasonably be expected to be safe and, at least 75 days before being introduced or delivered for introduction into interstate commerce, the manufacturer or distributor of the dietary ingredient or dietary supplement provides the Secretary with information, including any citation to published articles, which is the basis on which the manufacturer or distributor has concluded that a dietary supplement containing such dietary ingredient will reasonably be expected to be safe.

The Secretary shall keep confidential any information provided under paragraph (2) for 90 days following its receipt. After the expiration of such 90 days, the Secretary shall place such information on public display, except matters in the information which are trade secrets or otherwise confidential, commercial information.

(b) Petition

Any person may file with the Secretary a petition proposing the issuance of an order prescribing the conditions under which a new dietary ingredient under its intended conditions of use will reasonably be expected to be safe. The Secretary shall make a decision on such petition within 180 days of the date the

petition is filed with the Secretary. For purposes of chapter 7 of title 5, the decision of the Secretary shall be considered final agency action.

(c) Notification

(1) In general

If the Secretary determines that the information in a new dietary ingredient notification submitted under this section for an article purported to be a new dietary ingredient is inadequate to establish that a dietary supplement containing such article will reasonably be expected to be safe because the article may be, or may contain, an anabolic steroid or an analogue of an anabolic steroid, the Secretary shall notify the Drug Enforcement Administration of such determination. Such notification by the Secretary shall include, at a minimum, the name of the dietary supplement or article, the name of the person or persons who marketed the product or made the submission of information regarding the article to the Secretary under this section, and any contact information for such person or persons that the Secretary has.

(2) Definitions

For purposes of this subsection—

(A) the term "anabolic steroid" has the meaning given such term in section 802(41) of this title; and

(B) the term "analogue of an anabolic steroid" means a substance whose chemical structure is substantially similar to the chemical structure of an anabolic steroid.

(d) "New dietary ingredient" defined

For purposes of this section, the term "new dietary ingredient" means a dietary ingredient that was not marketed in the United States before October 15, 1994 and does not include any dietary ingredient which was marketed in the United States before October 15, 1994.

(June 25, 1938, ch. 675, §413, as added Pub. L. 103–417, §8, Oct. 25, 1994, 108 Stat. 4331; amended Pub. L. 111–353, title I, §113(a), Jan. 4, 2011, 124 Stat. 3920.)

Editorial Notes

Amendments

2011—Subsecs. (c), (d). Pub. L. 111–353 added subsec. (c) and redesignated former subsec. (c) as (d).

Statutory Notes and Related Subsidiaries

Guidance

Pub. L. 111–353, title I, §113(b), Jan. 4, 2011, 124 Stat. 3921, provided that: "Not later than 180 days after the date of enactment of this Act [Jan. 4, 2011], the Secretary shall publish guidance that clarifies when a dietary supplement ingredient is a new dietary ingredient, when the manufacturer or distributor of a dietary ingredient or dietary supplement should provide the Secretary with information as described in section 413(a)(2) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 350b(a)(2)], the evidence needed to document the safety of new dietary ingredients, and appropriate methods for establishing the identify [sic] of a new dietary ingredient."

Construction of 2011 Amendment

Nothing in amendment by Pub. L. 111–353 to be construed to apply to certain alcohol-related facilities, to alter jurisdiction and authorities established under certain other Acts, or in a manner inconsistent with international agreements to which the United States is a party, see sections 2206, 2251, and 2252 of this title.

§350c. Maintenance and inspection of records

(a) Records inspection

(1) Adulterated food

If the Secretary has a reasonable belief that an article of food, and any other article of food that the Secretary reasonably believes is likely to be affected in a similar manner, is adulterated and presents a threat of serious adverse health consequences or death to humans or animals, each person (excluding farms and restaurants) who manufactures, processes, packs, distributes, receives, holds, or imports such article shall, at the request of an officer or employee duly designated by the Secretary, permit such officer or employee, upon presentation of appropriate credentials and a written notice to such person, at reasonable times and within reasonable limits and in a reasonable manner, to have access to and copy all records relating to such article, and to any other article of food that the Secretary reasonably believes is likely to be affected in a similar manner, that are needed to assist the Secretary in determining whether the food is adulterated and presents a threat of serious adverse health consequences or death to humans or animals.

(2) Use of or exposure to food of concern

If the Secretary believes that there is a reasonable probability that the use of or exposure to an article of food, and any other article of food that the Secretary reasonably believes is likely to be affected in a similar manner, will cause serious adverse health consequences or death to humans or animals, each person (excluding farms and restaurants) who manufactures, processes, packs, distributes, receives, holds, or imports such article shall, at the request of an officer or employee duly designated by the Secretary, permit such officer or employee, upon presentation of appropriate credentials and a written notice to such person, at reasonable times and within reasonable limits and in a reasonable manner, to have access to and copy all records relating to such article and to any other article of food that the Secretary reasonably believes is likely to be affected in a similar manner, that are needed to assist the Secretary in determining whether there is a reasonable probability that the use of or exposure to the food will cause serious adverse health consequences or death to humans or animals.

(3) Application

The requirement under paragraphs (1) and (2) applies to all records relating to the manufacture, processing, packing, distribution, receipt, holding, or importation of such article maintained by or on behalf of such person in any format (including paper and electronic formats) and at any location.

(b) Regulations concerning recordkeeping

The Secretary, in consultation and coordination, as appropriate, with other Federal departments and agencies with responsibilities for regulating food safety, may by regulation establish requirements regarding the establishment and maintenance, for not longer than two years, of records by persons (excluding farms and restaurants) who manufacture, process, pack, transport, distribute, receive, hold, or import food, which records are needed by the Secretary for inspection to allow the Secretary to identify the immediate previous sources and the immediate subsequent recipients of food, including its packaging, in order to address credible threats of serious adverse health consequences or death to humans or animals. The Secretary shall take into account the size of a business in promulgating regulations under this section.

(c) Protection of sensitive information

The Secretary shall take appropriate measures to ensure that there are in effect effective procedures to prevent the unauthorized disclosure of any trade secret or confidential information that is obtained by the Secretary pursuant to this section.

(d) Limitations

This section shall not be construed—

(1) to limit the authority of the Secretary to inspect records or to require establishment and maintenance of records under any other provision of this chapter;

(2) to authorize the Secretary to impose any requirements with respect to a food to the extent that it is within the exclusive jurisdiction of the Secretary of Agriculture pursuant to the Federal Meat Inspection Act (21 U.S.C. 601 et seq.), the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), or the Egg Products Inspection Act (21 U.S.C. 1031 et seq.);

(3) to have any legal effect on section 552 of title 5 or section 1905 of title 18; or

(4) to extend to recipes for food, financial data, pricing data, personnel data, research data, or sales data (other than shipment data regarding sales).

(June 25, 1938, ch. 675, §414, as added Pub. L. 107–188, title III, §306(a), June 12, 2002, 116 Stat. 669; amended Pub. L. 111–353, title I, §101(a), Jan. 4, 2011, 124 Stat. 3886.)

Editorial Notes

References in Text

The Federal Meat Inspection Act, referred to in subsec. (d)(2), is titles I to V of act Mar. 4, 1907, ch. 2907, as added Pub. L. 90–201, Dec. 15, 1967, 81 Stat. 584, and Pub. L. 110–246, title XI, §11015(a), June 18, 2008, 122 Stat. 2124, which are classified generally to subchapters I to IV–A (§601 et seq.) of chapter 12 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 601 of this title and Tables.

The Poultry Products Inspection Act, referred to in subsec. (d)(2), is Pub. L. 85–172, Aug. 28, 1957, 71 Stat. 441, which is classified generally to chapter 10 (§451 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 451 of this title and Tables.

The Egg Products Inspection Act, referred to in subsec. (d)(2), is Pub. L. 91–597, Dec. 29, 1970, 84 Stat. 1620, which is classified principally to chapter 15 (§1031 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1031 of this title and Tables.

Amendments

2011—Subsec. (a). Pub. L. 111–353 reenacted heading without change, designated existing provisions as par. (1) and inserted heading, substituted "If the Secretary has a reasonable belief that an article of food, and any other article of food that the Secretary reasonably believes is likely to be affected in a similar manner, is" for "If the Secretary has a reasonable belief that an article of food is", inserted ", and to any other article of food that the Secretary reasonably believes is likely to be affected in a similar manner," after "relating to such article", struck out at end "The requirement under the preceding sentence applies to all records relating to the manufacture, processing, packing, distribution, receipt, holding, or importation of such article maintained by or on behalf of such person in any format (including paper and electronic formats) and at any location.", and added pars. (2) and (3).

Statutory Notes and Related Subsidiaries

Expedited Rulemaking

Pub. L. 107–188, title III, §306(d), June 12, 2002, 116 Stat. 670, provided that: "Not later than 18 months after the date of the enactment of this Act [June 12, 2002], the Secretary shall promulgate proposed and final regulations establishing recordkeeping requirements under subsection 414(b) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 350c(b)] (as added by subsection (a))."

Construction of 2011 Amendment

Nothing in amendment by Pub. L. 111–353 to be construed to apply to certain alcohol-related facilities, to alter jurisdiction and authorities established under certain other Acts, or in a manner inconsistent with international agreements to which the United States is a party, see sections 2206, 2251, and 2252 of this title.

§350d. Registration of food facilities

(a) Registration

(1) In general

The Secretary shall by regulation require that any facility engaged in manufacturing, processing, packing, or holding food for consumption in the United States be registered with the Secretary. To be registered—

(A) for a domestic facility, the owner, operator, or agent in charge of the facility shall submit a registration to the Secretary; and

(B) for a foreign facility, the owner, operator, or agent in charge of the facility shall submit a registration to the Secretary and shall include with the registration the name of the United States agent for the facility.

(2) Registration

An entity (referred to in this section as the "registrant") shall submit a registration under paragraph (1) to the Secretary containing information necessary to notify the Secretary of the name and address of each facility at which, and all trade names under which, the registrant conducts business, the e-mail address for the contact person of the facility or, in the case of a foreign facility, the United States agent for the facility, and, when determined necessary by the Secretary through guidance, the general food category (as identified under section 170.3 of title 21, Code of Federal Regulations, or any other food categories as determined appropriate by the Secretary, including by guidance) of any food manufactured, processed, packed, or held at such facility. The registration shall contain an assurance that the Secretary will be permitted to inspect such facility at the times and in the manner permitted by this chapter. The registrant shall notify the Secretary in a timely manner of changes to such information.

(3) Biennial registration renewal

During the period beginning on October 1 and ending on December 31 of each even-numbered year, a registrant that has submitted a registration under paragraph (1) shall submit to the Secretary a renewal registration containing the information described in paragraph (2). The Secretary shall provide for an abbreviated registration renewal process for any registrant that has not had any changes to such information since the registrant submitted the preceding registration or registration renewal for the facility involved.

(4) Procedure

Upon receipt of a completed registration described in paragraph (1), the Secretary shall notify the registrant of the receipt of such registration and assign a registration number to each registered facility.

(5) List

The Secretary shall compile and maintain an up-to-date list of facilities that are registered under this section. Such list and any registration documents submitted pursuant to this subsection shall not be subject to disclosure under section 552 of title 5. Information derived from such list or registration documents shall not be subject to disclosure under section 552 of title 5 to the extent that it discloses the identity or location of a specific registered person.

(b) Suspension of registration

(1) In general

If the Secretary determines that food manufactured, processed, packed, received, or held by a facility registered under this section has a reasonable probability of causing serious adverse health consequences or death to humans or animals, the Secretary may by order suspend the registration of a facility—

(A) that created, caused, or was otherwise responsible for such reasonable probability; or

(B)(i) that knew of, or had reason to know of, such reasonable probability; and

(ii) packed, received, or held such food.

(2) Hearing on suspension

The Secretary shall provide the registrant subject to an order under paragraph (1) with an opportunity for an informal hearing, to be held as soon as possible but not later than 2 business days after the issuance of the order or such other time period, as agreed upon by the Secretary and the registrant, on the actions required for reinstatement of registration and why the registration that is subject to suspension should be reinstated. The Secretary shall reinstate a registration if the Secretary determines, based on evidence presented, that adequate grounds do not exist to continue the suspension of the registration.

(3) Post-hearing corrective action plan; vacating of order

(A) Corrective action plan

If, after providing opportunity for an informal hearing under paragraph (2), the Secretary determines that the suspension of registration remains necessary, the Secretary shall require the registrant to submit a corrective action plan to demonstrate how the registrant plans to correct the conditions found by the Secretary. The Secretary shall review such plan not later than 14 days after the submission of the corrective action plan or such other time period as determined by the Secretary.

(B) Vacating of order

Upon a determination by the Secretary that adequate grounds do not exist to continue the suspension actions required by the order, or that such actions should be modified, the Secretary shall promptly vacate the order and reinstate the registration of the facility subject to the order or modify the order, as appropriate.

(4) Effect of suspension

If the registration of a facility is suspended under this subsection, no person shall import or export food into the United States from such facility, offer to import or export food into the United States from such facility, or otherwise introduce food from such facility into interstate or intrastate commerce in the United States.

(5) Regulations

(A) In general

The Secretary shall promulgate regulations to implement this subsection. The Secretary may promulgate such regulations on an interim final basis.

(B) Registration requirement

The Secretary may require that registration under this section be submitted in an electronic format. Such requirement may not take effect before the date that is 5 years after January 4, 2011.

(6) Application date

Facilities shall be subject to the requirements of this subsection beginning on the earlier of—

(A) the date on which the Secretary issues regulations under paragraph (5); or

(B) 180 days after January 4, 2011.

(7) No delegation

The authority conferred by this subsection to issue an order to suspend a registration or vacate an order of suspension shall not be delegated to any officer or employee other than the Commissioner.

(c) Facility

For purposes of this section:

(1) The term "facility" includes any factory, warehouse, or establishment (including a factory, warehouse, or establishment of an importer) that manufactures, processes, packs, or holds food. Such term does not include farms; restaurants; other retail food establishments; nonprofit food establishments in which food is prepared for or served directly to the consumer; or fishing vessels (except such vessels engaged in processing as defined in section 123.3(k) of title 21, Code of Federal Regulations).

(2) The term "domestic facility" means a facility located in any of the States or Territories.

(3)(A) The term "foreign facility" means a facility that manufacturers, processes, packs, or holds food, but only if food from such facility is exported to the United States without further processing or packaging outside the United States.

(B) A food may not be considered to have undergone further processing or packaging for purposes of subparagraph (A) solely on the basis that labeling was added or that any similar activity of a de minimis nature was carried out with respect to the food.

(d) Rule of construction

Nothing in this section shall be construed to authorize the Secretary to require an application, review, or licensing process for a facility to be registered, except with respect to the reinstatement of a registration that is suspended under subsection (b).

(June 25, 1938, ch. 675, §415, as added Pub. L. 107–188, title III, §305(a), June 12, 2002, 116 Stat. 667; amended Pub. L. 111–353, title I, §102(a)–(b)(1), (d)(2), Jan. 4, 2011, 124 Stat. 3887, 3889.)

Editorial Notes

Amendments

2011—Subsec. (a)(2). Pub. L. 111–353, §102(a)(1), (b)(1)(A), substituted "conducts business, the e-mail address for the contact person of the facility or, in the case of a foreign facility, the United States agent for the facility, and" for "conducts business and", inserted ", or any other food categories as determined appropriate by the Secretary, including by guidance" after "Code of Federal Regulations", and inserted after first sentence "The registration shall contain an assurance that the Secretary will be permitted to inspect such facility at the times and in the manner permitted by this chapter."

Subsec. (a)(3) to (5). Pub. L. 111–353, §102(a)(2), (3), added par. (3) and redesignated former pars. (3) and (4) as (4) and (5), respectively.

Subsecs. (b), (c). Pub. L. 111–353, §102(b)(1)(B), (C), added subsec. (b) and redesignated former subsec. (b) as (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 111–353, §102(b)(1)(B), (d)(2), redesignated subsec. (c) as (d) and inserted "for a facility to be registered, except with respect to the reinstatement of a registration that is suspended under subsection (b)" before period at end.

Statutory Notes and Related Subsidiaries

Regulations

Pub. L. 111–353, title I, §102(c), Jan. 4, 2011, 124 Stat. 3889, provided that:

"(1) Retail food establishment.—The Secretary shall amend the definition of the term 'retail food establishment' in section in [sic] 1.227(b)(11) of title 21, Code of Federal Regulations[,] to clarify that, in determining the primary function of an establishment or a retail food establishment under such section, the sale of food products directly to consumers by such establishment and the sale of food directly to consumers by such retail food establishment include—

"(A) the sale of such food products or food directly to consumers by such establishment at a roadside stand or farmers' market where such stand or market is located other than where the food was manufactured or processed;

"(B) the sale and distribution of such food through a community supported agriculture program; and

"(C) the sale and distribution of such food at any other such direct sales platform as determined by the Secretary.

"(2) Definitions.—For purposes of paragraph (1)—

"(A) the term 'community supported agriculture program' has the same meaning given the term 'community supported agriculture (CSA) program' in section 249.2 of title 7, Code of Federal Regulations (or any successor regulation); and

"(B) the term 'consumer' does not include a business."

Pub. L. 111–353, title I, §103(c), Jan. 4, 2011, 124 Stat. 3896, provided that:

"(1) Proposed rulemaking.—

"(A) In general.—Not later than 9 months after the date of enactment of this Act [Jan. 4, 2011], the Secretary of Health and Human Services (referred to in this subsection as the 'Secretary') shall publish a notice of proposed rulemaking in the Federal Register to promulgate regulations with respect to—

"(i) activities that constitute on-farm packing or holding of food that is not grown, raised, or consumed on such farm or another farm under the same ownership for purposes of section 415 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350d), as amended by this Act; and

"(ii) activities that constitute on-farm manufacturing or processing of food that is not consumed on that farm or on another farm under common ownership for purposes of such section 415.

"(B) Clarification.—The rulemaking described under subparagraph (A) shall enhance the implementation of such section 415 and clarify the activities that are included as part of the definition of the term 'facility' under such section 415. Nothing in this Act [see Short Title note set out under section 2201 of this title] authorizes the Secretary to modify the definition of the term 'facility' under such section.

"(C) Science-based risk analysis.—In promulgating regulations under subparagraph (A), the Secretary shall conduct a science-based risk analysis of—

"(i) specific types of on-farm packing or holding of food that is not grown, raised, or consumed on such farm or another farm under the same ownership, as such packing and holding relates to specific foods; and

"(ii) specific on-farm manufacturing and processing activities as such activities relate to specific foods that are not consumed on that farm or on another farm under common ownership.

"(D) Authority with respect to certain facilities.—

"(i) IN GENERAL.—In promulgating the regulations under subparagraph (A), the Secretary shall consider the results of the science-based risk analysis conducted under subparagraph (C), and shall exempt certain facilities from the requirements in section 418 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 350g] (as added by this section), including hazard analysis and preventive controls, and the mandatory inspection frequency in section 421 of such Act [21 U.S.C. 350j] (as added by section 201), or modify the requirements in such sections 418 or 421, as the Secretary determines appropriate, if such facilities are engaged only in specific types of on-farm manufacturing, processing, packing, or holding activities that the Secretary determines to be low risk involving specific foods the Secretary determines to be low risk.

"(ii) LIMITATION.—The exemptions or modifications under clause (i) shall not include an exemption from the requirement to register under section 415 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350d), as amended by this Act, if applicable, and shall apply only to small businesses and very small businesses, as defined in the regulation promulgated under section 418(n) of the Federal Food, Drug, and Cosmetic Act (as added under subsection (a)).

"(2) FINAL REGULATIONS.—Not later than 9 months after the close of the comment period for the proposed rulemaking under paragraph (1), the Secretary shall adopt final rules with respect to—

"(A) activities that constitute on-farm packing or holding of food that is not grown, raised, or consumed on such farm or another farm under the same ownership for purposes of section 415 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350d), as amended by this Act;

"(B) activities that constitute on-farm manufacturing or processing of food that is not consumed on that farm or on another farm under common ownership for purposes of such section 415; and

"(C) the requirements under sections 418 and 421 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 350g, 350j], as added by this Act, from which the Secretary may issue exemptions or modifications of the requirements for certain types of facilities."

Pub. L. 107–188, title III, §305(e), June 12, 2002, 116 Stat. 669, provided that: "Not later than 18 months after the date of the enactment of this Act [June 12, 2002], the Secretary of Health and Human Services shall promulgate proposed and final regulations for the requirement of registration under section 415 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 350d] (as added by subsection (a) of this section). Such requirement of registration takes effect—

"(1) upon the effective date of such final regulations; or

"(2) upon the expiration of such 18-month period if the final regulations have not been made effective as of the expiration of such period, subject to compliance with the final regulations when the final regulations are made effective."

CONSTRUCTION OF 2011 AMENDMENT

Nothing in amendments by Pub. L. 111–353 to be construed to alter jurisdiction and authorities established under certain other Acts or in a manner inconsistent with international agreements to which the United States is a party, see sections 2251 and 2252 of this title.

SMALL ENTITY COMPLIANCE POLICY GUIDE

Pub. L. 111–353, title I, §102(b)(2), Jan. 4, 2011, 124 Stat. 3888, provided that: "Not later than 180 days after the issuance of the regulations promulgated under section 415(b)(5) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 350d(b)(5)] (as added by this section), the Secretary shall issue a small entity compliance policy guide setting forth in plain language the requirements of such regulations to assist small entities in complying with registration requirements and other activities required under such section."

ELECTRONIC FILING

Pub. L. 107–188, title III, §305(d), June 12, 2002, 116 Stat. 668, provided that: "For the purpose of reducing paperwork and reporting burdens, the Secretary of Health and Human Services may provide for, and encourage the use of, electronic methods of submitting to the Secretary registrations required pursuant to this section [enacting this section, amending sections 331 and 381 of this title, and enacting provisions set out as a note under this section]. In providing for the electronic submission of such registrations, the Secretary shall ensure adequate authentication protocols are used to enable identification of the registrant and validation of the data as appropriate."

§350e. Sanitary transportation practices

(a) Definitions

In this section:

(1) Bulk vehicle

The term "bulk vehicle" includes a tank truck, hopper truck, rail tank car, hopper car, cargo tank, portable tank, freight container, or hopper bin, and any other vehicle in which food is shipped in bulk, with the food coming into direct contact with the vehicle.

(2) Transportation

The term "transportation" means any movement in commerce by motor vehicle or rail vehicle.

(b) Regulations

The Secretary shall by regulation require shippers, carriers by motor vehicle or rail vehicle, receivers, and other persons engaged in the transportation of food to use sanitary transportation practices prescribed by the Secretary to ensure that food is not transported under conditions that may render the food adulterated.

(c) Contents

The regulations under subsection (b) shall—

(1) prescribe such practices as the Secretary determines to be appropriate relating to—

(A) sanitation;

(B) packaging, isolation, and other protective measures;

(C) limitations on the use of vehicles;

(D) information to be disclosed—

(i) to a carrier by a person arranging for the transport of food; and

(ii) to a manufacturer or other person that—

(I) arranges for the transportation of food by a carrier; or

(II) furnishes a tank vehicle or bulk vehicle for the transportation of food; and

(E) recordkeeping; and

(2) include—

(A) a list of nonfood products that the Secretary determines may, if shipped in a bulk vehicle, render adulterated food that is subsequently transported in the same vehicle; and

(B) a list of nonfood products that the Secretary determines may, if shipped in a motor vehicle or rail vehicle (other than a tank vehicle or bulk vehicle), render adulterated food that is simultaneously or subsequently transported in the same vehicle.

(d) Waivers

(1) In general

The Secretary may waive any requirement under this section, with respect to any class of persons, vehicles, food, or nonfood products, if the Secretary determines that the waiver—

(A) will not result in the transportation of food under conditions that would be unsafe for human or animal health; and

(B) will not be contrary to the public interest.

(2) Publication

The Secretary shall publish in the Federal Register any waiver and the reasons for the waiver.

(e) Preemption

(1) In general

A requirement of a State or political subdivision of a State that concerns the transportation of food is preempted if—

(A) complying with a requirement of the State or political subdivision and a requirement of this section, or a regulation prescribed under this section, is not possible; or

(B) the requirement of the State or political subdivision as applied or enforced is an obstacle to accomplishing and carrying out this section or a regulation prescribed under this section.

(2) Applicability

This subsection applies to transportation that occurs on or after the effective date of the regulations promulgated under subsection (b).

(f) Assistance of other agencies

The Secretary of Transportation, the Secretary of Agriculture, the Administrator of the Environmental Protection Agency, and the heads of other Federal agencies, as appropriate, shall provide assistance on request, to the extent resources are available, to the Secretary for the purposes of carrying out this section.

(June 25, 1938, ch. 675, §416, as added Pub. L. 109–59, title VII, §7202(b), Aug. 10, 2005, 119 Stat. 1911.)

Statutory Notes and Related Subsidiaries

Effective Date

Section effective Oct. 1, 2005, see section 7204 of Pub. L. 109–59, set out as an Effective Date of 2005 Amendment note under section 331 of this title.

Regulations

Pub. L. 111–353, title I, §111(a), Jan. 4, 2011, 124 Stat. 3916, provided that: "Not later than 18 months after the date of enactment of this Act [Jan. 4, 2011], the Secretary shall promulgate regulations described in section 416(b) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350e(b))."

§350f. Reportable food registry

(a) Definitions

In this section:

(1) Responsible party

The term "responsible party", with respect to an article of food, means a person that submits the registration under section 350d(a) of this title for a food facility that is required to register under section 350d(a) of this title, at which such article of food is manufactured, processed, packed, or held.

(2) Reportable food

The term "reportable food" means an article of food (other than infant formula) for which there is a reasonable probability that the use of, or exposure to, such article of food will cause serious adverse health consequences or death to humans or animals.

(b) Establishment

(1) In general

Not later than 1 year after September 27, 2007, the Secretary shall establish within the Food and Drug Administration a Reportable Food Registry to which instances of reportable food may be submitted by the Food and Drug Administration after receipt of reports under subsection (d), via an electronic portal, from—

(A) Federal, State, and local public health officials; or

(B) responsible parties.

(2) Review by Secretary

The Secretary shall promptly review and assess the information submitted under paragraph (1) for the purposes of identifying reportable food, submitting entries to the Reportable Food Registry, acting under subsection (c), and exercising other existing food safety authorities under this chapter to protect the public health.

(c) Issuance of an alert by the Secretary

(1) In general

The Secretary shall issue, or cause to be issued, an alert or a notification with respect to a reportable food using information from the Reportable Food Registry as the Secretary deems necessary to protect the public health.

(2) Effect

Paragraph (1) shall not affect the authority of the Secretary to issue an alert or a notification under any other provision of this chapter.

(d) Reporting and notification

(1) In general

Except as provided in paragraph (2), as soon as practicable, but in no case later than 24 hours after a responsible party determines that an article of food is a reportable food, the responsible party shall—

(A) submit a report to the Food and Drug Administration through the electronic portal established under subsection (b) that includes the data elements described in subsection (e) (except the elements described in paragraphs (8), (9), and (10) of such subsection); and

(B) investigate the cause of the adulteration if the adulteration of the article of food may have originated with the responsible party.

(2) No report required

A responsible party is not required to submit a report under paragraph (1) if—

(A) the adulteration originated with the responsible party;

(B) the responsible party detected the adulteration prior to any transfer to another person of such article of food; and

(C) the responsible party—

(i) corrected such adulteration; or

(ii) destroyed or caused the destruction of such article of food.

(3) Reports by public health officials

A Federal, State, or local public health official may submit a report about a reportable food to the Food and Drug Administration through the electronic portal established under subsection (b) that includes the data elements described in subsection (e) that the official is able to provide.

(4) Report number

The Secretary shall ensure that, upon submission of a report under paragraph (1) or (3), a unique number is issued through the electronic portal established under subsection (b) to the person submitting such report, by which the Secretary is able to link reports about the reportable food submitted and amended under this subsection and identify the supply chain for such reportable food.

(5) Review

The Secretary shall promptly review a report submitted under paragraph (1) or (3).

(6) Response to report submitted by a responsible party

After consultation with the responsible party that submitted a report under paragraph (1), the Secretary may require such responsible party to perform, as soon as practicable, but in no case later than a time specified by the Secretary, 1 or more of the following:

(A) Amend the report submitted by the responsible party under paragraph (1) to include the data element described in subsection (e)(9).

(B) Provide a notification—

(i) to the immediate previous source of the article of food, if the Secretary deems necessary;

(ii) to the immediate subsequent recipient of the article of food, if the Secretary deems necessary; and

(iii) that includes—

(I) the data elements described in subsection (e) that the Secretary deems necessary;

(II) the actions described under paragraph (7) that the recipient of the notification shall perform, as required by the Secretary; and

(III) any other information that the Secretary may require.

(7) Subsequent reports and notifications

Except as provided in paragraph (8), the Secretary may require a responsible party to perform, as soon as practicable, but in no case later than a time specified by the Secretary, after the responsible party receives a notification under subparagraph (C) or paragraph (6)(B), 1 or more of the following:

(A) Submit a report to the Food and Drug Administration through the electronic portal established under subsection (b) that includes those data elements described in subsection (e) and other information that the Secretary deems necessary.

(B) Investigate the cause of the adulteration if the adulteration of the article of food may have originated with the responsible party.

(C) Provide a notification—

(i) to the immediate previous source of the article of food, if the Secretary deems necessary;

(ii) to the immediate subsequent recipient of the article of food, if the Secretary deems necessary; and

(iii) that includes—

(I) the data elements described in subsection (e) that the Secretary deems necessary;

(II) the actions described under this paragraph that the recipient of the notification shall perform, as required by the Secretary; and

(III) any other information that the Secretary may require.

(8) Amended report

If a responsible party receives a notification under paragraph (6)(B) or paragraph (7)(C) with respect to an article of food after the responsible party has submitted a report to the Food and Drug Administration under paragraph (1) with respect to such article of food—

(A) the responsible party is not required to submit an additional report or make a notification under paragraph (7); and

(B) the responsible party shall amend the report submitted by the responsible party under paragraph (1) to include the data elements described in paragraph (9), and, with respect to both such notification and such report, paragraph (11) of subsection (e).

(e) Data elements

The data elements described in this subsection are the following:

(1) The registration numbers of the responsible party under section 350d(a)(3) [1] of this title.

(2) The date on which an article of food was determined to be a reportable food.

(3) A description of the article of food including the quantity or amount.

(4) The extent and nature of the adulteration.

(5) If the adulteration of the article of food may have originated with the responsible party, the results of the investigation required under paragraph (1)(B) or (7)(B) of subsection (d), as applicable and when known.

(6) The disposition of the article of food, when known.

(7) Product information typically found on packaging including product codes, use-by dates, and names of manufacturers, packers, or distributors sufficient to identify the article of food.

(8) Contact information for the responsible party.

(9) The contact information for parties directly linked in the supply chain and notified under paragraph (6)(B) or (7)(C) of subsection (d), as applicable.

(10) The information required by the Secretary to be included in a notification provided by the responsible party involved under paragraph (6)(B) or (7)(C) of subsection (d) or required in a report under subsection (d)(7)(A).

(11) The unique number described in subsection (d)(4).

(f) Critical information

Except with respect to fruits and vegetables that are raw agricultural commodities, not more than 18 months after January 4, 2011, the Secretary may require a responsible party to submit to the Secretary consumer-oriented information regarding a reportable food, which shall include—

(1) a description of the article of food as provided in subsection (e)(3);

(2) as provided in subsection (e)(7), affected product identification codes, such as UPC, SKU, or lot or batch numbers sufficient for the consumer to identify the article of food;

(3) contact information for the responsible party as provided in subsection (e)(8); and

(4) any other information the Secretary determines is necessary to enable a consumer to accurately identify whether such consumer is in possession of the reportable food.

(g) Grocery store notification

(1) Action by Secretary

The Secretary shall—

(A) prepare the critical information described under subsection (f) for a reportable food as a standardized one-page summary;

(B) publish such one-page summary on the Internet website of the Food and Drug Administration in a format that can be easily printed by a grocery store for purposes of consumer notification.

(2) Action by grocery store

A notification described under paragraph (1)(B) shall include the date and time such summary was posted on the Internet website of the Food and Drug Administration.

(h) Consumer notification

(1) In general

If a grocery store sold a reportable food that is the subject of the posting and such establishment is part of [2] chain of establishments with 15 or more physical locations, then such establishment shall, not later than 24 hours after a one page summary described in subsection (g) is published, prominently display such summary or the information from such summary via at least one of the methods identified under paragraph (2) and maintain the display for 14 days.

(2) List of conspicuous locations

Not more than 1 year after January 4, 2011, the Secretary shall develop and publish a list of acceptable conspicuous locations and manners, from which grocery stores shall select at least one, for providing the notification required in paragraph (1). Such list shall include—

(A) posting the notification at or near the register;

(B) providing the location of the reportable food;

(C) providing targeted recall information given to customers upon purchase of a food; and

(D) other such prominent and conspicuous locations and manners utilized by grocery stores as of January 4, 2011, to provide notice of such recalls to consumers as considered appropriate by the Secretary.

(i) Coordination of Federal, State, and local efforts

(1) Department of Agriculture

In implementing this section, the Secretary shall—

(A) share information and coordinate regulatory efforts with the Department of Agriculture; and

(B) if the Secretary receives a report submitted about a food within the jurisdiction of the Department of Agriculture, promptly provide such report to the Department of Agriculture.

(2) States and localities

In implementing this section, the Secretary shall work with the State and local public health officials to share information and coordinate regulatory efforts, in order to—

(A) help to ensure coverage of the safety of the food supply chain, including those food establishments regulated by the States and localities that are not required to register under section 350d of this title; and

(B) reduce duplicative regulatory efforts.

(j) Maintenance and inspection of records

The responsible party shall maintain records related to each report received, notification made, and report submitted to the Food and Drug Administration under this section for 2 years. A responsible party

shall, at the request of the Secretary, permit inspection of such records as provided for section [3] 350c of this title.

(k) Request for information

Except as provided by section 350d(a)(4) [1] of this title, section 552 of title 5 shall apply to any request for information regarding a record in the Reportable Food Registry.

(l) Safety report

A report or notification under subsection (d) shall be considered to be a safety report under section 379v of this title and may be accompanied by a statement, which shall be part of any report released for public disclosure, that denies that the report or the notification constitutes an admission that the product involved caused or contributed to a death, serious injury, or serious illness.

(m) Admission

A report or notification under this section shall not be considered an admission that the article of food involved is adulterated or caused or contributed to a death, serious injury, or serious illness.

(n) Homeland Security notification

If, after receiving a report under subsection (d), the Secretary believes such food may have been deliberately adulterated, the Secretary shall immediately notify the Secretary of Homeland Security. The Secretary shall make relevant information from the Reportable Food Registry available to the Secretary of Homeland Security.

(June 25, 1938, ch. 675, §417, as added Pub. L. 110–85, title X, §1005(b), Sept. 27, 2007, 121 Stat. 965; amended Pub. L. 111–353, title II, §211(a), Jan. 4, 2011, 124 Stat. 3951.)

Editorial Notes

References in Text

Section 350d(a)(3), (4) of this title, referred to in subsecs. (e)(1) and (k), was redesignated section 350d(a)(4), (5), respectively, of this title by Pub. L. 111–353, title I, §102(a)(2), Jan. 4, 2011, 124 Stat. 3887.

Amendments

2011—Subsecs. (f) to (n). Pub. L. 111–353 added subsecs. (f) to (h) and redesignated former subsecs. (f) to (k) as (i) to (n), respectively.

Statutory Notes and Related Subsidiaries

Effective Date

Pub. L. 110–85, title X, §1005(e), Sept. 27, 2007, 121 Stat. 969, provided that: "The requirements of section 417(d) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 350f(d)], as added by subsection (a) [probably should be (b)], shall become effective 1 year after the date of the enactment of this Act [Sept. 27, 2007]."

Construction of 2011 Amendment

Nothing in amendment by Pub. L. 111–353 to be construed to apply to certain alcohol-related facilities, to alter jurisdiction and authorities established under certain other Acts, or in a manner inconsistent with international agreements to which the United States is a party, see sections 2206, 2251, and 2252 of this title.

Findings

Pub. L. 110–85, title X, §1005(a), Sept. 27, 2007, 121 Stat. 964, provided that: "Congress makes the following findings:

"(1) In 1994, Congress passed the Dietary Supplement Health and Education Act of 1994 (Public Law 103–417) [see Short Title of 1994 Amendments note set out under section 301 of this title] to provide the Food and Drug Administration the legal framework which is intended to ensure that dietary supplements are safe and properly labeled foods.

"(2) In 2006, Congress passed the Dietary Supplement and Nonprescription Drug Consumer Protection Act (Public Law 109–462) [see Short Title of 2006 Amendment note set out under section 301 of this title] to

establish a mandatory reporting system of serious adverse events for nonprescription drugs and dietary supplements sold and consumed in the United States.

"(3) The adverse event reporting system created under the Dietary Supplement and Nonprescription Drug Consumer Protection Act is intended to serve as an early warning system for potential public health issues associated with the use of these products.

"(4) A reliable mechanism to track patterns of adulteration in food would support efforts by the Food and Drug Administration to target limited inspection resources to protect the public health."

GUIDANCE

Pub. L. 110–85, title X, §1005(f), Sept. 27, 2007, 121 Stat. 969, provided that: "Not later than 9 months after the date of the enactment of this Act [Sept. 27, 2007], the Secretary [of Health and Human Services] shall issue a guidance to industry about submitting reports to the electronic portal established under section 417 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 350f] (as added by this section) and providing notifications to other persons in the supply chain of an article of food under such section 417."

[1] *See References in Text note below.*

[2] *So in original. Probably should be followed by "a".*

[3] *So in original. Probably should be "in section".*

§350g. Hazard analysis and risk-based preventive controls

(a) In general

The owner, operator, or agent in charge of a facility shall, in accordance with this section, evaluate the hazards that could affect food manufactured, processed, packed, or held by such facility, identify and implement preventive controls to significantly minimize or prevent the occurrence of such hazards and provide assurances that such food is not adulterated under section 342 of this title or misbranded under section 343(w) of this title, monitor the performance of those controls, and maintain records of this monitoring as a matter of routine practice.

(b) Hazard analysis

The owner, operator, or agent in charge of a facility shall—

(1) identify and evaluate known or reasonably foreseeable hazards that may be associated with the facility, including—

(A) biological, chemical, physical, and radiological hazards, natural toxins, pesticides, drug residues, decomposition, parasites, allergens, and unapproved food and color additives; and

(B) hazards that occur naturally, or may be unintentionally introduced; and

(2) identify and evaluate hazards that may be intentionally introduced, including by acts of terrorism; and

(3) develop a written analysis of the hazards.

(c) Preventive controls

The owner, operator, or agent in charge of a facility shall identify and implement preventive controls, including at critical control points, if any, to provide assurances that—

(1) hazards identified in the hazard analysis conducted under subsection (b)(1) will be significantly minimized or prevented;

(2) any hazards identified in the hazard analysis conducted under subsection (b)(2) will be significantly minimized or prevented and addressed, consistent with section 350i of this title, as applicable; and

(3) the food manufactured, processed, packed, or held by such facility will not be adulterated under section 342 of this title or misbranded under section 343(w) of this title.

(d) Monitoring of effectiveness

The owner, operator, or agent in charge of a facility shall monitor the effectiveness of the preventive controls implemented under subsection (c) to provide assurances that the outcomes described in subsection (c) shall be achieved.

(e) Corrective actions

The owner, operator, or agent in charge of a facility shall establish procedures to ensure that, if the preventive controls implemented under subsection (c) are not properly implemented or are found to be ineffective—

(1) appropriate action is taken to reduce the likelihood of recurrence of the implementation failure;

(2) all affected food is evaluated for safety; and

(3) all affected food is prevented from entering into commerce if the owner, operator or agent in charge of such facility cannot ensure that the affected food is not adulterated under section 342 of this title or misbranded under section 343(w) of this title.

(f) Verification

The owner, operator, or agent in charge of a facility shall verify that—

(1) the preventive controls implemented under subsection (c) are adequate to control the hazards identified under subsection (b);

(2) the owner, operator, or agent is conducting monitoring in accordance with subsection (d);

(3) the owner, operator, or agent is making appropriate decisions about corrective actions taken under subsection (e);

(4) the preventive controls implemented under subsection (c) are effectively and significantly minimizing or preventing the occurrence of identified hazards, including through the use of environmental and product testing programs and other appropriate means; and

(5) there is documented, periodic reanalysis of the plan under subsection (i) to ensure that the plan is still relevant to the raw materials, conditions and processes in the facility, and new and emerging threats.

(g) Recordkeeping

The owner, operator, or agent in charge of a facility shall maintain, for not less than 2 years, records documenting the monitoring of the preventive controls implemented under subsection (c), instances of nonconformance material to food safety, the results of testing and other appropriate means of verification under subsection (f)(4), instances when corrective actions were implemented, and the efficacy of preventive controls and corrective actions.

(h) Written plan and documentation

The owner, operator, or agent in charge of a facility shall prepare a written plan that documents and describes the procedures used by the facility to comply with the requirements of this section, including analyzing the hazards under subsection (b) and identifying the preventive controls adopted under subsection (c) to address those hazards. Such written plan, together with the documentation described in subsection (g), shall be made promptly available to a duly authorized representative of the Secretary upon oral or written request.

(i) Requirement to reanalyze

The owner, operator, or agent in charge of a facility shall conduct a reanalysis under subsection (b) whenever a significant change is made in the activities conducted at a facility operated by such owner, operator, or agent if the change creates a reasonable potential for a new hazard or a significant increase in a previously identified hazard or not less frequently than once every 3 years, whichever is earlier. Such reanalysis shall be completed and additional preventive controls needed to address the hazard identified, if any, shall be implemented before the change in activities at the facility is operative. Such owner, operator, or agent shall revise the written plan required under subsection (h) if such a significant change is made or document the basis for the conclusion that no additional or revised preventive controls are needed. The Secretary may require a reanalysis under this section to respond to new hazards and developments in scientific understanding, including, as appropriate, results from the Department of Homeland Security biological, chemical, radiological, or other terrorism risk assessment.

(j) Exemption for seafood, juice, and low-acid canned food facilities subject to HACCP

(1) In general

This section shall not apply to a facility if the owner, operator, or agent in charge of such facility is required to comply with, and is in compliance with, 1 of the following standards and regulations with respect to such facility:

(A) The Seafood Hazard Analysis Critical Control Points Program of the Food and Drug Administration.

(B) The Juice Hazard Analysis Critical Control Points Program of the Food and Drug Administration.

(C) The Thermally Processed Low-Acid Foods Packaged in Hermetically Sealed Containers standards of the Food and Drug Administration (or any successor standards).

(2) Applicability

The exemption under paragraph (1)(C) shall apply only with respect to microbiological hazards that are regulated under the standards for Thermally Processed Low-Acid Foods Packaged in Hermetically Sealed Containers under part 113 of chapter [1] 21, Code of Federal Regulations (or any successor regulations).

(k) Exception for activities of facilities subject to section 350h of this title

This section shall not apply to activities of a facility that are subject to section 350h of this title.

(l) Modified requirements for qualified facilities

(1) Qualified facilities

(A) In general

A facility is a qualified facility for purposes of this subsection if the facility meets the conditions under subparagraph (B) or (C).

(B) Very small business

A facility is a qualified facility under this subparagraph—

(i) if the facility, including any subsidiary or affiliate of the facility, is, collectively, a very small business (as defined in the regulations promulgated under subsection (n)); and

(ii) in the case where the facility is a subsidiary or affiliate of an entity, if such subsidiaries or affiliates, are, collectively, a very small business (as so defined).

(C) Limited annual monetary value of sales

(i) In general

A facility is a qualified facility under this subparagraph if clause (ii) applies—

(I) to the facility, including any subsidiary or affiliate of the facility, collectively; and

(II) to the subsidiaries or affiliates, collectively, of any entity of which the facility is a subsidiary or affiliate.

(ii) Average annual monetary value

This clause applies if—

(I) during the 3-year period preceding the applicable calendar year, the average annual monetary value of the food manufactured, processed, packed, or held at such facility (or the collective average annual monetary value of such food at any subsidiary or affiliate, as described in clause (i)) that is sold directly to qualified end-users during such period exceeded the average annual monetary value of the food manufactured, processed, packed, or held at such facility (or the collective average annual monetary value of such food at any subsidiary or affiliate, as so described) sold by such facility (or collectively by any such subsidiary or affiliate) to all other purchasers during such period; and

(II) the average annual monetary value of all food sold by such facility (or the collective average annual monetary value of such food sold by any subsidiary or affiliate, as described in clause (i)) during such period was less than $500,000, adjusted for inflation.

(2) Exemption

A qualified facility—

(A) shall not be subject to the requirements under subsections (a) through (i) and subsection (n) in an applicable calendar year; and

(B) shall submit to the Secretary—

(i)(I) documentation that demonstrates that the owner, operator, or agent in charge of the facility has identified potential hazards associated with the food being produced, is implementing preventive controls to address the hazards, and is monitoring the preventive controls to ensure that such controls are effective; or

(II) documentation (which may include licenses, inspection reports, certificates, permits, credentials, certification by an appropriate agency (such as a State department of agriculture), or other evidence of oversight), as specified by the Secretary, that the facility is in compliance with State, local, county, or other applicable non-Federal food safety law; and

(ii) documentation, as specified by the Secretary in a guidance document issued not later than 1 year after January 4, 2011, that the facility is a qualified facility under paragraph (1)(B) or (1)(C).

(3) Withdrawal; rule of construction

(A) In general

In the event of an active investigation of a foodborne illness outbreak that is directly linked to a qualified facility subject to an exemption under this subsection, or if the Secretary determines that it is necessary to protect the public health and prevent or mitigate a foodborne illness outbreak based on conduct or conditions associated with a qualified facility that are material to the safety of the food manufactured, processed, packed, or held at such facility, the Secretary may withdraw the exemption provided to such facility under this subsection.

(B) Rule of construction

Nothing in this subsection shall be construed to expand or limit the inspection authority of the Secretary.

(4) Definitions

In this subsection:

(A) Affiliate

The term "affiliate" means any facility that controls, is controlled by, or is under common control with another facility.

(B) Qualified end-user

The term "qualified end-user", with respect to a food, means—

(i) the consumer of the food; or

(ii) a restaurant or retail food establishment (as those terms are defined by the Secretary for purposes of section 350d of this title) that—

(I) is located—

(aa) in the same State as the qualified facility that sold the food to such restaurant or establishment; or

(bb) not more than 275 miles from such facility; and

(II) is purchasing the food for sale directly to consumers at such restaurant or retail food establishment.

(C) Consumer

For purposes of subparagraph (B), the term "consumer" does not include a business.

(D) Subsidiary

The term "subsidiary" means any company which is owned or controlled directly or indirectly by another company.

(5) Study

(A) In general

The Secretary, in consultation with the Secretary of Agriculture, shall conduct a study of the food processing sector regulated by the Secretary to determine—

(i) the distribution of food production by type and size of operation, including monetary value of food sold;

(ii) the proportion of food produced by each type and size of operation;

(iii) the number and types of food facilities co-located on farms, including the number and proportion by commodity and by manufacturing or processing activity;

(iv) the incidence of foodborne illness originating from each size and type of operation and the type of food facilities for which no reported or known hazard exists; and

(v) the effect on foodborne illness risk associated with commingling, processing, transporting, and storing food and raw agricultural commodities, including differences in risk based on the scale and duration of such activities.

(B) Size

The results of the study conducted under subparagraph (A) shall include the information necessary to enable the Secretary to define the terms "small business" and "very small business", for purposes of promulgating the regulation under subsection (n). In defining such terms, the Secretary shall include consideration of harvestable acres, income, the number of employees, and the volume of food harvested.

(C) Submission of report

Not later than 18 months after January 4, 2011, the Secretary shall submit to Congress a report that describes the results of the study conducted under subparagraph (A).

(6) No preemption

Nothing in this subsection preempts State, local, county, or other non-Federal law regarding the safe production of food. Compliance with this subsection shall not relieve any person from liability at common law or under State statutory law.

(7) Notification to consumers

(A) In general

A qualified facility that is exempt from the requirements under subsections (a) through (i) and subsection (n) and does not prepare documentation under paragraph (2)(B)(i)(I) shall—

(i) with respect to a food for which a food packaging label is required by the Secretary under any other provision of this chapter, include prominently and conspicuously on such label the name and business address of the facility where the food was manufactured or processed; or

(ii) with respect to a food for which a food packaging label is not required by the Secretary under any other provisions of this chapter, prominently and conspicuously display, at the point of purchase, the name and business address of the facility where the food was manufactured or processed, on a label, poster, sign, placard, or documents delivered contemporaneously with the food in the normal course of business, or, in the case of Internet sales, in an electronic notice.

(B) No additional label

Subparagraph (A) does not provide authority to the Secretary to require a label that is in addition to any label required under any other provision of this chapter.

(m) Authority with respect to certain facilities

The Secretary may, by regulation, exempt or modify the requirements for compliance under this section with respect to facilities that are solely engaged in the production of food for animals other than man, the storage of raw agricultural commodities (other than fruits and vegetables) intended for further distribution or processing, or the storage of packaged foods that are not exposed to the environment.

(n) Regulations

(1) In general

Not later than 18 months after January 4, 2011, the Secretary shall promulgate regulations—

(A) to establish science-based minimum standards for conducting a hazard analysis, documenting hazards, implementing preventive controls, and documenting the implementation of the preventive controls under this section; and

(B) to define, for purposes of this section, the terms "small business" and "very small business", taking into consideration the study described in subsection (l)(5).

(2) Coordination

In promulgating the regulations under paragraph (1)(A), with regard to hazards that may be intentionally introduced, including by acts of terrorism, the Secretary shall coordinate with the Secretary of Homeland Security, as appropriate.

(3) Content

The regulations promulgated under paragraph (1)(A) shall—

(A) provide sufficient flexibility to be practicable for all sizes and types of facilities, including small businesses such as a small food processing facility co-located on a farm;

(B) comply with chapter 35 of title 44 (commonly known as the "Paperwork Reduction Act"), with special attention to minimizing the burden (as defined in section 3502(2) of such title) on the facility, and collection of information (as defined in section 3502(3) of such title), associated with such regulations;

(C) acknowledge differences in risk and minimize, as appropriate, the number of separate standards that apply to separate foods; and

(D) not require a facility to hire a consultant or other third party to identify, implement, certify, or audit preventative controls, except in the case of negotiated enforcement resolutions that may require such a consultant or third party.

(4) Rule of construction

Nothing in this subsection shall be construed to provide the Secretary with the authority to prescribe specific technologies, practices, or critical controls for an individual facility.

(5) Review

In promulgating the regulations under paragraph (1)(A), the Secretary shall review regulatory hazard analysis and preventive control programs in existence on January 4, 2011, including the Grade "A" Pasteurized Milk Ordinance to ensure that such regulations are consistent, to the extent practicable, with applicable domestic and internationally-recognized standards in existence on such date.

(o) Definitions

For purposes of this section:

(1) Critical control point

The term "critical control point" means a point, step, or procedure in a food process at which control can be applied and is essential to prevent or eliminate a food safety hazard or reduce such hazard to an acceptable level.

(2) Facility

The term "facility" means a domestic facility or a foreign facility that is required to register under section 350d of this title.

(3) Preventive controls

The term "preventive controls" means those risk-based, reasonably appropriate procedures, practices, and processes that a person knowledgeable about the safe manufacturing, processing, packing, or holding of food would employ to significantly minimize or prevent the hazards identified under the hazard analysis conducted under subsection (b) and that are consistent with the current scientific understanding of safe food manufacturing, processing, packing, or holding at the time of the analysis. Those procedures, practices, and processes may include the following:

(A) Sanitation procedures for food contact surfaces and utensils and food-contact surfaces of equipment.

(B) Supervisor, manager, and employee hygiene training.

(C) An environmental monitoring program to verify the effectiveness of pathogen controls in processes where a food is exposed to a potential contaminant in the environment.

(D) A food allergen control program.

(E) A recall plan.

(F) Current Good Manufacturing Practices (cGMPs) under part 110 of title 21, Code of Federal Regulations (or any successor regulations).

(G) Supplier verification activities that relate to the safety of food.

(June 25, 1938, ch. 675, §418, as added Pub. L. 111–353, title I, §103(a), Jan. 4, 2011, 124 Stat. 3889.)

Statutory Notes and Related Subsidiaries

Effective Date

Pub. L. 111–353, title I, §103(i), Jan. 4, 2011, 124 Stat. 3898, provided that:

"(1) General rule.—The amendments made by this section [enacting this section and amending section 331 of this title] shall take effect 18 months after the date of enactment of this Act [Jan. 4, 2011].

"(2) Flexibility for small businesses.—Notwithstanding paragraph (1)—

"(A) the amendments made by this section shall apply to a small business (as defined in the regulations promulgated under section 418(n) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 350g(n)] (as added by this section)) beginning on the date that is 6 months after the effective date of such regulations; and

"(B) the amendments made by this section shall apply to a very small business (as defined in such regulations) beginning on the date that is 18 months after the effective date of such regulations."

Construction

Nothing in this section to be construed to apply to certain alcohol-related facilities, to alter jurisdiction and authorities established under certain other Acts, or in a manner inconsistent with international agreements to which the United States is a party, see sections 2206, 2251, and 2252 of this title.

Guidance Document

Pub. L. 111–353, title I, §103(b), Jan. 4, 2011, 124 Stat. 3896, provided that: "The Secretary shall issue a guidance document related to the regulations promulgated under subsection (b)(1) [probably means 21 U.S.C. 350g(n)(1)] with respect to the hazard analysis and preventive controls under section 418 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 350g] (as added by subsection (a))."

Small Entity Compliance Policy Guide

Pub. L. 111–353, title I, §103(d), Jan. 4, 2011, 124 Stat. 3898, provided that: "Not later than 180 days after the issuance of the regulations promulgated under subsection (n) of section 418 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 350g(n)] (as added by subsection (a)), the Secretary shall issue a small entity compliance policy guide setting forth in plain language the requirements of such section 418 and this section [enacting this section, amending section 331 of this title, and enacting provisions set out as notes under this section and sections 342 and 350d of this title] to assist small entities in complying with the hazard analysis and other activities required under such section 418 and this section."

No Effect on HACCP Authorities

Pub. L. 111–353, title I, §103(f), Jan. 4, 2011, 124 Stat. 3898, provided that: "Nothing in the amendments made by this section [enacting this section and amending section 331 of this title] limits the authority of the Secretary under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) or the Public Health Service Act (42 U.S.C. 201 et seq.) to revise, issue, or enforce Hazard Analysis Critical Control [Points] programs and the Thermally Processed Low-Acid Foods Packaged in Hermetically Sealed Containers standards."

Dietary Supplements

Pub. L. 111–353, title I, §103(g), Jan. 4, 2011, 124 Stat. 3898, provided that: "Nothing in the amendments made by this section [enacting this section and amending section 331 of this title] shall apply to any facility with regard to the manufacturing, processing, packing, or holding of a dietary supplement that is in compliance with the requirements of sections 402(g)(2) and 761 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 342(g)(2), 379aa–1)."

[1] So in original. Probably should be "title".

§350h. Standards for produce safety

(a) Proposed rulemaking

(1) In general

(A) Rulemaking

Not later than 1 year after January 4, 2011, the Secretary, in coordination with the Secretary of Agriculture and representatives of State departments of agriculture (including with regard to the national organic program established under the Organic Foods Production Act of 1990 [7 U.S.C. 6501 et seq.]), and in consultation with the Secretary of Homeland Security, shall publish a notice of proposed rulemaking to establish science-based minimum standards for the safe production and harvesting of those types of fruits and vegetables, including specific mixes or categories of fruits and vegetables, that are raw agricultural commodities for which the Secretary has determined that such standards minimize the risk of serious adverse health consequences or death.

(B) Determination by Secretary

With respect to small businesses and very small businesses (as such terms are defined in the regulation promulgated under subparagraph (A)) that produce and harvest those types of fruits and vegetables that are raw agricultural commodities that the Secretary has determined are low risk and do not present a risk of serious adverse health consequences or death, the Secretary may determine not to include production and harvesting of such fruits and vegetables in such rulemaking, or may modify the applicable requirements of regulations promulgated pursuant to this section.

(2) Public input

During the comment period on the notice of proposed rulemaking under paragraph (1), the Secretary shall conduct not less than 3 public meetings in diverse geographical areas of the United States to provide persons in different regions an opportunity to comment.

(3) Content

The proposed rulemaking under paragraph (1) shall—

(A) provide sufficient flexibility to be applicable to various types of entities engaged in the production and harvesting of fruits and vegetables that are raw agricultural commodities, including small businesses and entities that sell directly to consumers, and be appropriate to the scale and diversity of the production and harvesting of such commodities;

(B) include, with respect to growing, harvesting, sorting, packing, and storage operations, science-based minimum standards related to soil amendments, hygiene, packaging, temperature controls, animals in the growing area, and water;

(C) consider hazards that occur naturally, may be unintentionally introduced, or may be intentionally introduced, including by acts of terrorism;

(D) take into consideration, consistent with ensuring enforceable public health protection, conservation and environmental practice standards and policies established by Federal natural resource conservation, wildlife conservation, and environmental agencies;

(E) in the case of production that is certified organic, not include any requirements that conflict with or duplicate the requirements of the national organic program established under the Organic Foods Production Act of 1990, while providing the same level of public health protection as the requirements under guidance documents, including guidance documents regarding action levels, and regulations under the FDA Food Safety Modernization Act; and

(F) define, for purposes of this section, the terms "small business" and "very small business".

(4) Prioritization

The Secretary shall prioritize the implementation of the regulations under this section for specific fruits and vegetables that are raw agricultural commodities based on known risks which may include a history and severity of foodborne illness outbreaks.

(b) Final regulation

(1) In general

Not later than 1 year after the close of the comment period for the proposed rulemaking under subsection (a), the Secretary shall adopt a final regulation to provide for minimum science-based standards for those types of fruits and vegetables, including specific mixes or categories of fruits or vegetables, that are raw agricultural commodities, based on known safety risks, which may include a history of foodborne illness outbreaks.

(2) Final regulation

The final regulation shall—

(A) provide for coordination of education and enforcement activities by State and local officials, as designated by the Governors of the respective States or the appropriate elected State official as recognized by State statute; and

(B) include a description of the variance process under subsection (c) and the types of permissible variances the Secretary may grant.

(3) Flexibility for small businesses

Notwithstanding paragraph (1)—

(A) the regulations promulgated under this section shall apply to a small business (as defined in the regulation promulgated under subsection (a)(1)) after the date that is 1 year after the effective date of the final regulation under paragraph (1); and

(B) the regulations promulgated under this section shall apply to a very small business (as defined in the regulation promulgated under subsection (a)(1)) after the date that is 2 years after the effective date of the final regulation under paragraph (1).

(c) Criteria

(1) In general

The regulations adopted under subsection (b) shall—

(A) set forth those procedures, processes, and practices that the Secretary determines to minimize the risk of serious adverse health consequences or death, including procedures, processes, and practices that the Secretary determines to be reasonably necessary to prevent the introduction of known or reasonably foreseeable biological, chemical, and physical hazards, including hazards that occur naturally, may be unintentionally introduced, or may be intentionally introduced, including by acts of terrorism, into fruits and vegetables, including specific mixes or categories of fruits and vegetables, that are raw agricultural commodities and to provide reasonable assurances that the produce is not adulterated under section 342 of this title;

(B) provide sufficient flexibility to be practicable for all sizes and types of businesses, including small businesses such as a small food processing facility co-located on a farm;

(C) comply with chapter 35 of title 44 (commonly known as the "Paperwork Reduction Act"), with special attention to minimizing the burden (as defined in section 3502(2) of such title) on the business, and collection of information (as defined in section 3502(3) of such title), associated with such regulations;

(D) acknowledge differences in risk and minimize, as appropriate, the number of separate standards that apply to separate foods; and

(E) not require a business to hire a consultant or other third party to identify, implement, certify, compliance [1] with these procedures, processes, and practices, except in the case of negotiated enforcement resolutions that may require such a consultant or third party; and

(F) permit States and foreign countries from which food is imported into the United States to request from the Secretary variances from the requirements of the regulations, subject to paragraph (2), where the State or foreign country determines that the variance is necessary in light of local growing conditions and that the procedures, processes, and practices to be followed under the variance are reasonably likely to ensure that the produce is not adulterated under section 342 of this title and to provide the same level of public health protection as the requirements of the regulations adopted under subsection (b).

(2) Variances

(A) Requests for variances

A State or foreign country from which food is imported into the United States may in writing request a variance from the Secretary. Such request shall describe the variance requested and present information demonstrating that the variance does not increase the likelihood that the food for which the variance is requested will be adulterated under section 342 of this title, and that the variance provides the same level of public health protection as the requirements of the regulations adopted under subsection (b). The Secretary shall review such requests in a reasonable timeframe.

(B) Approval of variances

The Secretary may approve a variance in whole or in part, as appropriate, and may specify the scope of applicability of a variance to other similarly situated persons.

(C) Denial of variances

The Secretary may deny a variance request if the Secretary determines that such variance is not reasonably likely to ensure that the food is not adulterated under section 342 of this title and is not reasonably likely to provide the same level of public health protection as the requirements of the regulation adopted under subsection (b). The Secretary shall notify the person requesting such variance of the reasons for the denial.

(D) Modification or revocation of a variance

The Secretary, after notice and an opportunity for a hearing, may modify or revoke a variance if the Secretary determines that such variance is not reasonably likely to ensure that the food is not adulterated under section 342 of this title and is not reasonably likely to provide the same level of public health protection as the requirements of the regulations adopted under subsection (b).

(d) Enforcement

The Secretary may coordinate with the Secretary of Agriculture and, as appropriate, shall contract and coordinate with the agency or department designated by the Governor of each State to perform activities to ensure compliance with this section.

(e) Guidance

(1) In general

Not later than 1 year after January 4, 2011, the Secretary shall publish, after consultation with the Secretary of Agriculture, representatives of State departments of agriculture, farmer representatives, and various types of entities engaged in the production and harvesting or importing of fruits and vegetables that are raw agricultural commodities, including small businesses, updated good agricultural practices and guidance for the safe production and harvesting of specific types of fresh produce under this section.

(2) Public meetings

The Secretary shall conduct not fewer than 3 public meetings in diverse geographical areas of the United States as part of an effort to conduct education and outreach regarding the guidance described in paragraph (1) for persons in different regions who are involved in the production and harvesting of fruits and vegetables that are raw agricultural commodities, including persons that sell directly to consumers and farmer representatives, and for importers of fruits and vegetables that are raw agricultural commodities.

(3) Paperwork reduction

The Secretary shall ensure that any updated guidance under this section will—

(A) provide sufficient flexibility to be practicable for all sizes and types of facilities, including small businesses such as a small food processing facility co-located on a farm; and

(B) acknowledge differences in risk and minimize, as appropriate, the number of separate standards that apply to separate foods.

(f) Exemption for direct farm marketing

(1) In general

A farm shall be exempt from the requirements under this section in a calendar year if—

(A) during the previous 3-year period, the average annual monetary value of the food sold by such farm directly to qualified end-users during such period exceeded the average annual monetary value of the food sold by such farm to all other buyers during such period; and

(B) the average annual monetary value of all food sold during such period was less than $500,000, adjusted for inflation.

(2) Notification to consumers

(A) In general

A farm that is exempt from the requirements under this section shall—

(i) with respect to a food for which a food packaging label is required by the Secretary under any other provision of this chapter, include prominently and conspicuously on such label the name and business address of the farm where the produce was grown; or

(ii) with respect to a food for which a food packaging label is not required by the Secretary under any other provision of this chapter, prominently and conspicuously display, at the point of purchase, the name and business address of the farm where the produce was grown, on a label, poster, sign, placard, or documents delivered contemporaneously with the food in the normal course of business, or, in the case of Internet sales, in an electronic notice.

(B) No additional label

Subparagraph (A) does not provide authority to the Secretary to require a label that is in addition to any label required under any other provision of this chapter.

(3) Withdrawal; rule of construction

(A) In general

In the event of an active investigation of a foodborne illness outbreak that is directly linked to a farm subject to an exemption under this subsection, or if the Secretary determines that it is necessary to protect the public health and prevent or mitigate a foodborne illness outbreak based on conduct or conditions associated with a farm that are material to the safety of the food produced or harvested at such farm, the Secretary may withdraw the exemption provided to such farm under this subsection.

(B) Rule of construction

Nothing in this subsection shall be construed to expand or limit the inspection authority of the Secretary.

(4) Definitions

(A) Qualified end-user

In this subsection, the term "qualified end-user", with respect to a food means—

(i) the consumer of the food; or

(ii) a restaurant or retail food establishment (as those terms are defined by the Secretary for purposes of section 350d of this title) that is located—

(I) in the same State as the farm that produced the food; or

(II) not more than 275 miles from such farm.

(B) Consumer

For purposes of subparagraph (A), the term "consumer" does not include a business.

(5) No preemption

Nothing in this subsection preempts State, local, county, or other non-Federal law regarding the safe production, harvesting, holding, transportation, and sale of fresh fruits and vegetables. Compliance with this subsection shall not relieve any person from liability at common law or under State statutory law.

(6) Limitation of effect

Nothing in this subsection shall prevent the Secretary from exercising any authority granted in the other sections of this chapter.

(g) Clarification

This section shall not apply to produce that is produced by an individual for personal consumption.

(h) Exception for activities of facilities subject to section 350g of this title

This section shall not apply to activities of a facility that are subject to section 350g of this title.

(June 25, 1938, ch. 675, §419, as added Pub. L. 111–353, title I, §105(a), Jan. 4, 2011, 124 Stat. 3899.)

Editorial Notes

References in Text

The Organic Foods Production Act of 1990, referred to in subsec. (a)(1)(A), (3)(E), is title XXI of Pub. L. 101–624, Nov. 28, 1990, 104 Stat. 3935, which is classified generally to chapter 94 (§6501 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see Short Title note set out under section 6501 of Title 7 and Tables.

The FDA Food Safety Modernization Act, referred to in subsec. (a)(3)(E), is Pub. L. 111–353, Jan. 4, 2011, 124 Stat. 3885, which enacted chapter 27 (§2201 et seq.) and sections 350g to 350l–1, 379j–31, 384a to 384d, 399c, and 399d of this title, section 7625 of Title 7, Agriculture, and section 280g–16 of Title 42, The Public Health and Welfare, amended sections 331, 333, 334, 350b to 350d, 350f, 374, 381, 393, and 399 of this title and section 247b–20 of Title 42, and enacted provisions set out as notes under sections 331, 334, 342, 350b, 350d, 350e, 350g to 350j, 350l, and 381 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2201 of this title and Tables.

Statutory Notes and Related Subsidiaries

Construction

Nothing in this section to be construed to apply to certain alcohol-related facilities, to alter jurisdiction and authorities established under certain other Acts, or in a manner inconsistent with international agreements to which the United States is a party, see sections 2206, 2251, and 2252 of this title.

Scientific and Economic Analysis of the FDA Food Safety Modernization Act

Pub. L. 113–79, title XII, §12311(a), Feb. 7, 2014, 128 Stat. 992, provided that: "When publishing a final rule with respect to 'Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption' published by the Department of Health and Human Services on January 16, 2013 (78 Fed. Reg. 3504), the Secretary of Health and Human Services (referred to in this section as the 'Secretary') shall ensure that the final rule (referred to in this section as the 'final rule') includes the following information:

"(1) An analysis of the scientific information used to promulgate the final rule, taking into consideration any information about farming and ranching operations of a variety of sizes, with regional differences, and that have a diversity of production practices and methods.

"(2) An analysis of the economic impact of the final rule.

"(3) A plan to systematically—

"(A) evaluate the impact of the final rule on farming and ranching operations; and

"(B) develop an ongoing process to evaluate and respond to business concerns."

Small Entity Compliance Policy Guide

Pub. L. 111–353, title I, §105(b), Jan. 4, 2011, 124 Stat. 3904, provided that: "Not later than 180 days after the issuance of regulations under section 419 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 350h] (as added by subsection (a)), the Secretary of Health and Human Services shall issue a small entity compliance policy guide setting forth in plain language the requirements of such section 419 and to assist small entities in complying with standards for safe production and harvesting and other activities required under such section."

No Effect on HACCP Authorities

Pub. L. 111–353, title I, §105(d), Jan. 4, 2011, 124 Stat. 3905, provided that: "Nothing in the amendments made by this section [enacting this section and amending section 331 of this title] limits the authority of the Secretary [of Health and Human Services] under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) or the Public Health Service Act (42 U.S.C. 201 et seq.) to revise, issue, or enforce product and category-specific regulations,

such as the Seafood Hazard Analysis Critical Controls Points Program, the Juice Hazard Analysis Critical Control [Points] Program, and the Thermally Processed Low-Acid Foods Packaged in Hermetically Sealed Containers standards."

[1] *So in original. Probably should be "or certify compliance".*

§350i. Protection against intentional adulteration

(a) Determinations

(1) In general

The Secretary shall—

(A) conduct a vulnerability assessment of the food system, including by consideration of the Department of Homeland Security biological, chemical, radiological, or other terrorism risk assessments;

(B) consider the best available understanding of uncertainties, risks, costs, and benefits associated with guarding against intentional adulteration of food at vulnerable points; and

(C) determine the types of science-based mitigation strategies or measures that are necessary to protect against the intentional adulteration of food.

(2) Limited distribution

In the interest of national security, the Secretary, in consultation with the Secretary of Homeland Security, may determine the time, manner, and form in which determinations made under paragraph (1) are made publicly available.

(b) Regulations

Not later than 18 months after January 4, 2011, the Secretary, in coordination with the Secretary of Homeland Security and in consultation with the Secretary of Agriculture, shall promulgate regulations to protect against the intentional adulteration of food subject to this chapter. Such regulations shall—

(1) specify how a person shall assess whether the person is required to implement mitigation strategies or measures intended to protect against the intentional adulteration of food; and

(2) specify appropriate science-based mitigation strategies or measures to prepare and protect the food supply chain at specific vulnerable points, as appropriate.

(c) Applicability

Regulations promulgated under subsection (b) shall apply only to food for which there is a high risk of intentional contamination, as determined by the Secretary, in consultation with the Secretary of Homeland Security, under subsection (a), that could cause serious adverse health consequences or death to humans or animals and shall include those foods—

(1) for which the Secretary has identified clear vulnerabilities (including short shelf-life or susceptibility to intentional contamination at critical control points); and

(2) in bulk or batch form, prior to being packaged for the final consumer.

(d) Exception

This section shall not apply to farms, except for those that produce milk.

(e) Definition

For purposes of this section, the term "farm" has the meaning given that term in section 1.227 of title 21, Code of Federal Regulations (or any successor regulation).

(June 25, 1938, ch. 675, §420, as added Pub. L. 111–353, title I, §106(a), Jan. 4, 2011, 124 Stat. 3905.)

Statutory Notes and Related Subsidiaries

Construction

Nothing in this section to be construed to apply to certain alcohol-related facilities, to alter jurisdiction and authorities established under certain other Acts, or in a manner inconsistent with international agreements to which the United States is a party, see sections 2206, 2251, and 2252 of this title.

Guidance Documents

Pub. L. 111–353, title I, §106(b), Jan. 4, 2011, 124 Stat. 3906, provided that:

"(1) In general.—Not later than 1 year after the date of enactment of this Act [Jan. 4, 2011], the Secretary of Health and Human Services, in consultation with the Secretary of Homeland Security and the Secretary of Agriculture, shall issue guidance documents related to protection against the intentional adulteration of food, including mitigation strategies or measures to guard against such adulteration as required under section 420 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 450i], as added by subsection (a).

"(2) Content.—The guidance documents issued under paragraph (1) shall—

"(A) include a model assessment for a person to use under subsection (b)(1) of section 420 of the Federal Food, Drug, and Cosmetic Act, as added by subsection (a);

"(B) include examples of mitigation strategies or measures described in subsection (b)(2) of such section; and

"(C) specify situations in which the examples of mitigation strategies or measures described in subsection (b)(2) of such section are appropriate.

"(3) Limited distribution.—In the interest of national security, the Secretary of Health and Human Services, in consultation with the Secretary of Homeland Security, may determine the time, manner, and form in which the guidance documents issued under paragraph (1) are made public, including by releasing such documents to targeted audiences."

Periodic Review

Pub. L. 111–353, title I, §106(c), Jan. 4, 2011, 124 Stat. 3906, provided that: "The Secretary of Health and Human Services shall periodically review and, as appropriate, update the regulations under section 420(b) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 450i(b)], as added by subsection (a), and the guidance documents under subsection (b) [section 106(b) of Pub. L. 111–353, set out above]."

§350j. Targeting of inspection resources for domestic facilities, foreign facilities, and ports of entry; annual report

(a) Identification and inspection of facilities

(1) Identification

The Secretary shall identify high-risk facilities and shall allocate resources to inspect facilities according to the known safety risks of the facilities, which shall be based on the following factors:

(A) The known safety risks of the food manufactured, processed, packed, or held at the facility.

(B) The compliance history of a facility, including with regard to food recalls, outbreaks of foodborne illness, and violations of food safety standards.

(C) The rigor and effectiveness of the facility's hazard analysis and risk-based preventive controls.

(D) Whether the food manufactured, processed, packed, or held at the facility meets the criteria for priority under section 381(h)(1) of this title.

(E) Whether the food or the facility that manufactured, processed, packed, or held such food has received a certification as described in section 381(q) or 384b of this title, as appropriate.

(F) Any other criteria deemed necessary and appropriate by the Secretary for purposes of allocating inspection resources.

(2) Inspections

(A) In general

Beginning on January 4, 2011, the Secretary shall increase the frequency of inspection of all facilities.

(B) Domestic high-risk facilities

The Secretary shall increase the frequency of inspection of domestic facilities identified under paragraph (1) as high-risk facilities such that each such facility is inspected—

(i) not less often than once in the 5-year period following January 4, 2011; and
(ii) not less often than once every 3 years thereafter.

(C) Domestic non-high-risk facilities

The Secretary shall ensure that each domestic facility that is not identified under paragraph (1) as a high-risk facility is inspected—

(i) not less often than once in the 7-year period following January 4, 2011; and
(ii) not less often than once every 5 years thereafter.

(D) Foreign facilities

(i) Year 1

In the 1-year period following January 4, 2011, the Secretary shall inspect not fewer than 600 foreign facilities.

(ii) Subsequent years

In each of the 5 years following the 1-year period described in clause (i), the Secretary shall inspect not fewer than twice the number of foreign facilities inspected by the Secretary during the previous year.

(E) Reliance on Federal, State, or local inspections

In meeting the inspection requirements under this subsection for domestic facilities, the Secretary may rely on inspections conducted by other Federal, State, or local agencies under interagency agreement, contract, memoranda of understanding, or other obligation.

(b) Identification and inspection at ports of entry

The Secretary, in consultation with the Secretary of Homeland Security, shall allocate resources to inspect any article of food imported into the United States according to the known safety risks of the article of food, which shall be based on the following factors:

(1) The known safety risks of the food imported.

(2) The known safety risks of the countries or regions of origin and countries through which such article of food is transported.

(3) The compliance history of the importer, including with regard to food recalls, outbreaks of foodborne illness, and violations of food safety standards.

(4) The rigor and effectiveness of the activities conducted by the importer of such article of food to satisfy the requirements of the foreign supplier verification program under section 384a of this title.

(5) Whether the food importer participates in the voluntary qualified importer program under section 384b of this title.

(6) Whether the food meets the criteria for priority under section 381(h)(1) of this title.

(7) Whether the food or the facility that manufactured, processed, packed, or held such food received a certification as described in section 381(q) or 384b of this title.

(8) Any other criteria deemed necessary and appropriate by the Secretary for purposes of allocating inspection resources.

(c) Interagency agreements with respect to seafood

(1) In general

The Secretary of Health and Human Services, the Secretary of Commerce, the Secretary of Homeland Security, the Chairman of the Federal Trade Commission, and the heads of other appropriate agencies may enter into such agreements as may be necessary or appropriate to improve seafood safety.

(2) Scope of agreements

The agreements under paragraph (1) may include—

(A) cooperative arrangements for examining and testing seafood imports that leverage the resources, capabilities, and authorities of each party to the agreement;

(B) coordination of inspections of foreign facilities to increase the percentage of imported seafood and seafood facilities inspected;

(C) standardization of data on seafood names, inspection records, and laboratory testing to improve interagency coordination;

(D) coordination to detect and investigate violations under applicable Federal law;

(E) a process, including the use or modification of existing processes, by which officers and employees of the National Oceanic and Atmospheric Administration may be duly designated by the Secretary to carry out seafood examinations and investigations under section 381 of this title or section 203 of the Food Allergen Labeling and Consumer Protection Act of 2004;

(F) the sharing of information concerning observed non-compliance with United States food requirements domestically and in foreign nations and new regulatory decisions and policies that may affect the safety of food imported into the United States;

(G) conducting joint training on subjects that affect and strengthen seafood inspection effectiveness by Federal authorities; and

(H) outreach on Federal efforts to enhance seafood safety and compliance with Federal food safety requirements.

(d) Coordination

The Secretary shall improve coordination and cooperation with the Secretary of Agriculture and the Secretary of Homeland Security to target food inspection resources.

(e) Facility

For purposes of this section, the term "facility" means a domestic facility or a foreign facility that is required to register under section 350d of this title.

(June 25, 1938, ch. 675, §421, as added Pub. L. 111–353, title II, §201(a), Jan. 4, 2011, 124 Stat. 3923.)

Editorial Notes

References in Text

Section 203 of the Food Allergen Labeling and Consumer Protection Act of 2004, referred to in subsec. (c)(2)(E), is section 203 of Pub. L. 108–282, Aug. 2, 2004, 118 Stat. 906, which amended sections 321, 343, and 343–1 of this title and enacted provisions set out as notes under sections 321 and 343 of this title.

Statutory Notes and Related Subsidiaries

Construction

Nothing in this section to be construed to apply to certain alcohol-related facilities, to alter jurisdiction and authorities established under certain other Acts, or in a manner inconsistent with international agreements to which the United States is a party, see sections 2206, 2251, and 2252 of this title.

Advisory Committee Consultation

Pub. L. 111–353, title II, §201(c), Jan. 4, 2011, 124 Stat. 3926, provided that: "In allocating inspection resources as described in section 421 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 450j] (as added by subsection (a)), the Secretary may, as appropriate, consult with any relevant advisory committee within the Department of Health and Human Services."

§350k. Laboratory accreditation for analyses of foods

(a) Recognition of laboratory accreditation

(1) In general

Not later than 2 years after January 4, 2011, the Secretary shall—

(A) establish a program for the testing of food by accredited laboratories;

(B) establish a publicly available registry of accreditation bodies recognized by the Secretary and laboratories accredited by a recognized accreditation body, including the name of, contact

information for, and other information deemed appropriate by the Secretary about such bodies and laboratories; and

(C) require, as a condition of recognition or accreditation, as appropriate, that recognized accreditation bodies and accredited laboratories report to the Secretary any changes that would affect the recognition of such accreditation body or the accreditation of such laboratory.

(2) Program requirements

The program established under paragraph (1)(A) shall provide for the recognition of laboratory accreditation bodies that meet criteria established by the Secretary for accreditation of laboratories, including independent private laboratories and laboratories run and operated by a Federal agency (including the Department of Commerce), State, or locality with a demonstrated capability to conduct 1 or more sampling and analytical testing methodologies for food.

(3) Increasing the number of qualified laboratories

The Secretary shall work with the laboratory accreditation bodies recognized under paragraph (1), as appropriate, to increase the number of qualified laboratories that are eligible to perform testing under subparagraph [1] (b) beyond the number so qualified on January 4, 2011.

(4) Limited distribution

In the interest of national security, the Secretary, in coordination with the Secretary of Homeland Security, may determine the time, manner, and form in which the registry established under paragraph (1)(B) is made publicly available.

(5) Foreign laboratories

Accreditation bodies recognized by the Secretary under paragraph (1) may accredit laboratories that operate outside the United States, so long as such laboratories meet the accreditation standards applicable to domestic laboratories accredited under this section.

(6) Model laboratory standards

The Secretary shall develop model standards that a laboratory shall meet to be accredited by a recognized accreditation body for a specified sampling or analytical testing methodology and included in the registry provided for under paragraph (1). In developing the model standards, the Secretary shall consult existing standards for guidance. The model standards shall include—

(A) methods to ensure that—

(i) appropriate sampling, analytical procedures (including rapid analytical procedures), and commercially available techniques are followed and reports of analyses are certified as true and accurate;

(ii) internal quality systems are established and maintained;

(iii) procedures exist to evaluate and respond promptly to complaints regarding analyses and other activities for which the laboratory is accredited; and

(iv) individuals who conduct the sampling and analyses are qualified by training and experience to do so; and

(B) any other criteria determined appropriate by the Secretary.

(7) Review of recognition

To ensure compliance with the requirements of this section, the Secretary—

(A) shall periodically, and in no case less than once every 5 years, reevaluate accreditation bodies recognized under paragraph (1) and may accompany auditors from an accreditation body to assess whether the accreditation body meets the criteria for recognition; and

(B) shall promptly revoke the recognition of any accreditation body found not to be in compliance with the requirements of this section, specifying, as appropriate, any terms and conditions necessary for laboratories accredited by such body to continue to perform testing as described in this section.

(b) Testing procedures

(1) In general

Not later than 30 months after January 4, 2011, food testing shall be conducted by Federal laboratories or non-Federal laboratories that have been accredited for the appropriate sampling or analytical testing methodology or methodologies by a recognized accreditation body on the registry established by the Secretary under subsection (a)(1)(B) whenever such testing is conducted—

(A) by or on behalf of an owner or consignee—

(i) in response to a specific testing requirement under this chapter or implementing regulations, when applied to address an identified or suspected food safety problem; and

(ii) as required by the Secretary, as the Secretary deems appropriate, to address an identified or suspected food safety problem; or

(B) on behalf of an owner or consignee—

(i) in support of admission of an article of food under section 381(a) of this title; and

(ii) under an Import Alert that requires successful consecutive tests.

(2) Results of testing

The results of any such testing shall be sent directly to the Food and Drug Administration, except the Secretary may by regulation exempt test results from such submission requirement if the Secretary determines that such results do not contribute to the protection of public health. Test results required to be submitted may be submitted to the Food and Drug Administration through electronic means.

(3) Exception

The Secretary may waive requirements under this subsection if—

(A) a new methodology or methodologies have been developed and validated but a laboratory has not yet been accredited to perform such methodology or methodologies; and

(B) the use of such methodology or methodologies are necessary to prevent, control, or mitigate a food emergency or foodborne illness outbreak.

(c) Review by Secretary

If food sampling and testing performed by a laboratory run and operated by a State or locality that is accredited by a recognized accreditation body on the registry established by the Secretary under subsection (a) result in a State recalling a food, the Secretary shall review the sampling and testing results for the purpose of determining the need for a national recall or other compliance and enforcement activities.

(d) No limit on Secretarial authority

Nothing in this section shall be construed to limit the ability of the Secretary to review and act upon information from food testing, including determining the sufficiency of such information and testing.

(June 25, 1938, ch. 675, §422, as added Pub. L. 111–353, title II, §202(a), Jan. 4, 2011, 124 Stat. 3926.)

Statutory Notes and Related Subsidiaries

Construction

Nothing in this section to be construed to apply to certain alcohol-related facilities, to alter jurisdiction and authorities established under certain other Acts, or in a manner inconsistent with international agreements to which the United States is a party, see sections 2206, 2251, and 2252 of this title.

[1] *So in original. Probably should be "subsection".*

§350*l*. Mandatory recall authority

(a) Voluntary procedures

If the Secretary determines, based on information gathered through the reportable food registry under section 350f of this title or through any other means, that there is a reasonable probability that an article of food (other than infant formula) is adulterated under section 342 of this title or misbranded under section

343(w) of this title and the use of or exposure to such article will cause serious adverse health consequences or death to humans or animals, the Secretary shall provide the responsible party (as defined in section 350f of this title) with an opportunity to cease distribution and recall such article.

(b) Prehearing order to cease distribution and give notice

(1) In general

If the responsible party refuses to or does not voluntarily cease distribution or recall such article within the time and in the manner prescribed by the Secretary (if so prescribed), the Secretary may, by order require, as the Secretary deems necessary, such person to—

(A) immediately cease distribution of such article; and

(B) as applicable, immediately notify all persons—

(i) manufacturing, processing, packing, transporting, distributing, receiving, holding, or importing and selling such article; and

(ii) to which such article has been distributed, transported, or sold, to immediately cease distribution of such article.[1]

(2) Required additional information

(A) In general

If an article of food covered by a recall order issued under paragraph (1)(B) has been distributed to a warehouse-based third party logistics provider without providing such provider sufficient information to know or reasonably determine the precise identity of the article of food covered by a recall order that is in its possession, the notice provided by the responsible party subject to the order issued under paragraph (1)(B) shall include such information as is necessary for the warehouse-based third party logistics provider to identify the food.

(B) Rules of construction

Nothing in this paragraph shall be construed—

(i) to exempt a warehouse-based third party logistics provider from the requirements of this chapter, including the requirements in this section and section 350c of this title; or

(ii) to exempt a warehouse-based third party logistics provider from being the subject of a mandatory recall order.

(3) Determination to limit areas affected

If the Secretary requires a responsible party to cease distribution under paragraph (1)(A) of an article of food identified in subsection (a), the Secretary may limit the size of the geographic area and the markets affected by such cessation if such limitation would not compromise the public health.

(c) Hearing on order

The Secretary shall provide the responsible party subject to an order under subsection (b) with an opportunity for an informal hearing, to be held as soon as possible, but not later than 2 days after the issuance of the order, on the actions required by the order and on why the article that is the subject of the order should not be recalled.

(d) Post-hearing recall order and modification of order

(1) Amendment of order

If, after providing opportunity for an informal hearing under subsection (c), the Secretary determines that removal of the article from commerce is necessary, the Secretary shall, as appropriate—

(A) amend the order to require recall of such article or other appropriate action;

(B) specify a timetable in which the recall shall occur;

(C) require periodic reports to the Secretary describing the progress of the recall; and

(D) provide notice to consumers to whom such article was, or may have been, distributed.

(2) Vacating of order

If, after such hearing, the Secretary determines that adequate grounds do not exist to continue the actions required by the order, or that such actions should be modified, the Secretary shall vacate the order or modify the order.

(e) Rule regarding alcoholic beverages

The Secretary shall not initiate a mandatory recall or take any other action under this section with respect to any alcohol beverage until the Secretary has provided the Alcohol and Tobacco Tax and Trade Bureau with a reasonable opportunity to cease distribution and recall such article under the Alcohol and Tobacco Tax and Trade Bureau authority.

(f) Cooperation and consultation

The Secretary shall work with State and local public health officials in carrying out this section, as appropriate.

(g) Public notification

In conducting a recall under this section, the Secretary shall—

(1) ensure that a press release is published regarding the recall, as well as alerts and public notices, as appropriate, in order to provide notification—

(A) of the recall to consumers and retailers to whom such article was, or may have been, distributed; and

(B) that includes, at a minimum—

(i) the name of the article of food subject to the recall;

(ii) a description of the risk associated with such article; and

(iii) to the extent practicable, information for consumers about similar articles of food that are not affected by the recall;

(2) consult the policies of the Department of Agriculture regarding providing to the public a list of retail consignees receiving products involved in a Class I recall and shall consider providing such a list to the public, as determined appropriate by the Secretary; and

(3) if available, publish on the Internet Web site of the Food and Drug Administration an image of the article that is the subject of the press release described in (1).[2]

(h) No delegation

The authority conferred by this section to order a recall or vacate a recall order shall not be delegated to any officer or employee other than the Commissioner.

(i) Effect

Nothing in this section shall affect the authority of the Secretary to request or participate in a voluntary recall, or to issue an order to cease distribution or to recall under any other provision of this chapter or under the Public Health Service Act [42 U.S.C. 201 et seq.].

(j) Coordinated communication

(1) In general

To assist in carrying out the requirements of this subsection, the Secretary shall establish an incident command operation or a similar operation within the Department of Health and Human Services that will operate not later than 24 hours after the initiation of a mandatory recall or the recall of an article of food for which the use of, or exposure to, such article will cause serious adverse health consequences or death to humans or animals.

(2) Requirements

To reduce the potential for miscommunication during recalls or regarding investigations of a food borne illness outbreak associated with a food that is subject to a recall, each incident command operation or similar operation under paragraph (1) shall use regular staff and resources of the Department of Health and Human Services to—

(A) ensure timely and coordinated communication within the Department, including enhanced communication and coordination between different agencies and organizations within the Department;

(B) ensure timely and coordinated communication from the Department, including public statements, throughout the duration of the investigation and related foodborne illness outbreak;

(C) identify a single point of contact within the Department for public inquiries regarding any actions by the Secretary related to a recall;

(D) coordinate with Federal, State, local, and tribal authorities, as appropriate, that have responsibilities related to the recall of a food or a foodborne illness outbreak associated with a food that is subject to the recall, including notification of the Secretary of Agriculture and the Secretary of Education in the event such recalled food is a commodity intended for use in a child nutrition program (as identified in section 1769f(b) of title 42); and

(E) conclude operations at such time as the Secretary determines appropriate.

(3) Multiple recalls

The Secretary may establish multiple or concurrent incident command operations or similar operations in the event of multiple recalls or foodborne illness outbreaks necessitating such action by the Department of Health and Human Services.

(June 25, 1938, ch. 675, §423, as added Pub. L. 111–353, title II, §206(a), Jan. 4, 2011, 124 Stat. 3939.)

Editorial Notes

References in Text

The Public Health Service Act, referred to in subsec. (i), is act July 1, 1944, ch. 373, 58 Stat. 682, which is classified generally to chapter 6A (§201 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 201 of Title 42 and Tables.

Statutory Notes and Related Subsidiaries

Construction

Nothing in this section to be construed to alter jurisdiction and authorities established under certain other Acts or in a manner inconsistent with international agreements to which the United States is a party, see sections 2251 and 2252 of this title.

Search Engine

Pub. L. 111–353, title II, §206(b), Jan. 4, 2011, 124 Stat. 3942, provided that: "Not later than 90 days after the date of enactment of this Act [Jan. 4, 2011], the Secretary shall modify the Internet Web site of the Food and Drug Administration to include a search engine that—

"(1) is consumer-friendly, as determined by the Secretary; and

"(2) provides a means by which an individual may locate relevant information regarding each article of food subject to a recall under section 423 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 350l] and the status of such recall (such as whether a recall is ongoing or has been completed)."

[1] *So in original. The words "to immediately cease distribution of such article." probably should follow cl. (ii).*

[2] *So in original. Probably should be "paragraph (1)."*

§350*l*–1. Annual report to Congress

(1) In general

Not later than 2 years after January 4, 2011, and annually thereafter, the Secretary of Health and Human Services (referred to in this section as the "Secretary") shall submit a report to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Energy and Commerce of the House of Representatives on the use of recall authority under section 350l of this title (as added by subsection (a)) [1] and any public health advisories issued by the Secretary that advise against the consumption of an article of food on the ground that the article of food is adulterated and poses an imminent danger to health.

(2) Content

The report under paragraph (1) shall include, with respect to the report year—

(A) the identity of each article of food that was the subject of a public health advisory described in paragraph (1), an opportunity to cease distribution and recall under subsection (a) of section 350l of this title, or a mandatory recall order under subsection (b) of such section;

(B) the number of responsible parties, as defined in section 350f of this title, formally given the opportunity to cease distribution of an article of food and recall such article, as described in section 350l(a) of such title;

(C) the number of responsible parties described in subparagraph (B) who did not cease distribution of or recall an article of food after given the opportunity to cease distribution or recall under section 350l(a) of this title;

(D) the number of recall orders issued under section 350l(b) of this title; and

(E) a description of any instances in which there was no testing that confirmed adulteration of an article of food that was the subject of a recall under section 350l(b) of this title or a public health advisory described in paragraph (1).

(Pub. L. 111–353, title II, §206(f), Jan. 4, 2011, 124 Stat. 3943.)

Editorial Notes

References in Text

Subsection (a), referred to in par. (1), means subsec. (a) of section 206 of Pub. L. 111–353.

Codification

Section was enacted as part of the FDA Food Safety Modernization Act, and not as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

Statutory Notes and Related Subsidiaries

Construction

Nothing in this section to be construed to alter jurisdiction and authorities established under certain other Acts or in a manner inconsistent with international agreements to which the United States is a party, see sections 2251 and 2252 of this title.

[1] *See References in Text note below.*

SUBCHAPTER V—DRUGS AND DEVICES

Part A—Drugs and Devices

§351. Adulterated drugs and devices

A drug or device shall be deemed to be adulterated—

(a) Poisonous, insanitary, etc., ingredients; adequate controls in manufacture

(1) If it consists in whole or in part of any filthy, putrid, or decomposed substance; or (2)(A) if it has been prepared, packed, or held under insanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered injurious to health; or (B) if it is a drug and the methods used in, or the facilities or controls used for, its manufacture, processing, packing, or holding do not conform to or are not operated or administered in conformity with current good manufacturing practice to assure that

such drug meets the requirements of this chapter as to safety and has the identity and strength, and meets the quality and purity characteristics, which it purports or is represented to possess; or (C) if it is a compounded positron emission tomography drug and the methods used in, or the facilities and controls used for, its compounding, processing, packing, or holding do not conform to or are not operated or administered in conformity with the positron emission tomography compounding standards and the official monographs of the United States Pharmacopoeia to assure that such drug meets the requirements of this chapter as to safety and has the identity and strength, and meets the quality and purity characteristics, that it purports or is represented to possess; or (3) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or (4) if (A) it bears or contains, for purposes of coloring only, a color additive which is unsafe within the meaning of section 379e(a) of this title, or (B) it is a color additive the intended use of which in or on drugs or devices is for purposes of coloring only and is unsafe within the meaning of section 379e(a) of this title; or (5) if it is a new animal drug which is unsafe within the meaning of section 360b of this title; or (6) if it is an animal feed bearing or containing a new animal drug, and such animal feed is unsafe within the meaning of section 360b of this title.

(b) Strength, quality, or purity differing from official compendium

If it purports to be or is represented as a drug the name of which is recognized in an official compendium, and its strength differs from, or its quality or purity falls below, the standard set forth in such compendium. Such determination as to strength, quality, or purity shall be made in accordance with the tests or methods of assay set forth in such compendium, except that whenever tests or methods of assay have not been prescribed in such compendium, or such tests or methods of assay as are prescribed are, in the judgment of the Secretary, insufficient for the making of such determination, the Secretary shall bring such fact to the attention of the appropriate body charged with the revision of such compendium, and if such body fails within a reasonable time to prescribe tests or methods of assay which, in the judgment of the Secretary, are sufficient for purposes of this paragraph, then the Secretary shall promulgate regulations prescribing appropriate tests or methods of assay in accordance with which such determination as to strength, quality, or purity shall be made. No drug defined in an official compendium shall be deemed to be adulterated under this paragraph because it differs from the standard of strength, quality, or purity therefor set forth in such compendium, if its difference in strength, quality, or purity from such standard is plainly stated on its label. Whenever a drug is recognized in both the United States Pharmacopoeia and the Homoeopathic Pharmacopoeia of the United States it shall be subject to the requirements of the United States Pharmacopoeia unless it is labeled and offered for sale as a homoeopathic drug, in which case it shall be subject to the provisions of the Homoeopathic Pharmacopoeia of the United States and not to those of the United States Pharmacopoeia.

(c) Misrepresentation of strength, etc., where drug is unrecognized in compendium

If it is not subject to the provisions of paragraph (b) of this section and its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess.

(d) Mixture with or substitution of another substance

If it is a drug and any substance has been (1) mixed or packed therewith so as to reduce its quality or strength or (2) substituted wholly or in part therefor.

(e) Devices not in conformity with performance standards

(1) If it is, or purports to be or is represented as, a device which is subject to a performance standard established under section 360d of this title unless such device is in all respects in conformity with such standard.

(2) If it is declared to be, purports to be, or is represented as, a device that is in conformity with any standard recognized under section 360d(c) of this title unless such device is in all respects in conformity with such standard.

(f) Certain class III devices

(1) If it is a class III device—

(A)(i) which is required by an order issued under subsection (b) of section 360e of this title to have an approval under such section of an application for premarket approval and which is not exempt from

section 360e of this title under section 360j(g) of this title, and

(ii)(I) for which an application for premarket approval or a notice of completion of a product development protocol was not filed with the Secretary within the ninety-day period beginning on the date of the issuance of such order, or

(II) for which such an application was filed and approval of the application has been denied, suspended, or withdrawn, or such a notice was filed and has been declared not completed or the approval of the device under the protocol has been withdrawn;

(B)(i) which was classified under section 360c(f) of this title into class III, which under section 360e(a) of this title is required to have in effect an approved application for premarket approval, and which is not exempt from section 360e of this title under section 360j(g) of this title, and

(ii) which has an application which has been suspended or is otherwise not in effect; or

(C) which was classified under section 360j(l) of this title into class III, which under such section is required to have in effect an approved application under section 360e of this title, and which has an application which has been suspended or is otherwise not in effect.

(2)(A) In the case of a device classified under section 360c(f) of this title into class III and intended solely for investigational use, paragraph [1] (1)(B) shall not apply with respect to such device during the period ending on the ninetieth day after the date of the promulgation of the regulations prescribing the procedures and conditions required by section 360j(g)(2) of this title.

(B) In the case of a device subject to an order issued under subsection (b) of section 360e of this title, paragraph [1] (1) shall not apply with respect to such device during the period ending—

(i) on the last day of the thirtieth calendar month beginning after the month in which the classification of the device in class III became effective under section 360c of this title, or

(ii) on the ninetieth day after the date of the issuance of such order,

whichever occurs later.

(3) In the case of a device with respect to which a regulation was promulgated under section 360e(b) of this title prior to July 9, 2012, a reference in this subsection to an order issued under section 360e(b) of this title shall be deemed to include such regulation.

(g) Banned devices

If it is a banned device.

(h) Manufacture, packing, storage, or installation of device not in conformity with applicable requirements or conditions

If it is a device and the methods used in, or the facilities or controls used for, its manufacture, packing, storage, or installation are not in conformity with applicable requirements under section 360j(f)(1) of this title or an applicable condition prescribed by an order under section 360j(f)(2) of this title.

(i) Failure to comply with requirements under which device was exempted for investigational use

If it is a device for which an exemption has been granted under section 360j(g) of this title for investigational use and the person who was granted such exemption or any investigator who uses such device under such exemption fails to comply with a requirement prescribed by or under such section.

(j) Delayed, denied, or limited inspection; refusal to permit entry or inspection

If it is a drug or device and it has been manufactured, processed, packed, or held in any factory, warehouse, or establishment and the owner, operator, or agent of such factory, warehouse, or establishment delays, denies, or limits an inspection, or refuses to permit entry or inspection.

For purposes of paragraph (a)(2)(B), the term "current good manufacturing practice" includes the implementation of oversight and controls over the manufacture of drugs to ensure quality, including managing the risk of and establishing the safety of raw materials, materials used in the manufacturing of drugs, and finished drug products.

(June 25, 1938, ch. 675, §501, 52 Stat. 1049; Pub. L. 86–618, title I, §102(b)(1), July 12, 1960, 74 Stat. 398; Pub. L. 87–781, title I, §101, Oct. 10, 1962, 76 Stat. 780; Pub. L. 90–399, §101(a), July 13, 1968, 82

Stat. 343; Pub. L. 94–295, §§3(d), 9(b)(1), May 28, 1976, 90 Stat. 576, 583; Pub. L. 101–629, §9(b), Nov. 28, 1990, 104 Stat. 4521; Pub. L. 102–571, title I, §107(8), Oct. 29, 1992, 106 Stat. 4499; Pub. L. 105–115, title I, §121(b)(1), title II, §204(c), Nov. 21, 1997, 111 Stat. 2320, 2336; Pub. L. 112–144, title VI, §608(b)(2), title VII, §§707(a), 711, July 9, 2012, 126 Stat. 1058, 1068, 1071; Pub. L. 115–52, title VII, §702(c), Aug. 18, 2017, 131 Stat. 1056.)

Editorial Notes

Amendments

2017—Par. (j). Pub. L. 115–52 inserted "or device" after "drug".

2012—Pub. L. 112–144, §711, inserted concluding provisions.

Par. (f)(1)(A)(i). Pub. L. 112–144, §608(b)(2)(A)(i), substituted "an order issued" for "a regulation promulgated".

Par. (f)(1)(A)(ii)(I). Pub. L. 112–144, §608(b)(2)(A)(ii), substituted "issuance of such order" for "promulgation of such regulation".

Par. (f)(2)(B). Pub. L. 112–144, §608(b)(2)(B), substituted "an order issued" for "a regulation promulgated" in introductory provisions and "issuance of such order" for "promulgation of such regulation" in subcl. (ii).

Par. (f)(3). Pub. L. 112–144, §608(b)(2)(C), added subpar. (3).

Par. (j). Pub. L. 112–144, §707(a), added par. (j).

1997—Par. (a)(2)(C). Pub. L. 105–115, §121(b)(1), inserted "; or (C) if it is a compounded positron emission tomography drug and the methods used in, or the facilities and controls used for, its compounding, processing, packing, or holding do not conform to or are not operated or administered in conformity with the positron emission tomography compounding standards and the official monographs of the United States Pharmacopoeia to assure that such drug meets the requirements of this chapter as to safety and has the identity and strength, and meets the quality and purity characteristics, that it purports or is represented to possess;" before "or (3)".

Par. (e). Pub. L. 105–115, §204(c), designated existing provisions as subpar. (1) and added subpar. (2).

1992—Par. (a)(4). Pub. L. 102–571 substituted "379e(a)" for "376(a)" in cls. (A) and (B).

1990—Par. (f)(1). Pub. L. 101–629, §9(b), which directed the amendment of subpars. (A) to (C) of par. (f), was executed by making the amendments in cls. (A) to (C) of subpar. (1) of par. (f) as follows to reflect the probable intent of Congress: in cl. (A)(ii)(II), substituted ", suspended, or withdrawn" for "or withdrawn"; in cl. (B)(ii), substituted "which has an application which has been suspended or is otherwise not in effect" for "which does not have such an application in effect"; and in cl. (C), substituted "which has an application which has been suspended or is otherwise not in effect" for "which does not have such an application in effect".

1976—Par. (a). Pub. L. 94–295, §9(b)(1), substituted "(3) if its" for "(3) if it is a drug and its" in cl. (3), substituted "(4) if (A) it bears or contains" for "(4) if (A) it is a drug which bears or contains" in cl. (4)(A), and substituted "drugs or devices" for "drugs" in cl. (4)(B).

Pars. (e) to (i). Pub. L. 94–295, §3(d), added pars. (e) to (i).

1968—Par. (a). Pub. L. 90–399 added cls. (5) and (6).

1962—Par. (a). Pub. L. 87–781 designated existing provisions of cl. (2) as (A) and added (B).

1960—Par. (a). Pub. L. 86–618 substituted provisions in cl. (4) relating to unsafe color additives for provisions which related to a coal-tar color other than one from a batch that has been certified in accordance with regulations as provided by section 354 of this title.

Statutory Notes and Related Subsidiaries

Effective and Termination Dates of 1997 Amendment

Pub. L. 105–115, title I, §121(b)(2), Nov. 21, 1997, 111 Stat. 2320, provided that: "Section 501(a)(2)(C) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 351(a)(2)(C)) shall not apply 4 years after the date of enactment of this Act [Nov. 21, 1997] or 2 years after the date on which the Secretary of Health and Human Services establishes the requirements described in subsection (c)(1)(B) [section 121(c)(1)(B) of Pub. L. 105–115, set out as a note under section 355 of this title], whichever is later."

Amendment by Pub. L. 105–115 effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as an Effective Date of 1997 Amendment note under section 321 of this title.

Effective Date of 1968 Amendment

Amendment by Pub. L. 90–399 effective on first day of thirteenth calendar month after July 13, 1968, see section 108(a) of Pub. L. 90–399, set out as an Effective Date and Transitional Provisions note under section 360b of this title.

Effective Date of 1962 Amendment; Exceptions

Amendment by Pub. L. 87–781 effective on first day of seventh calendar month following October 1962, see section 107 of Pub. L. 87–781, set out as a note under section 321 of this title.

Effective Date of 1960 Amendment

Amendment by Pub. L. 86–618 effective July 12, 1960, subject to the provisions of section 203 of Pub. L. 86–618, see section 202 of Pub. L. 86–618, set out as a note under section 379e of this title.

Effective Date; Postponement

Par. (a)(4) effective Jan. 1, 1940, see act June 23, 1939, ch. 242, 53 Stat. 853, set out as an Effective Date; Postponement in Certain Cases note under section 301 of this title.

Transfer of Functions

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

Approval by Regulation Prior to July 9, 2012

Pub. L. 112–144, title VI, §608(b)(3), July 9, 2012, 126 Stat. 1059, provided that: "The amendments made by this subsection [amending this section and section 360e of this title] shall have no effect on a regulation that was promulgated prior to the date of enactment of this Act [July 9, 2012] requiring that a device have an approval under section 515 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360e) of an application for premarket approval."

Guidance

Pub. L. 112–144, title VII, §707(b), July 9, 2012, 126 Stat. 1068, provided that: "Not later than 1 year after the date of enactment of this section [July 9, 2012], the Secretary of Health and Human Services shall issue guidance that defines the circumstances that would constitute delaying, denying, or limiting inspection, or refusing to permit entry or inspection, for purposes of section 501(j) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 351(j)] (as added by subsection (a))."

[1] *So in original. Probably should be "subparagraph".*

§352. Misbranded drugs and devices

A drug or device shall be deemed to be misbranded—

(a) False or misleading label

(1) If its labeling is false or misleading in any particular. Health care economic information provided to a payor, formulary committee, or other similar entity with knowledge and expertise in the area of health care economic analysis, carrying out its responsibilities for the selection of drugs for coverage or reimbursement, shall not be considered to be false or misleading under this paragraph if the health care economic information relates to an indication approved under section 355 of this title or under section 262(a) of title 42 for such drug, is based on competent and reliable scientific evidence, and includes, where applicable, a conspicuous and prominent statement describing any material differences between the health care economic information and the labeling approved for the drug under section 355 of this title or under section 262 of title 42. The requirements set forth in section 355(a) of this title or in subsections (a) and (k) of section 262 of title 42 shall not apply to health care economic information provided to such a payor, committee, or entity in accordance with this paragraph. Information that is relevant to the substantiation of the health care economic information presented pursuant to this paragraph shall be made available to the Secretary upon request.

(2)(A) For purposes of this paragraph,[1] the term "health care economic information" means any analysis (including the clinical data, inputs, clinical or other assumptions, methods, results, and other components underlying or comprising the analysis) that identifies, measures, or describes the economic consequences, which may be based on the separate or aggregated clinical consequences of the represented health outcomes, of the use of a drug. Such analysis may be comparative to the use of another drug, to another health care intervention, or to no intervention.

(B) Such term does not include any analysis that relates only to an indication that is not approved under section 355 of this title or under section 262 of title 42 for such drug.

(b) Package form; contents of label

If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

(c) Prominence of information on label

If any word, statement, or other information required by or under authority of this chapter to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

(d) Repealed. Pub. L. 105–115, title I, §126(b), Nov. 21, 1997, 111 Stat. 2327

(e) Designation of drugs or devices by established names

(1)(A) If it is a drug, unless its label bears, to the exclusion of any other nonproprietary name (except the applicable systematic chemical name or the chemical formula)—

(i) the established name (as defined in subparagraph (3)) of the drug, if there is such a name;

(ii) the established name and quantity or, if determined to be appropriate by the Secretary, the proportion of each active ingredient, including the quantity, kind, and proportion of any alcohol, and also including whether active or not the established name and quantity or if determined to be appropriate by the Secretary, the proportion of any bromides, ether, chloroform, acetanilide, acetophenetidin, amidopyrine, antipyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, digitalis glucosides, mercury, ouabain, strophanthin, strychnine, thyroid, or any derivative or preparation of any such substances, contained therein, except that the requirement for stating the quantity of the active ingredients, other than the quantity of those specifically named in this subclause, shall not apply to nonprescription drugs not intended for human use; and

(iii) the established name of each inactive ingredient listed in alphabetical order on the outside container of the retail package and, if determined to be appropriate by the Secretary, on the immediate container, as prescribed in regulation promulgated by the Secretary, except that nothing in this subclause shall be deemed to require that any trade secret be divulged, and except that the requirements of this subclause with respect to alphabetical order shall apply only to nonprescription drugs that are not also cosmetics and that this subclause shall not apply to nonprescription drugs not intended for human use.

(B) For any prescription drug the established name of such drug or ingredient, as the case may be, on such label (and on any labeling on which a name for such drug or ingredient is used) shall be printed prominently and in type at least half as large as that used thereon for any proprietary name or designation for such drug or ingredient, except that to the extent that compliance with the requirements of subclause (ii) or (iii) of clause (A) or this clause is impracticable, exemptions shall be established by regulations promulgated by the Secretary.

(2) If it is a device and it has an established name, unless its label bears, to the exclusion of any other nonproprietary name, its established name (as defined in subparagraph (4)) prominently printed in type at least half as large as that used thereon for any proprietary name or designation for such device, except that to the extent compliance with the requirements of this subparagraph is impracticable, exemptions shall be established by regulations promulgated by the Secretary.

(3) As used in subparagraph (1), the term "established name", with respect to a drug or ingredient thereof, means (A) the applicable official name designated pursuant to section 358 of this title, or (B), if there is no such name and such drug, or such ingredient, is an article recognized in an official compendium, then the official title thereof in such compendium, or (C) if neither clause (A) nor clause (B) of this subparagraph applies, then the common or usual name, if any, of such drug or of such ingredient, except that where clause (B) of this subparagraph applies to an article recognized in the United States Pharmacopeia and in the Homoeopathic Pharmacopoeia under different official titles, the official title used in the United States Pharmacopeia shall apply unless it is labeled and offered for sale as a homoeopathic drug, in which case the official title used in the Homoeopathic Pharmacopoeia shall apply.

(4) As used in subparagraph (2), the term "established name" with respect to a device means (A) the applicable official name of the device designated pursuant to section 358 of this title, (B) if there is no such name and such device is an article recognized in an official compendium, then the official title thereof in such compendium, or (C) if neither clause (A) nor clause (B) of this subparagraph applies, then any common or usual name of such device.

(f) Directions for use and warnings on label

Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users, except that where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Secretary shall promulgate regulations exempting such drug or device from such requirement. Required labeling for prescription devices intended for use in health care facilities or by a health care professional and required labeling for in vitro diagnostic devices intended for use by health care professionals or in blood establishments may be made available solely by electronic means, provided that the labeling complies with all applicable requirements of law, and that the manufacturer affords such users the opportunity to request the labeling in paper form, and after such request, promptly provides the requested information without additional cost.

(g) Representations as recognized drug; packing and labeling; inconsistent requirements for designation of drug

If it purports to be a drug the name of which is recognized in an official compendium, unless it is packaged and labeled as prescribed therein. The method of packing may be modified with the consent of the Secretary. Whenever a drug is recognized in both the United States Pharmacopoeia and the Homoeopathic Pharmacopoeia of the United States, it shall be subject to the requirements of the United States Pharmacopoeia with respect to packaging and labeling unless it is labeled and offered for sale as a homoeopathic drug, in which case it shall be subject to the provisions of the Homoeopathic Pharmacopoeia of the United States, and not those of the United States Pharmacopoeia, except that in the event of inconsistency between the requirements of this paragraph and those of paragraph (e) as to the name by which the drug or its ingredients shall be designated, the requirements of paragraph (e) shall prevail.

(h) Deteriorative drugs; packing and labeling

If it has been found by the Secretary to be a drug liable to deterioration, unless it is packaged in such form and manner, and its label bears a statement of such precautions, as the Secretary shall by regulations require as necessary for the protection of the public health. No such regulation shall be established for any drug recognized in an official compendium until the Secretary shall have informed the appropriate body charged with the revision of such compendium of the need for such packaging or labeling requirements and such body shall have failed within a reasonable time to prescribe such requirements.

(i) Drug; misleading container; imitation; offer for sale under another name

(1) If it is a drug and its container is so made, formed, or filled as to be misleading; or (2) if it is an imitation of another drug; or (3) if it is offered for sale under the name of another drug.

(j) Health-endangering when used as prescribed

If it is dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof.

(k), (l) Repealed. Pub. L. 105–115, title I, §125(a)(2)(B), (b)(2)(D), Nov. 21, 1997, 111 Stat. 2325

(m) Color additives; packing and labeling

If it is a color additive the intended use of which is for the purpose of coloring only, unless its packaging and labeling are in conformity with such packaging and labeling requirements applicable to such color additive, as may be contained in regulations issued under section 379e of this title.

(n) Prescription drug advertisements: established name; quantitative formula; side effects, contraindications, and effectiveness; prior approval; false advertising; labeling; construction of the Convention on Psychotropic Substances

In the case of any prescription drug distributed or offered for sale in any State, unless the manufacturer, packer, or distributor thereof includes in all advertisements and other descriptive printed matter issued or caused to be issued by the manufacturer, packer, or distributor with respect to that drug a true statement of (1) the established name as defined in paragraph (e), printed prominently and in type at least half as large as that used for any trade or brand name thereof, (2) the formula showing quantitatively each ingredient of such drug to the extent required for labels under paragraph (e), and (3) such other information in brief summary relating to side effects, contraindications, and effectiveness as shall be required in regulations which shall be issued by the Secretary in accordance with section 371(a) of this title, and in the case of published direct-to-consumer advertisements the following statement printed in conspicuous text: "You are encouraged to report negative side effects of prescription drugs to the FDA. Visit www.fda.gov/medwatch, or call 1–800-FDA-1088.", except that (A) except in extraordinary circumstances, no regulation issued under this paragraph shall require prior approval by the Secretary of the content of any advertisement, and (B) no advertisement of a prescription drug, published after the effective date of regulations issued under this paragraph applicable to advertisements of prescription drugs, shall with respect to the matters specified in this paragraph or covered by such regulations, be subject to the provisions of sections 52 to 57 of title 15. This paragraph (n) shall not be applicable to any printed matter which the Secretary determines to be labeling as defined in section 321(m) of this title. Nothing in the Convention on Psychotropic Substances, signed at Vienna, Austria, on February 21, 1971, shall be construed to prevent drug price communications to consumers. In the case of an advertisement for a drug subject to section 353(b)(1) of this title presented directly to consumers in television or radio format and stating the name of the drug and its conditions of use, the major statement relating to side effects and contraindications shall be presented in a clear, conspicuous, and neutral manner.

(o) Drugs or devices from nonregistered establishments

If it was manufactured, prepared, propagated, compounded, or processed in an establishment not duly registered under section 360 of this title, if it is a drug and was imported or offered for import by a commercial importer of drugs not duly registered under section 381(s) of this title, if it was not included in a list required by section 360(j) of this title, if a notice or other information respecting it was not provided as required by such section or section 360(k) of this title, or if it does not bear such symbols from the uniform system for identification of devices prescribed under section 360(e) of this title as the Secretary by regulation requires.

(p) Packaging or labeling of drugs in violation of regulations

If it is a drug and its packaging or labeling is in violation of an applicable regulation issued pursuant to section 1472 or 1473 of title 15.

(q) Restricted devices using false or misleading advertising or used in violation of regulations

In the case of any restricted device distributed or offered for sale in any State, if (1) its advertising is false or misleading in any particular, or (2) it is sold, distributed, or used in violation of regulations prescribed under section 360j(e) of this title.

(r) Restricted devices not carrying requisite accompanying statements in advertisements and other descriptive printed matter

In the case of any restricted device distributed or offered for sale in any State, unless the manufacturer, packer, or distributor thereof includes in all advertisements and other descriptive printed matter issued or caused to be issued by the manufacturer, packer, or distributor with respect to that device (1) a true statement of the device's established name as defined in subsection (e), printed prominently and in type at

least half as large as that used for any trade or brand name thereof, and (2) a brief statement of the intended uses of the device and relevant warnings, precautions, side effects, and contraindications and, in the case of specific devices made subject to a finding by the Secretary after notice and opportunity for comment that such action is necessary to protect the public health, a full description of the components of such device or the formula showing quantitatively each ingredient of such device to the extent required in regulations which shall be issued by the Secretary after an opportunity for a hearing. Except in extraordinary circumstances, no regulation issued under this paragraph shall require prior approval by the Secretary of the content of any advertisement and no advertisement of a restricted device, published after the effective date of this paragraph shall, with respect to the matters specified in this paragraph or covered by regulations issued hereunder, be subject to the provisions of sections 52 through 55 of title 15. This paragraph shall not be applicable to any printed matter which the Secretary determines to be labeling as defined in section 321(m) of this title.

(s) Devices subject to performance standards not bearing requisite labeling

If it is a device subject to a performance standard established under section 360d of this title, unless it bears such labeling as may be prescribed in such performance standard.

(t) Devices for which there has been a failure or refusal to give required notification or to furnish required material or information

If it is a device and there was a failure or refusal (1) to comply with any requirement prescribed under section 360h of this title respecting the device, (2) to furnish any material or information required by or under section 360i of this title respecting the device, or (3) to comply with a requirement under section 360l of this title.

(u) Identification of manufacturer

(1) Subject to paragraph (2), if it is a reprocessed single-use device, unless it, or an attachment thereto, prominently and conspicuously bears the name of the manufacturer of the reprocessed device, a generally recognized abbreviation of such name, or a unique and generally recognized symbol identifying such manufacturer.

(2) If the original device or an attachment thereto does not prominently and conspicuously bear the name of the manufacturer of the original device, a generally recognized abbreviation of such name, or a unique and generally recognized symbol identifying such manufacturer, a reprocessed device may satisfy the requirements of paragraph (1) through the use of a detachable label on the packaging that identifies the manufacturer and is intended to be affixed to the medical record of a patient.

(v) Reprocessed single-use devices

If it is a reprocessed single-use device, unless all labeling of the device prominently and conspicuously bears the statement "Reprocessed device for single use. Reprocessed by ____." The name of the manufacturer of the reprocessed device shall be placed in the space identifying the person responsible for reprocessing.

(w) New animal drugs

If it is a new animal drug—

(1) that is conditionally approved under section 360ccc of this title and its labeling does not conform with the approved application or section 360ccc(f) of this title, or that is not conditionally approved under section 360ccc of this title and its label bears the statement set forth in section 360ccc(f)(1)(A) of this title;

(2) that is indexed under section 360ccc–1 of this title and its labeling does not conform with the index listing under section 360ccc–1(e) of this title or 360ccc–1(h) of this title, or that has not been indexed under section 360ccc–1 of this title and its label bears the statement set forth in section 360ccc–1(h) of this title; or

(3) for which an application has been approved under section 360b of this title and the labeling of such drug does not include the application number in the format: "Approved by FDA under (A)NADA # xxx–xxx", except that this subparagraph shall not apply to representative labeling required under section 514.1(b)(3)(v)(b) of title 21, Code of Federal Regulations (or any successor regulation) for animal feed bearing or containing a new animal drug.

(x) Nonprescription drugs

If it is a nonprescription drug (as defined in section 379aa of this title) that is marketed in the United States, unless the label of such drug includes a domestic address or domestic phone number through which the responsible person (as described in section 379aa of this title) may receive a report of a serious adverse event (as defined in section 379aa of this title) with such drug.

(y) Drugs subject to approved risk evaluation and mitigation strategy

If it is a drug subject to an approved risk evaluation and mitigation strategy pursuant to section 355(p) of this title and the responsible person (as such term is used in section 355–1 of this title) fails to comply with a requirement of such strategy provided for under subsection (d), (e), or (f) of section 355–1 of this title.

(z) Postmarket studies and clinical trials; new safety information in labeling

If it is a drug, and the responsible person (as such term is used in section 355(o) of this title) is in violation of a requirement established under paragraph (3) (relating to postmarket studies and clinical trials) or paragraph (4) (relating to labeling) of section 355(o) of this title with respect to such drug.

(aa) Unpaid fees; failure to submit identifying information

If it is a drug, or an active pharmaceutical ingredient, and it was manufactured, prepared, propagated, compounded, or processed in a facility for which fees have not been paid as required by section 379j–42(a)(4) of this title or for which identifying information required by section 379j–42(f) of this title has not been submitted, or it contains an active pharmaceutical ingredient that was manufactured, prepared, propagated, compounded, or processed in such a facility.

(bb) False or misleading advertisement or promotion of compounded drug

If the advertising or promotion of a compounded drug is false or misleading in any particular.

(cc) Failure to bear product identifier

If it is a drug and it fails to bear the product identifier as required by section 360eee–1 of this title.

(dd) Improper labeling of antimicrobial drugs

If it is an antimicrobial drug, as defined in section 360a–2(f) of this title, and its labeling fails to conform with the requirements under section 360a–2(d) of this title.

(ee) Nonprescription drug subject to regulation

If it is a nonprescription drug that is subject to section 355h of this title, is not the subject of an application approved under section 355 of this title, and does not comply with the requirements under section 355h of this title.

(ff) Drugs manufactured, prepared, propagated, compounded, or processed in facilities for which fees have not been paid

If it is a drug and it was manufactured, prepared, propagated, compounded, or processed in a facility for which fees have not been paid as required by section 379j–72 of this title.

(June 25, 1938, ch. 675, §502, 52 Stat. 1050; June 23, 1939, ch. 242, §3, 53 Stat. 854; Dec. 22, 1941, ch. 613, §2, 55 Stat. 851; July 6, 1945, ch. 281, §2, 59 Stat. 463; Mar. 10, 1947, ch. 16, §2, 61 Stat. 11; July 13, 1949, ch. 305, §1, 63 Stat. 409; Aug. 5, 1953, ch. 334, §1, 67 Stat. 389; Pub. L. 86–618, title I, §102(b)(2), July 12, 1960, 74 Stat. 398; Pub. L. 87–781, title I, §§105(c), 112(a), (b), 131(a), title III, §305, Oct. 10, 1962, 76 Stat. 785, 790, 791, 795; Pub. L. 90–399, §105(a), July 13, 1968, 82 Stat. 352; Pub. L. 91–601, §6(d), formerly §7(d), Dec. 30, 1970, 84 Stat. 1673, renumbered Pub. L. 97–35, title XII, §1205(c), Aug. 13, 1981, 95 Stat. 716; Pub. L. 94–295, §§3(e), 4(b)(2), 5(a), 9(b)(2), May 28, 1976, 90 Stat. 577, 580, 583; Pub. L. 95–633, title I, §111, Nov. 10, 1978, 92 Stat. 3773; Pub. L. 102–300, §3(a)(2), June 16, 1992, 106 Stat. 239; Pub. L. 102–571, title I, §107(9), Oct. 29, 1992, 106 Stat. 4499; Pub. L. 103–80, §3(m), Aug. 13, 1993, 107 Stat. 777; Pub. L. 105–115, title I, §§114(a), 125(a)(2)(B), (b)(2)(D), 126(b), title IV, §412(c), Nov. 21, 1997, 111 Stat. 2312, 2325, 2327, 2375; Pub. L. 107–250, title II, §206, title III, §§301(a), 302(a)(1), Oct. 26, 2002, 116 Stat. 1613, 1616; Pub. L. 108–214, §2(b)(2)(B), Apr. 1, 2004, 118 Stat. 575; Pub. L. 108–282, title I, §102(b)(5)(E), Aug. 2, 2004, 118 Stat. 902; Pub. L. 109–43, §2(c)(1), Aug. 1, 2005, 119 Stat. 441; Pub. L. 109–462, §2(d), Dec. 22, 2006, 120 Stat. 3472; Pub. L. 110–85, title

IX, §§901(d)(3)(A), (6), 902(a), 906(a), Sept. 27, 2007, 121 Stat. 940, 942, 943, 949; Pub. L. 112–144, title III, §306, title VII, §§702(a), 714(c), July 9, 2012, 126 Stat. 1024, 1065, 1074; Pub. L. 112–193, §2(a), Oct. 5, 2012, 126 Stat. 1443; Pub. L. 113–54, title I, §103(b), title II, §206(b), Nov. 27, 2013, 127 Stat. 597, 639; Pub. L. 114–255, div. A, title III, §§3037, 3044(b)(2), Dec. 13, 2016, 130 Stat. 1105, 1121; Pub. L. 115–234, title III, §303(a), Aug. 14, 2018, 132 Stat. 2436; Pub. L. 116–136, div. A, title III, §3852, Mar. 27, 2020, 134 Stat. 454.)

Applicability of Amendment

Amendment of section by section 303(a) of Pub. L. 115–234 applicable beginning on Sept. 30, 2023. See 2018 Amendment note below.

Editorial Notes

Amendments

2020—Subsecs. (ee), (ff). Pub. L. 116–136 added subsecs. (ee) and (ff).

2018—Subsec. (w)(3). Pub. L. 115–234 added par. (3).

2016—Subsec. (a). Pub. L. 114–255, §3037, designated existing provisions as par. (1), substituted "a payor, formulary committee, or other similar entity with knowledge and expertise in the area of health care economic analysis, carrying out its responsibilities for the selection of drugs for coverage or reimbursement" for "a formulary committee, or other similar entity, in the course of the committee or the entity carrying out its responsibilities for the selection of drugs for managed care or other similar organizations", "relates" for "directly relates", and ", is based on competent and reliable scientific evidence, and includes, where applicable, a conspicuous and prominent statement describing any material differences between the health care economic information and the labeling approved for the drug under section 355 of this title or under section 262 of title 42. The requirements set forth in section 355(a) of this title or in subsections (a) and (k) of section 262 of title 42 shall not apply to health care economic information provided to such a payor, committee, or entity in accordance with this paragraph" for "and is based on competent and reliable scientific evidence. The requirements set forth in section 355(a) of this title or in section 262(a) of title 42 shall not apply to health care economic information provided to such a committee or entity in accordance with this paragraph", struck out "In this paragraph, the term 'health care economic information' means any analysis that identifies, measures, or compares the economic consequences, including the costs of the represented health outcomes, of the use of a drug to the use of another drug, to another health care intervention, or to no intervention." at end, and added par. (2).

Subsec. (dd). Pub. L. 114–255, §3044(b)(2), added subsec. (dd).

2013—Par. (bb). Pub. L. 113–54, §103(b), added par. (bb).

Par. (cc). Pub. L. 113–54, §206(b), added par. (cc).

2012—Par. (o). Pub. L. 112–144, §714(c), inserted "if it is a drug and was imported or offered for import by a commercial importer of drugs not duly registered under section 381(s) of this title," after "not duly registered under section 360 of this title,".

Pub. L. 112–144, §702(a), struck out "in any State" after "establishment".

Par. (aa). Pub. L. 112–193 substituted "379j–42(a)(4)" for "379j–41(a)(4)".

Pub. L. 112–144, §306, added par. (aa).

2007—Par. (n). Pub. L. 110–85, §906(a), inserted "and in the case of published direct-to-consumer advertisements the following statement printed in conspicuous text: 'You are encouraged to report negative side effects of prescription drugs to the FDA. Visit www.fda.gov/medwatch, or call 1–800-FDA-1088.'," after "section 371(a) of this title,".

Pub. L. 110–85, §901(d)(6), substituted "section 371(a) of this title" for "the procedure specified in section 371(e) of this title".

Pub. L. 110–85, §901(d)(3)(A), inserted at end "In the case of an advertisement for a drug subject to section 353(b)(1) of this title presented directly to consumers in television or radio format and stating the name of the drug and its conditions of use, the major statement relating to side effects and contraindications shall be presented in a clear, conspicuous, and neutral manner."

Pars. (y), (z). Pub. L. 110–85, §902(a), added pars. (y) and (z).

2006—Par. (x). Pub. L. 109–462 added par. (x).

2005—Par. (u). Pub. L. 109–43 amended par. (u) generally. Prior to amendment, par. (u) read as follows: "If it is a device, unless it, or an attachment thereto, prominently and conspicuously bears the name of the manufacturer of the device, a generally recognized abbreviation of such name, or a unique and generally recognized symbol

identifying such manufacturer, except that the Secretary may waive any requirement under this paragraph for the device if the Secretary determines that compliance with the requirement is not feasible for the device or would compromise the provision of reasonable assurance of the safety or effectiveness of the device."

2004—Par. (f). Pub. L. 108–214, in last sentence, inserted "or by a health care professional and required labeling for in vitro diagnostic devices intended for use by health care professionals or in blood establishments" after "in health care facilities", inserted comma after "means", substituted "requirements of law, and that the manufacturer affords such users the opportunity" for "requirements of law and, that the manufacturer affords health care facilities the opportunity", and struck out "the health care facility" after "promptly provides".

Par. (w). Pub. L. 108–282 added par. (w).

2002—Par. (f). Pub. L. 107–250, §206, inserted at end "Required labeling for prescription devices intended for use in health care facilities may be made available solely by electronic means provided that the labeling complies with all applicable requirements of law and, that the manufacturer affords health care facilities the opportunity to request the labeling in paper form, and after such request, promptly provides the health care facility the requested information without additional cost."

Par. (u). Pub. L. 107–250, §301(a), which directed amendment of section by adding par. (u) at end, was executed by adding par. (u) before par. (v) to reflect the probable intent of Congress.

Par. (v). Pub. L. 107–250, §302(a)(1), added par. (v).

1997—Par. (a). Pub. L. 105–115, §114(a), inserted at end "Health care economic information provided to a formulary committee, or other similar entity, in the course of the committee or the entity carrying out its responsibilities for the selection of drugs for managed care or other similar organizations, shall not be considered to be false or misleading under this paragraph if the health care economic information directly relates to an indication approved under section 355 of this title or under section 262(a) of title 42 for such drug and is based on competent and reliable scientific evidence. The requirements set forth in section 355(a) of this title or in section 262(a) of title 42 shall not apply to health care economic information provided to such a committee or entity in accordance with this paragraph. Information that is relevant to the substantiation of the health care economic information presented pursuant to this paragraph shall be made available to the Secretary upon request. In this paragraph, the term 'health care economic information' means any analysis that identifies, measures, or compares the economic consequences, including the costs of the represented health outcomes, of the use of a drug to the use of another drug, to another health care intervention, or to no intervention."

Par. (d). Pub. L. 105–115, §126(b), struck out par. (d) which read as follows: "If it is for use by man and contains any quantity of the narcotic or hypnotic substance alpha eucaine, barbituric acid, betaeucaine, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heroin, marihuana, morphine, opium, paraldehyde, peyote, or sulphonmethane; or any chemical derivative of such substance, which derivative has been by the Secretary, after investigation, found to be, and by regulations designated as, habit forming; unless its label bears the name and quantity or proportion of such substance or derivative and in juxtaposition therewith the statement 'Warning—May be habit forming.' "

Par. (e)(1). Pub. L. 105–115, §412(c), amended subpar. (1) generally. Prior to amendment, subpar. (1) read as follows: "If it is a drug, unless (A) its label bears, to the exclusion of any other nonproprietary name (except the applicable systematic chemical name or the chemical formula), (i) the established name (as defined in subparagraph (3)) of the drug, if such there be, and (ii), in case it is fabricated from two or more ingredients, the established name and quantity of each active ingredient, including the quantity, kind, and proportion of any alcohol, and also including, whether active or not, the established name and quantity or proportion of any bromides, ether, chloroform, acetanilid, acetphenetidin, amidopyrine, antipyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, digitalis glucosides, mercury ouabain strophanthin, strychnine, thyroid, or any derivative or preparation of any such substances, contained therein; *Provided*, That the requirement for stating the quantity of the active ingredients, other than the quantity of those specifically named in this paragraph, shall apply only to prescription drugs; and (B) for any prescription drug the established name of such drug or ingredient, as the case may be, on such label (and on any labeling on which a name for such drug or ingredient is used) is printed prominently and in type at least half as large as that used thereon for any proprietary name or designation for such drug or ingredient: *Provided*, That to the extent that compliance with the requirements of clause (A)(ii) or clause (B) of this subparagraph is impracticable, exemptions shall be established by regulations promulgated by the Secretary."

Par. (k). Pub. L. 105–115, §125(a)(2)(B), struck out par. (k) which read as follows: "If it is, or purports to be, or is represented as a drug composed wholly or partly of insulin, unless (1) it is from a batch with respect to which a certificate or release has been issued pursuant to section 356 of this title, and (2) such certificate or release is in effect with respect to such drug."

Par. (l). Pub. L. 105–115, §125(b)(2)(D), struck out par. (l) which read as follows: "If it is, or purports to be, or is represented as a drug (except a drug for use in animals other than man) composed wholly or partly of any kind of

penicillin, streptomycin, chlortetracycline, chloramphenicol, bacitracin, or any other antibiotic drug, or any derivative thereof, unless (1) it is from a batch with respect to which a certificate or release has been issued pursuant to section 357 of this title, and (2) such certificate or release is in effect with respect to such drug: *Provided*, That this paragraph shall not apply to any drug or class of drugs exempted by regulations promulgated under section 357(c) or (d) of this title."

1993—Par. (e)(3). Pub. L. 103–80, §3(m)(1), substituted "of such ingredient, except that" for "of such ingredient: *Provided*, That".

Par. (f). Pub. L. 103–80, §3(m)(2), substituted "users, except that where" for "users: *Provided*, That where".

Par. (g). Pub. L. 103–80, §3(m)(3), substituted "prescribed therein. The method" for "prescribed therein: *Provided*, That the method" and "Pharmacopoeia, except that" for "Pharmacopoeia: *Provided further*, That,".

Par. (n). Pub. L. 103–80, §3(m)(4), substituted ", except that (A)" for ": *Provided*, That (A)".

1992—Par. (m). Pub. L. 102–571 substituted "379e" for "376".

Par. (t)(3). Pub. L. 102–300 added cl. (3).

1978—Par. (n). Pub. L. 95–633 inserted provision relating to the construction of the Convention on Psychotropic Substances.

1976—Par. (e). Pub. L. 94–295, §5(a), substituted "subparagraph (3)" for "subparagraph (2)" in subpar. (1), added subpar. (2), redesignated former subpar. (2) as (3) and in subpar. (3) as so redesignated substituted "subparagraph (1)" for "this paragraph (e)", and added subpar. (4).

Par. (j). Pub. L. 94–295, §3(e)(2), substituted "dosage or manner," for "dosage,".

Par. (m). Pub. L. 94–295, §9(b)(2), substituted "the intended use of which is for" for "the intended use of which in or on drugs is for".

Par. (o). Pub. L. 94–295, §4(b)(2), substituted "If it was manufactured" for "If it is a drug and was manufactured" and inserted ", if it was not included in a list required by section 360(j) of this title, if a notice or other information respecting it was not provided as required by such section or section 360(k) of this title, or if it does not bear such symbols from the uniform system for identification of devices prescribed under section 360(e) of this title as the Secretary by regulation requires".

Pars. (q) to (t). Pub. L. 94–295, §3(e)(1), added pars. (q) to (t).

1970—Par. (p). Pub. L. 91–601 added par. (p).

1968—Par. (l). Pub. L. 90–399 inserted "(except a drug for use in animals other than man)" after "represented as a drug".

1962—Par. (e). Pub. L. 87–781, §112(a), designated existing provisions as subpar. (1), substituted ", unless (A) its label bears, to the exclusion of any other nonproprietary name (except the applicable systematic chemical name or the chemical formula), (i) the established name (as defined in subparagraph (2) of this subsection) of the drug, if such there be, and (ii), in case it is fabricated from two or more ingredients, the established name and quantity" for "and is not designated solely by a name recognized in an official compendium unless its label bears (1) the common or usual name of the drug, if such there be; and (2), in case it is fabricated from two or more ingredients, the common or usual name", and "the established name" for "the name", provided that the requirement for stating the quantity of active ingredients, other than those specified in this par., applies only to prescription drugs, and that the established name of a drug on a label is to be printed prominently and in type at least half as large as used for any proprietary designation, and added subpar. (2) defining "established name".

Par. (g). Pub. L. 87–781, §112(b), provided that if there is an inconsistency between the provisions of this par. and those of par. (e), as to the name of a drug, the requirements of par. (e) should prevail.

Par. (l). Pub. L. 87–781, §105(c), substituted "bacitracin, or any other antibiotic drug" for "or bacitracin."

Par. (n). Pub. L. 87–781, §131(a), added par. (n).

Par. (o). Pub. L. 87–781, §305, added par. (o).

1960—Par. (m). Pub. L. 86–618 added par. (m).

1953—Par. (l). Act Aug. 5, 1953, substituted "chlortetracycline" for "aureomycin".

1949—Par. (l). Act July 13, 1949, inserted ", aureomycin, chloramphenicol, or bacitracin" after "streptomycin".

1947—Par. (l). Act Mar. 10, 1947, inserted "or streptomycin" after "penicillin".

1945—Par. (l). Act July 6, 1945, added par. (l).

1941—Par. (k). Act Dec. 22, 1941, added par. (k).

1939—Par. (d). Act June 29, 1939, substituted "name, and quality or proportion" for "name, quantity, and percentage".

Statutory Notes and Related Subsidiaries

Effective Date of 2018 Amendment

Pub. L. 115–234, title III, §303(b), Aug. 14, 2018, 132 Stat. 2436, provided that: "Section 502(w)(3) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 352(w)(3)], as added by subsection (a), shall apply beginning on September 30, 2023."

Effective Date of 2012 Amendment

Amendment by section 306 of Pub. L. 112–144 effective Oct. 1, 2012, see section 305 of Pub. L. 112–144, set out as an Effective and Termination Dates note under section 379j–41 of this title.

Effective Date of 2007 Amendment

Amendment by Pub. L. 110–85 effective 180 days after Sept. 27, 2007, see section 909 of Pub. L. 110–85, set out as a note under section 331 of this title.

Effective Date of 2006 Amendment

Pub. L. 109–462, §2(e)(1), (2), Dec. 22, 2006, 120 Stat. 3472, provided that:

"(1) In general.—Except as provided in paragraph (2), the amendments made by this section [enacting section 379aa of this title and amending this section and section 331 of this title] shall take effect 1 year after the date of enactment of this Act [Dec. 22, 2006].

"(2) Misbranding.—Section 502(x) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 352(x)] (as added by this section) shall apply to any nonprescription drug (as defined in such section 502(x)) labeled on or after the date that is 1 year after the date of enactment of this Act [Dec. 22, 2006]."

Effective Date of 2002 Amendment

Pub. L. 107–250, title III, §301(b), Oct. 26, 2002, 116 Stat. 1616, as amended by Pub. L. 108–214, §2(c)(1), Apr. 1, 2004, 118 Stat. 575; Pub. L. 109–43, §2(d), Aug. 1, 2005, 119 Stat. 441, provided that: "Section 502(u) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 352(u)] (as amended by section 2(c) of the Medical Device User Fee Stabilization Act of 2005 [Pub. L. 109–43])—

"(1) shall be effective—

"(A) with respect to devices described under paragraph (1) of such section, 12 months after the date of enactment of the Medical Device User Fee Stabilization Act of 2005 [Aug. 1, 2005], or the date on which the original device first bears the name of the manufacturer of the original device, a generally recognized abbreviation of such name, or a unique and generally recognized symbol identifying such manufacturer, whichever is later; and

"(B) with respect to devices described under paragraph (2) of such section 502(u), 12 months after such date of enactment; and

"(2) shall apply only to devices reprocessed and introduced or delivered for introduction in interstate commerce after such applicable effective date."

Pub. L. 107–250, title III, §302(a)(2), Oct. 26, 2002, 116 Stat. 1616, provided that: "The amendment made by paragraph (1) [amending this section] takes effect 15 months after the date of the enactment of this Act [Oct. 26, 2002], and only applies to devices introduced or delivered for introduction into interstate commerce after such effective date."

Effective Date of 1997 Amendment

Amendment by sections 114(a), 126(b), and 412(c) of Pub. L. 105–115 effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as a note under section 321 of this title.

Effective Date of 1978 Amendment

Amendment by Pub. L. 95–633 effective on date the Convention on Psychotropic Substances enters into force in the United States [July 15, 1980], see section 112 of Pub. L. 95–633, set out as an Effective Date note under section 801a of this title.

Effective Date of 1970 Amendment

Amendment by Pub. L. 91–601 effective Dec. 30, 1970, and regulations establishing special packaging standards effective no sooner than 180 days or later than one year from date regulations are final, or an earlier date published in Federal Register, see section 8 of Pub. L. 91–601, set out as an Effective Date note under section 1471 of Title 15, Commerce and Trade.

Effective Date of 1968 Amendment

Amendment by Pub. L. 90–399 effective on first day of thirteenth calendar month after July 13, 1968, see section 108(a) of Pub. L. 90–399, set out as an Effective Date and Transitional Provisions note under section 360b of this title.

Effective Date of 1962 Amendment

Pub. L. 87–781, title I, §112(c), Oct. 10, 1962, 76 Stat. 791, provided that: "This section [amending this section] shall take effect on the first day of the seventh calendar month following the month in which this Act is enacted [October 1962]."

Pub. L. 87–781, title I, §131(b), Oct. 10, 1962, 76 Stat. 792, provided that: "No drug which was being commercially distributed prior to the date of enactment of this Act [Oct. 10, 1962] shall be deemed to be misbranded under paragraph (n) of section 502 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 352(n)], as added by this section, until the earlier of the following dates: (1) the first day of the seventh month following the month in which this Act is enacted; or (2) the effective date of regulations first issued under clause (3) of such paragraph (n) in accordance with the procedure specified in section 701(e) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 371(e)]."

Amendment by Pub. L. 87–781 effective on first day of seventh calendar month following October 1962, see section 107 of Pub. L. 87–781, set out as a note under section 321 of this title.

Effective Date of 1960 Amendment

Amendment by Pub. L. 86–618 effective July 12, 1960, subject to the provisions of section 203 of Pub. L. 86–618, see section 202 of Pub. L. 86–618, set out as a note under section 379e of this title.

Effective Date; Postponement

Pars. (b) and (d) to (h) effective Jan. 1, 1940, and such paragraphs effective July 1, 1940, as provided by regulations for certain lithographed labeling and containers bearing certain labeling, see act June 23, 1939, ch. 242, 53 Stat. 853, set out as an Effective Date: Postponement in Certain Cases note under section 301 of this title.

Regulations

Pub. L. 110–85, title IX, §901(d)(3)(B), Sept. 27, 2007, 121 Stat. 940, provided that: "Not later than 30 months after the date of the enactment of the Food and Drug Administration Amendments Act of 2007 [Sept. 27, 2007], the Secretary of Health and Human Services shall by regulation establish standards for determining whether a major statement relating to side effects and contraindications of a drug, described in section 502(n) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 352(n)) (as amended by subparagraph (A)) is presented in the manner required under such section."

Construction of 2016 Amendment

Nothing in amendment by section 3044(b)(2) of Pub. L. 114–255 to be construed to restrict the prescribing of antimicrobial drugs or other products, including drugs approved under section 356(h) of this title, by health care professionals, or to limit the practice of health care, see section 3043 of Pub. L. 114–255, set out as a note under section 356 of this title.

Transfer of Functions

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

Presentation of Prescription Drug Benefit and Risk Information

Pub. L. 111–148, title III, §3507, Mar. 23, 2010, 124 Stat. 530, provided that:

"(a) In General.—The Secretary of Health and Human Services (referred to in this section as the 'Secretary'), acting through the Commissioner of Food and Drugs, shall determine whether the addition of quantitative summaries of the benefits and risks of prescription drugs in a standardized format (such as a table or drug facts box) to the promotional labeling or print advertising of such drugs would improve health care decisionmaking by clinicians and patients and consumers.

"(b) Review and Consultation.—In making the determination under subsection (a), the Secretary shall review all available scientific evidence and research on decisionmaking and social and cognitive psychology and consult with drug manufacturers, clinicians, patients and consumers, experts in health literacy, representatives of racial and ethnic minorities, and experts in women's and pediatric health.

"(c) REPORT.—Not later than 1 year after the date of enactment of this Act [Mar. 23, 2010], the Secretary shall submit to Congress a report that provides—

"(1) the determination by the Secretary under subsection (a); and

"(2) the reasoning and analysis underlying that determination.

"(d) AUTHORITY.—If the Secretary determines under subsection (a) that the addition of quantitative summaries of the benefits and risks of prescription drugs in a standardized format (such as a table or drug facts box) to the promotional labeling or print advertising of such drugs would improve health care decisionmaking by clinicians and patients and consumers, then the Secretary, not later than 3 years after the date of submission of the report under subsection (c), shall promulgate proposed regulations as necessary to implement such format.

"(e) CLARIFICATION.—Nothing in this section shall be construed to restrict the existing authorities of the Secretary with respect to benefit and risk information."

GUIDANCE; MISBRANDED DEVICES

Pub. L. 109–43, §2(c)(2), Aug. 1, 2005, 119 Stat. 441, provided that: "Not later than 180 days after the date of enactment of this Act [Aug. 1, 2005], the Secretary of Health and Human Services shall issue guidance to identify circumstances in which the name of the manufacturer of the original device, a generally recognized abbreviation of such name, or a unique and generally recognized symbol identifying such manufacturer, is not 'prominent and conspicuous', as used in section 502(u) of Federal Food, Drug, and Cosmetic Act [21 U.S.C. 352(u)] (as amended by paragraph (1))."

STUDIES

Pub. L. 110–85, title IX, §906(b), Sept. 27, 2007, 121 Stat. 950, provided that:

"(1) IN GENERAL.—In the case of direct-to-consumer television advertisements, the Secretary of Health and Human Services, in consultation with the Advisory Committee on Risk Communication under section 567 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 360bbb–6] (as added by section 917), shall, not later than 6 months after the date of the enactment of this Act [Sept. 27, 2007], conduct a study to determine if the statement in section 502(n) of such Act [21 U.S.C. 352(n)] (as added by subsection (a)) required with respect to published direct-to-consumer advertisements is appropriate for inclusion in such television advertisements.

"(2) CONTENT.—As part of the study under paragraph (1), such Secretary shall consider whether the information in the statement described in paragraph (1) would detract from the presentation of risk information in a direct-to-consumer television advertisement. If such Secretary determines the inclusion of such statement is appropriate in direct-to-consumer television advertisements, such Secretary shall issue regulations requiring the implementation of such statement in direct-to-consumer television advertisements, including determining a reasonable length of time for displaying the statement in such advertisements. The Secretary shall report to the appropriate committees of Congress the findings of such study and any plans to issue regulations under this paragraph."

Pub. L. 108–173, title I, §107(f), Dec. 8, 2003, 117 Stat. 2171, directed the Secretary of Health and Human Services to undertake a study of how to make prescription pharmaceutical information, including drug labels and usage instructions, accessible to blind and visually-impaired individuals, and to submit a report to Congress not later than 18 months after Dec. 8, 2003.

Pub. L. 105–115, title I, §114(b), Nov. 21, 1997, 111 Stat. 2312, provided that: "The Comptroller General of the United States shall conduct a study of the implementation of the provisions added by the amendment made by subsection (a) [amending this section]. Not later than 4 years and 6 months after the date of enactment of this Act [Nov. 21, 1997], the Comptroller General of the United States shall prepare and submit to Congress a report containing the findings of the study."

COUNTERFEITING OF DRUGS; CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY

Pub. L. 89–74, §9(a), July 15, 1965, 79 Stat. 234, provided that: "The Congress finds and declares that there is a substantial traffic in counterfeit drugs simulating the brand or other identifying mark or device of the manufacturer of the genuine article; that such traffic poses a serious hazard to the health of innocent consumers of such drugs because of the lack of proper qualifications, facilities, and manufacturing controls on the part of the counterfeiter, whose operations are clandestine; that, while such drugs are deemed misbranded within the meaning of section 502(i) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 352(i)], the controls for the suppression of the traffic in such drugs are inadequate because of the difficulty of determining the place of interstate origin of such drugs and, if that place is discovered, the fact that the implements for counterfeiting are not subject to seizure, and that these factors require enactment of additional controls with respect to such drugs without regard to their interstate or intrastate origins."

Provisions as effective Feb. 1, 1966, see section 11 of Pub. L. 89–74, set out as an Effective Date of 1965 Amendment note under section 321 of this title.

[1] *So in original. The term "health care economic information" appears only in par. (1).*

§353. Exemptions and consideration for certain drugs, devices, and biological products

(a) Regulations for goods to be processed, labeled, or repacked elsewhere

The Secretary is directed to promulgate regulations exempting from any labeling or packaging requirement of this chapter drugs and devices which are, in accordance with the practice of the trade, to be processed, labeled, or repacked in substantial quantities at establishments other than those where originally processed or packed, on condition that such drugs and devices are not adulterated or misbranded under the provisions of this chapter upon removal from such processing, labeling, or repacking establishment.

(b) Prescription by physician; exemption from labeling and prescription requirements; misbranded drugs; compliance with narcotic and marihuana laws

(1) A drug intended for use by man which—

(A) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or

(B) is limited by an approved application under section 355 of this title to use under the professional supervision of a practitioner licensed by law to administer such drug;

shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

(2) Any drug dispensed by filling or refilling a written or oral prescription of a practitioner licensed by law to administer such drug shall be exempt from the requirements of section 352 of this title, except paragraphs (a), (i)(2) and (3), (k), and (l), and the packaging requirements of paragraphs (g), (h), and (p), if the drug bears a label containing the name and address of the dispenser, the serial number and date of the prescription or of its filling, the name of the prescriber, and, if stated in the prescription, the name of the patient, and the directions for use and cautionary statements, if any, contained in such prescription. This exemption shall not apply to any drug dispensed in the course of the conduct of a business of dispensing drugs pursuant to diagnosis by mail, or to a drug dispensed in violation of paragraph (1) of this subsection.

(3) The Secretary may by regulation remove drugs subject to section 355 of this title from the requirements of paragraph (1) of this subsection when such requirements are not necessary for the protection of the public health.

(4)(A) A drug that is subject to paragraph (1) shall be deemed to be misbranded if at any time prior to dispensing the label of the drug fails to bear, at a minimum, the symbol "Rx only".

(B) A drug to which paragraph (1) does not apply shall be deemed to be misbranded if at any time prior to dispensing the label of the drug bears the symbol described in subparagraph (A).

(5) Nothing in this subsection shall be construed to relieve any person from any requirement prescribed by or under authority of law with respect to drugs now included or which may hereafter be included within the classifications stated in sections 4721, 6001, and 6151 of title 26, or to marihuana as defined in section 4761 of title 26.

(c) Sales restrictions

(1) No person may sell, purchase, or trade or offer to sell, purchase, or trade any drug sample. For purposes of this paragraph and subsection (d), the term "drug sample" means a unit of a drug, subject to

subsection (b), which is not intended to be sold and is intended to promote the sale of the drug. Nothing in this paragraph shall subject an officer or executive of a drug manufacturer or distributor to criminal liability solely because of a sale, purchase, trade, or offer to sell, purchase, or trade in violation of this paragraph by other employees of the manufacturer or distributor.

(2) No person may sell, purchase, or trade, offer to sell, purchase, or trade, or counterfeit any coupon. For purposes of this paragraph, the term "coupon" means a form which may be redeemed, at no cost or at a reduced cost, for a drug which is prescribed in accordance with subsection (b).

(3)(A) No person may sell, purchase, or trade, or offer to sell, purchase, or trade, any drug—

(i) which is subject to subsection (b), and

(ii)(I) which was purchased by a public or private hospital or other health care entity, or

(II) which was donated or supplied at a reduced price to a charitable organization described in section 501(c)(3) of title 26.

(B) Subparagraph (A) does not apply to—

(i) the purchase or other acquisition by a hospital or other health care entity which is a member of a group purchasing organization of a drug for its own use from the group purchasing organization or from other hospitals or health care entities which are members of such organization,

(ii) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug by an organization described in subparagraph (A)(ii)(II) to a nonprofit affiliate of the organization to the extent otherwise permitted by law,

(iii) a sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug among hospitals or other health care entities which are under common control,

(iv) a sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug for emergency medical reasons, or

(v) a sale, purchase, or trade of a drug, an offer to sell, purchase, or trade a drug, or the dispensing of a drug pursuant to a prescription executed in accordance with subsection (b).

For purposes of this paragraph, the term "entity" does not include a wholesale distributor of drugs or a retail pharmacy licensed under State law and the term "emergency medical reasons" includes transfers of a drug between health care entities or from a health care entity to a retail pharmacy undertaken to alleviate temporary shortages of the drug arising from delays in or interruptions of regular distribution schedules.

(d) Distribution of drug samples

(1) Except as provided in paragraphs (2) and (3), no person may distribute any drug sample. For purposes of this subsection, the term "distribute" does not include the providing of a drug sample to a patient by a—

(A) practitioner licensed to prescribe such drug,

(B) health care professional acting at the direction and under the supervision of such a practitioner, or

(C) pharmacy of a hospital or of another health care entity that is acting at the direction of such a practitioner and that received such sample pursuant to paragraph (2) or (3).

(2)(A) The manufacturer or authorized distributor of record of a drug subject to subsection (b) may, in accordance with this paragraph, distribute drug samples by mail or common carrier to practitioners licensed to prescribe such drugs or, at the request of a licensed practitioner, to pharmacies of hospitals or other health care entities. Such a distribution of drug samples may only be made—

(i) in response to a written request for drug samples made on a form which meets the requirements of subparagraph (B), and

(ii) under a system which requires the recipient of the drug sample to execute a written receipt for the drug sample upon its delivery and the return of the receipt to the manufacturer or authorized distributor of record.

(B) A written request for a drug sample required by subparagraph (A)(i) shall contain—

(i) the name, address, professional designation, and signature of the practitioner making the request,

(ii) the identity of the drug sample requested and the quantity requested,

(iii) the name of the manufacturer of the drug sample requested, and
(iv) the date of the request.

(C) Each drug manufacturer or authorized distributor of record which makes distributions by mail or common carrier under this paragraph shall maintain, for a period of 3 years, the request forms submitted for such distributions and the receipts submitted for such distributions and shall maintain a record of distributions of drug samples which identifies the drugs distributed and the recipients of the distributions. Forms, receipts, and records required to be maintained under this subparagraph shall be made available by the drug manufacturer or authorized distributor of record to Federal and State officials engaged in the regulation of drugs and in the enforcement of laws applicable to drugs.

(3) The manufacturer or authorized distributor of record of a drug subject to subsection (b) may, by means other than mail or common carrier, distribute drug samples only if the manufacturer or authorized distributor of record makes the distributions in accordance with subparagraph (A) and carries out the activities described in subparagraphs (B) through (F) as follows:

(A) Drug samples may only be distributed—

(i) to practitioners licensed to prescribe such drugs if they make a written request for the drug samples, or

(ii) at the written request of such a licensed practitioner, to pharmacies of hospitals or other health care entities.

A written request for drug samples shall be made on a form which contains the practitioner's name, address, and professional designation, the identity of the drug sample requested, the quantity of drug samples requested, the name of the manufacturer or authorized distributor of record of the drug sample, the date of the request and signature of the practitioner making the request.

(B) Drug manufacturers or authorized distributors of record shall store drug samples under conditions that will maintain their stability, integrity, and effectiveness and will assure that the drug samples will be free of contamination, deterioration, and adulteration.

(C) Drug manufacturers or authorized distributors of record shall conduct, at least annually, a complete and accurate inventory of all drug samples in the possession of representatives of the manufacturer or authorized distributor of record. Drug manufacturers or authorized distributors of record shall maintain lists of the names and address of each of their representatives who distribute drug samples and of the sites where drug samples are stored. Drug manufacturers or authorized distributors of record shall maintain records for at least 3 years of all drug samples distributed, destroyed, or returned to the manufacturer or authorized distributor of record, of all inventories maintained under this subparagraph, of all thefts or significant losses of drug samples, and of all requests made under subparagraph (A) for drug samples. Records and lists maintained under this subparagraph shall be made available by the drug manufacturer or authorized distributor of record to the Secretary upon request.

(D) Drug manufacturers or authorized distributors of record shall notify the Secretary of any significant loss of drug samples and any known theft of drug samples.

(E) Drug manufacturers or authorized distributors of record shall report to the Secretary any conviction of their representatives for violations of subsection (c)(1) or a State law because of the sale, purchase, or trade of a drug sample or the offer to sell, purchase, or trade a drug sample.

(F) Drug manufacturers or authorized distributors of record shall provide to the Secretary the name and telephone number of the individual responsible for responding to a request for information respecting drug samples.

(4) In this subsection, the term "authorized distributors of record" means those distributors with whom a manufacturer has established an ongoing relationship to distribute such manufacturer's products.

(e) Licensing and reporting requirements for wholesale distributors; fees; definitions

(1) REQUIREMENT.—Subject to section 360eee–2 of this title:

(A) IN GENERAL.—No person may engage in wholesale distribution of a drug subject to subsection (b)(1) in any State unless such person—

(i)(I) is licensed by the State from which the drug is distributed; or

(II) if the State from which the drug is distributed has not established a licensure requirement, is licensed by the Secretary; and

(ii) if the drug is distributed interstate, is licensed by the State into which the drug is distributed if the State into which the drug is distributed requires the licensure of a person that distributes drugs into the State.

(B) STANDARDS.—Each Federal and State license described in subparagraph (A) shall meet the standards, terms, and conditions established by the Secretary under section 360eee–2 of this title.

(2) REPORTING AND DATABASE.—

(A) REPORTING.—Beginning January 1, 2015, any person who owns or operates an establishment that engages in wholesale distribution shall—

(i) report to the Secretary, on an annual basis pursuant to a schedule determined by the Secretary—

(I) each State by which the person is licensed and the appropriate identification number of each such license; and

(II) the name, address, and contact information of each facility at which, and all trade names under which, the person conducts business; and

(ii) report to the Secretary within a reasonable period of time and in a reasonable manner, as determined by the Secretary, any significant disciplinary actions, such as the revocation or suspension of a wholesale distributor license, taken by a State or the Federal Government during the reporting period against the wholesale distributor.

(B) DATABASE.—Not later than January 1, 2015, the Secretary shall establish a database of authorized wholesale distributors. Such database shall—

(i) identify each authorized wholesale distributor by name, contact information, and each State where such wholesale distributor is appropriately licensed to engage in wholesale distribution;

(ii) be available to the public on the Internet Web site of the Food and Drug Administration; and

(iii) be regularly updated on a schedule determined by the Secretary.

(C) COORDINATION.—The Secretary shall establish a format and procedure for appropriate State officials to access the information provided pursuant to subparagraph (A) in a prompt and secure manner.

(D) CONFIDENTIALITY.—Nothing in this paragraph shall be construed as authorizing the Secretary to disclose any information that is a trade secret or confidential information subject to section 552(b)(4) of title 5 or section 1905 of title 18.

(3) COSTS.—

(A) AUTHORIZED FEES OF SECRETARY.—If a State does not establish a licensing program for persons engaged in the wholesale distribution of a drug subject to subsection (b), the Secretary shall license a person engaged in wholesale distribution located in such State and may collect a reasonable fee in such amount necessary to reimburse the Secretary for costs associated with establishing and administering the licensure program and conducting periodic inspections under this section. The Secretary shall adjust fee rates as needed on an annual basis to generate only the amount of revenue needed to perform this service. Fees authorized under this paragraph shall be collected and available for obligation only to the extent and in the amount provided in advance in appropriations Acts. Such fees are authorized to remain available until expended. Such sums as may be necessary may be transferred from the Food and Drug Administration salaries and expenses appropriation account without fiscal year limitation to such appropriation account for salaries and expenses with such fiscal year limitation.

(B) STATE LICENSING FEES.—Nothing in this chapter shall prohibit States from collecting fees from wholesale distributors in connection with State licensing of such distributors.

(4) For the purposes of this subsection and subsection (d), the term "wholesale distribution" means the distribution of a drug subject to subsection (b) to a person other than a consumer or patient, or receipt of a

drug subject to subsection (b) by a person other than the consumer or patient, but does not include—

(A) intracompany distribution of any drug between members of an affiliate or within a manufacturer;

(B) the distribution of a drug, or an offer to distribute a drug among hospitals or other health care entities which are under common control;

(C) the distribution of a drug or an offer to distribute a drug for emergency medical reasons, including a public health emergency declaration pursuant to section 319 of the Public Health Service Act [42 U.S.C. 247d], except that, for purposes of this paragraph, a drug shortage not caused by a public health emergency shall not constitute an emergency medical reason;

(D) the dispensing of a drug pursuant to a prescription executed in accordance with subsection (b)(1);

(E) the distribution of minimal quantities of drug by a licensed retail pharmacy to a licensed practitioner for office use;

(F) the distribution of a drug or an offer to distribute a drug by a charitable organization to a nonprofit affiliate of the organization to the extent otherwise permitted by law;

(G) the purchase or other acquisition by a dispenser, hospital, or other health care entity of a drug for use by such dispenser, hospital, or other health care entity;

(H) the distribution of a drug by the manufacturer of such drug;

(I) the receipt or transfer of a drug by an authorized third-party logistics provider provided that such third-party logistics provider does not take ownership of the drug;

(J) a common carrier that transports a drug, provided that the common carrier does not take ownership of the drug;

(K) the distribution of a drug, or an offer to distribute a drug by an authorized repackager that has taken ownership or possession of the drug and repacks it in accordance with section 360eee–1(e) of this title;

(L) salable drug returns when conducted by a dispenser;

(M) the distribution of a collection of finished medical devices, which may include a product or biological product, assembled in kit form strictly for the convenience of the purchaser or user (referred to in this subparagraph as a "medical convenience kit") if—

(i) the medical convenience kit is assembled in an establishment that is registered with the Food and Drug Administration as a device manufacturer in accordance with section 360(b)(2) of this title;

(ii) the medical convenience kit does not contain a controlled substance that appears in a schedule contained in the Comprehensive Drug Abuse Prevention and Control Act of 1970 [21 U.S.C. 801 et seq.];

(iii) in the case of a medical convenience kit that includes a product, the person that manufacturers the kit—

(I) purchased such product directly from the pharmaceutical manufacturer or from a wholesale distributor that purchased the product directly from the pharmaceutical manufacturer; and

(II) does not alter the primary container or label of the product as purchased from the manufacturer or wholesale distributor; and

(iv) in the case of a medical convenience kit that includes a product, the product is—

(I) an intravenous solution intended for the replenishment of fluids and electrolytes;

(II) a product intended to maintain the equilibrium of water and minerals in the body;

(III) a product intended for irrigation or reconstitution;

(IV) an anesthetic;

(V) an anticoagulant;

(VI) a vasopressor; or

(VII) a sympathomimetic;

(N) the distribution of an intravenous drug that, by its formulation, is intended for the replenishment of fluids and electrolytes (such as sodium, chloride, and potassium) or calories (such as dextrose and amino acids);

(O) the distribution of an intravenous drug used to maintain the equilibrium of water and minerals in the body, such as dialysis solutions;

(P) the distribution of a drug that is intended for irrigation, or sterile water, whether intended for such purposes or for injection;

(Q) the distribution of medical gas, as defined in section 360ddd of this title;

(R) facilitating the distribution of a product by providing solely administrative services, including processing of orders and payments; or

(S) the transfer of a product by a hospital or other health care entity, or by a wholesale distributor or manufacturer operating at the direction of the hospital or other health care entity, to a repackager described in section 360eee(16)(B) of this title and registered under section 360 of this title for the purpose of repackaging the drug for use by that hospital, or other health care entity and other health care entities that are under common control, if ownership of the drug remains with the hospital or other health care entity at all times.

(5) THIRD-PARTY LOGISTICS PROVIDERS.—Notwithstanding paragraphs (1) through (4), each entity that meets the definition of a third-party logistics provider under section 360eee(22) of this title shall obtain a license as a third-party logistics provider as described in section 360eee–3(a) of this title and is not required to obtain a license as a wholesale distributor if the entity never assumes an ownership interest in the product it handles.

(6) AFFILIATE.—For purposes of this subsection, the term "affiliate" means a business entity that has a relationship with a second business entity if, directly or indirectly—

(A) one business entity controls, or has the power to control, the other business entity; or

(B) a third party controls, or has the power to control, both of the business entities.

(f) Veterinary prescription drugs

(1)(A) A drug intended for use by animals other than man, other than a veterinary feed directive drug intended for use in animal feed or an animal feed bearing or containing a veterinary feed directive drug, which—

(i) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary for its use, is not safe for animal use except under the professional supervision of a licensed veterinarian, or

(ii) is limited by an approved application under subsection (b) of section 360b of this title, a conditionally-approved application under section 360ccc of this title, or an index listing under section 360ccc–1 of this title to use under the professional supervision of a licensed veterinarian,

shall be dispensed only by or upon the lawful written or oral order of a licensed veterinarian in the course of the veterinarian's professional practice.

(B) For purposes of subparagraph (A), an order is lawful if the order—

(i) is a prescription or other order authorized by law,

(ii) is, if an oral order, promptly reduced to writing by the person lawfully filling the order, and filed by that person, and

(iii) is refilled only if authorized in the original order or in a subsequent oral order promptly reduced to writing by the person lawfully filling the order, and filed by that person.

(C) The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

(2) Any drug when dispensed in accordance with paragraph (1) of this subsection—

(A) shall be exempt from the requirements of section 352 of this title, except subsections (a), (g), (h), (i)(2), (i)(3), and (p) of such section, and

(B) shall be exempt from the packaging requirements of subsections (g), (h), and (p) of such section, if—

(i) when dispensed by a licensed veterinarian, the drug bears a label containing the name and address of the practitioner and any directions for use and cautionary statements specified by the practitioner, or

(ii) when dispensed by filling the lawful order of a licensed veterinarian, the drug bears a label containing the name and address of the dispenser, the serial number and date of the order or of its

filling, the name of the licensed veterinarian, and the directions for use and cautionary statements, if any, contained in such order.

The preceding sentence shall not apply to any drug dispensed in the course of the conduct of a business of dispensing drugs pursuant to diagnosis by mail.

(3) The Secretary may by regulation exempt drugs for animals other than man subject to section 360b, 360ccc, or 360ccc–1 of this title from the requirements of paragraph (1) when such requirements are not necessary for the protection of the public health.

(4) A drug which is subject to paragraph (1) shall be deemed to be misbranded if at any time prior to dispensing its label fails to bear the statement "Caution: Federal law restricts this drug to use by or on the order of a licensed veterinarian.". A drug to which paragraph (1) does not apply shall be deemed to be misbranded if at any time prior to dispensing its label bears the statement specified in the preceding sentence.

(g) Regulation of combination products

(1)(A) The Secretary shall, in accordance with this subsection, assign a primary agency center to regulate products that constitute a combination of a drug, device, or biological product.

(B) The Secretary shall conduct the premarket review of any combination product under a single application, whenever appropriate.

(C) For purposes of this subsection, the term "primary mode of action" means the single mode of action of a combination product expected to make the greatest contribution to the overall intended therapeutic effects of the combination product.

(D) The Secretary shall determine the primary mode of action of the combination product. If the Secretary determines that the primary mode of action is that of—

(i) a drug (other than a biological product), the agency center charged with premarket review of drugs shall have primary jurisdiction;

(ii) a device, the agency center charged with premarket review of devices shall have primary jurisdiction; or

(iii) a biological product, the agency center charged with premarket review of biological products shall have primary jurisdiction.

(E) In determining the primary mode of action of a combination product, the Secretary shall not determine that the primary mode of action is that of a drug or biological product solely because the combination product has any chemical action within or on the human body.

(F) If a sponsor of a combination product disagrees with the determination under subparagraph (D)—

(i) such sponsor may request, and the Secretary shall provide, a substantive rationale to such sponsor that references scientific evidence provided by the sponsor and any other scientific evidence relied upon by the Secretary to support such determination; and

(ii)(I) the sponsor of the combination product may propose one or more studies (which may be nonclinical, clinical, or both) to establish the relevance, if any, of the chemical action in achieving the primary mode of action of such product;

(II) if the sponsor proposes any such studies, the Secretary and the sponsor of such product shall collaborate and seek to reach agreement, within a reasonable time of such proposal, not to exceed 90 calendar days, on the design of such studies; and

(III) if an agreement is reached under subclause (II) and the sponsor conducts one or more of such studies, the Secretary shall consider the data resulting from any such study when reevaluating the determination of the primary mode of action of such product, and unless and until such reevaluation has occurred and the Secretary issues a new determination, the determination of the Secretary under subparagraph (D) shall remain in effect.

(2)(A) [1] (i) To establish clarity and certainty for the sponsor, the sponsor of a combination product may request a meeting on such combination product. If the Secretary concludes that a determination of the primary mode of action pursuant to paragraph (1)(D) is necessary, the sponsor may request such meeting only after the Secretary makes such determination. If the sponsor submits a written meeting request, the

Secretary shall, not later than 75 calendar days after receiving such request, meet with the sponsor of such combination product.

(ii) A meeting under clause (i) may—

(I) address the standards and requirements for market approval or clearance of the combination product;

(II) address other issues relevant to such combination product, such as requirements related to postmarket modification of such combination product and good manufacturing practices applicable to such combination product; and

(III) identify elements under subclauses (I) and (II) that may be more appropriate for discussion and agreement with the Secretary at a later date given that scientific or other information is not available, or agreement is otherwise not feasible regarding such elements, at the time a request for such meeting is made.

(iii) Any agreement under this subparagraph shall be in writing and made part of the administrative record by the Secretary.

(iv) Any such agreement shall remain in effect, except—

(I) upon the written agreement of the Secretary and the sponsor or applicant; or

(II) pursuant to a decision by the director of the reviewing division of the primary agency center, or a person more senior than such director, in consultation with consulting centers and the Office, as appropriate, that an issue essential to determining whether the standard for market clearance or other applicable standard under this chapter or the Public Health Service Act [42 U.S.C. 201 et seq.] applicable to the combination product has been identified since the agreement was reached, or that deviating from the agreement is otherwise justifiable based on scientific evidence, for public health reasons.

(3) For purposes of conducting the premarket review of a combination product that contains an approved constituent part described in paragraph (4), the Secretary may require that the sponsor of such combination product submit to the Secretary only data or information that the Secretary determines is necessary to meet the standard for clearance or approval, as applicable, under this chapter or the Public Health Service Act, including any incremental risks and benefits posed by such combination product, using a risk-based approach and taking into account any prior finding of safety and effectiveness or substantial equivalence for the approved constituent part relied upon by the applicant in accordance with paragraph (5).

(4) For purposes of paragraph (3), an approved constituent part is—

(A) a drug constituent part of a combination product being reviewed in a single application or request under section 360e, 360(k), or 360c(f)(2) of this title (submitted in accordance with paragraph (5)), that is an approved drug, provided such application or request complies with paragraph (5);

(B) a device constituent part approved under section 360e of this title that is referenced by the sponsor and that is available for use by the Secretary under section 360j(h)(4) of this title; or

(C) any constituent part that was previously approved, cleared, or classified under section 355, 360(k), 360c(f)(2), or 360e of this title for which the sponsor has a right of reference or any constituent part that is a nonprescription drug, as defined in section 379aa(a)(2) of this title.

(5)(A) If an application is submitted under section 360e or 360(k) of this title or a request is submitted under section 360c(f)(2) of this title, consistent with any determination made under paragraph (1)(D), for a combination product containing as a constituent part an approved drug—

(i) the application or request shall include the certification or statement described in section 355(b)(2) of this title; and

(ii) the applicant or requester shall provide notice as described in section 355(b)(3) of this title.

(B) For purposes of this paragraph and paragraph (4), the term "approved drug" means an active ingredient—

(i) that was in an application previously approved under section 355(c) of this title;

(ii) where such application is relied upon by the applicant submitting the application or request described in subparagraph (A);

(iii) for which full reports of investigations that have been made to show whether such drug is safe for use and whether such drug is effective in use were not conducted by or for the applicant submitting the application or request described in subparagraph (A); and

(iv) for which the applicant submitting the application or request described in subparagraph (A) has not obtained a right of reference or use from the person by or for whom the investigations described in clause (iii) were conducted.

(C) The following provisions shall apply with respect to an application or request described in subparagraph (A) to the same extent and in the same manner as if such application or request were an application described in section 355(b)(2) of this title that referenced the approved drug:

(i) Subparagraphs (A), (B), (C), and (D) of section 355(c)(3) of this title.

(ii) Clauses (ii), (iii), and (iv) of section 355(c)(3)(E) of this title.

(iii) Subsections (b) and (c) of section 355a of this title.

(iv) Section 355f(a) of this title.

(v) Section 360cc(a) of this title.

(D) Notwithstanding any other provision of this subsection, an application or request for classification for a combination product described in subparagraph (A) shall be considered an application submitted under section 355(b)(2) of this title for purposes of section 271(e)(2)(A) of title 35.

(6) Nothing in this subsection shall be construed as prohibiting a sponsor from submitting separate applications for the constituent parts of a combination product, unless the Secretary determines that a single application is necessary.

(7) Nothing in this subsection shall prevent the Secretary from using any agency resources of the Food and Drug Administration necessary to ensure adequate review of the safety, effectiveness, or substantial equivalence of an article.

(8)(A) Not later than 60 days after October 26, 2002, the Secretary shall establish within the Office of the Commissioner of Food and Drugs an office to ensure the prompt assignment of combination products to agency centers, the timely and effective premarket review of such products, and consistent and appropriate postmarket regulation of like products subject to the same statutory requirements to the extent permitted by law. Additionally, the office shall, in determining whether a product is to be designated a combination product, consult with the component within the Office of the Commissioner of Food and Drugs that is responsible for such determinations. Such office (referred to in this paragraph as the "Office") shall have appropriate scientific and medical expertise, and shall be headed by a director.

(B) In carrying out this subsection, the Office shall, for each combination product, promptly assign an agency center with primary jurisdiction in accordance with paragraph (1) for the premarket review of such product.

(C)(i) In carrying out this subsection, the Office shall help to ensure timely and effective premarket review that involves more than one agency center by coordinating such reviews, overseeing the timeliness of such reviews, and overseeing the alignment of feedback regarding such reviews.

(ii) In order to ensure the timeliness and alignment of the premarket review of a combination product, the agency center with primary jurisdiction for the product, and the consulting agency center, shall be responsible to the Office with respect to the timeliness and alignment of the premarket review.

(iii) The Office shall ensure that, with respect to a combination product, a designated person or persons in the primary agency center is the primary point or points of contact for the sponsor of such combination product. The Office shall also coordinate communications to and from any consulting center involved in such premarket review, if requested by such primary agency center or any such consulting center. Agency communications and commitments, to the extent consistent with other provisions of law and the requirements of all affected agency centers, from the primary agency center shall be considered as communication from the Secretary on behalf of all agency centers involved in the review.

(iv) The Office shall, with respect to the premarket review of a combination product—

(I) ensure that any meeting between the Secretary and the sponsor of such product is attended by each agency center involved in the review, as appropriate;

(II) ensure that each consulting agency center has completed its premarket review and provided the results of such review to the primary agency center in a timely manner; and

(III) ensure that each consulting center follows the guidance described in clause (vi) and advises, as appropriate, on other relevant regulations, guidances, and policies.

(v) In seeking agency action with respect to a combination product, the sponsor of such product—

(I) shall identify the product as a combination product; and

(II) may request in writing the participation of representatives of the Office in meetings related to such combination product, or to have the Office otherwise engage on such regulatory matters concerning the combination product.

(vi) Not later than 4 years after December 13, 2016, and after a public comment period of not less than 60 calendar days, the Secretary shall issue a final guidance that describes—

(I) the structured process for managing pre-submission interactions with sponsors developing combination products;

(II) the best practices for ensuring that the feedback in such pre-submission interactions represents the Agency's best advice based on the information provided during such pre-submission interactions; [2]

(III) the information that is required to be submitted with a meeting request under paragraph (2), how such meetings relate to other types of meetings in the Food and Drug Administration, and the form and content of any agreement reached through a meeting under such paragraph (2); [3]

(D) In carrying out this subsection, the Office shall ensure the consistency and appropriateness of postmarket regulation of like products subject to the same statutory requirements to the extent permitted by law.

(E)(i) Any dispute regarding the timeliness of the premarket review of a combination product may be presented to the Office for resolution, unless the dispute is clearly premature.

(ii) During the review process, any dispute regarding the substance of the premarket review may be presented to the Commissioner of Food and Drugs after first being considered by the agency center with primary jurisdiction of the premarket review, under the scientific dispute resolution procedures for such center. The Commissioner of Food and Drugs shall consult with the Director of the Office in resolving the substantive dispute.

(F) The Secretary, acting through the Office, shall review each agreement, guidance, or practice of the Secretary that is specific to the assignment of combination products to agency centers and shall determine whether the agreement, guidance, or practice is consistent with the requirements of this subsection. In carrying out such review, the Secretary shall consult with stakeholders and the directors of the agency centers. After such consultation, the Secretary shall determine whether to continue in effect, modify, revise, or eliminate such agreement, guidance, or practice, and shall publish in the Federal Register a notice of the availability of such modified or revised agreement, guidance or practice. Nothing in this paragraph shall be construed as preventing the Secretary from following each agreement, guidance, or practice until continued, modified, revised, or eliminated.

(G) Not later than one year after October 26, 2002 (except with respect to clause (iv), beginning not later than one year after December 13, 2016), and annually thereafter, the Secretary shall report to the appropriate committees of Congress on the activities and impact of the Office. The report shall include provisions—

(i) describing the numbers and types of combination products under review and the timeliness in days of such assignments, reviews, and dispute resolutions;

(ii) identifying the number of premarket reviews of such products that involved a consulting agency center;

(iii) describing improvements in the consistency of postmarket regulation of combination products; and

(iv) identifying the percentage of combination products for which a dispute resolution, with respect to premarket review, was requested by the combination product's sponsor.

(H) Nothing in this paragraph shall be construed to limit the regulatory authority of any agency center.

(9) As used in this subsection:

(A) The term "agency center" means a center or alternative organizational component of the Food and Drug Administration.

(B) The term "biological product" has the meaning given the term in section 351(i) of the Public Health Service Act (42 U.S.C. 262(i)).

(C) The term "market clearance" includes—

(i) approval of an application under section 355, 357,[4] 360e, or 360j(g) of this title;

(ii) a finding of substantial equivalence under this part;

(iii) approval of a biologics license application under subsection (a) of section 351 of the Public Health Service Act (42 U.S.C. 262); and

(iv) de novo classification under section 360c(a)(1) of this title.

(D) The terms "premarket review" and "reviews" include all activities of the Food and Drug Administration conducted prior to approval or clearance of an application, notification, or request for classification submitted under section 355, 360(k), 360c(f)(2), 360e, or 360j of this title or under section 351 of the Public Health Service Act [42 U.S.C. 262], including with respect to investigational use of the product.

(June 25, 1938, ch. 675, §503, 52 Stat. 1051; Oct. 26, 1951, ch. 578, §1, 65 Stat. 648; Pub. L. 87–781, title I, §104(e)(2), Oct. 10, 1962, 76 Stat. 785; Pub. L. 91–601, §6(e), formerly §7(e), Dec. 30, 1970, 84 Stat. 1673, renumbered Pub. L. 97–35, title XII, §1205(c), Aug. 13, 1981, 95 Stat. 716; Pub. L. 100–293, §§4–6, Apr. 22, 1988, 102 Stat. 96–98; Pub. L. 100–670, title I, §105, Nov. 16, 1988, 102 Stat. 3983; Pub. L. 101–629, §16(a), Nov. 28, 1990, 104 Stat. 4526; Pub. L. 102–108, §2(d), Aug. 17, 1991, 105 Stat. 550; Pub. L. 102–300, §6(d), June 16, 1992, 106 Stat. 240; Pub. L. 102–353, §§2(a)–(c), 4, Aug. 26, 1992, 106 Stat. 941, 942; Pub. L. 104–250, §5(a), Oct. 9, 1996, 110 Stat. 3155; Pub. L. 105–115, title I, §§123(e), 126(a), (c)(1), (2), Nov. 21, 1997, 111 Stat. 2324, 2327, 2328; Pub. L. 107–250, title II, §204, Oct. 26, 2002, 116 Stat. 1611; Pub. L. 108–282, title I, §102(b)(5)(F), Aug. 2, 2004, 118 Stat. 903; Pub. L. 113–54, title II, §204(a)(1)–(4), (b), Nov. 27, 2013, 127 Stat. 630–635; Pub. L. 114–255, div. A, title III, §3038(a), Dec. 13, 2016, 130 Stat. 1105.)

Editorial Notes

References in Text

The Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in subsec. (e)(4)(M)(ii), is Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1236, which is classified principally to chapter 13 (§801 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 801 of this title and Tables.

The Public Health Service Act, referred to in subsec. (g)(2)(A)(iv)(II), (3), is act July 1, 1944, ch. 373, 58 Stat. 682, which is classified generally to chapter 6A (§201 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 201 of Title 42 and Tables.

Section 357 of this title, referred to in subsec. (g)(9)(C)(i), was repealed by Pub. L. 105–115, title I, §125(b)(1), Nov. 21, 1997, 111 Stat. 2325.

Codification

In subsec. (b)(5), "sections 4721, 6001, and 6151 of title 26" and "section 4761 of title 26" substituted for "section 3220 of the Internal Revenue Code (26 U.S.C. 3220)" and "section 3238(b) of the Internal Revenue Code (26 U.S.C. 3238(b))", respectively, on authority of section 7852(b) of Title 26, Internal Revenue Code.

Amendments

2016—Subsec. (g)(1). Pub. L. 114–255, §3038(a)(4), added par. (1) and struck out former par. (1) which read as follows: "The Secretary shall in accordance with this subsection assign an agency center to regulate products that constitute a combination of a drug, device, or biological product. The Secretary shall determine the primary mode of action of the combination product. If the Secretary determines that the primary mode of action is that of—

"(A) a drug (other than a biological product), the agency center charged with premarket review of drugs shall have primary jurisdiction,

"(B) a device, the agency center charged with premarket review of devices shall have primary jurisdiction, or

"(C) a biological product, the agency center charged with premarket review of biological products shall have primary jurisdiction."

Subsec. (g)(2). Pub. L. 114–255, §3038(a)(4), added par. (2). Former par. (2) redesignated (7).

Subsec. (g)(3). Pub. L. 114–255, §3038(a)(1), (4), added par. (3) and struck out former par. (3) which read as follows: "The Secretary shall promulgate regulations to implement market clearance procedures in accordance with paragraphs (1) and (2) not later than 1 year after November 28, 1990."

Subsec. (g)(4) to (6). Pub. L. 114–255, §3038(a)(4), added pars. (4) to (6). Former pars. (4) and (5) redesignated (8) and (9), respectively.

Subsec. (g)(7). Pub. L. 114–255, §3038(a)(2), redesignated par. (2) as (7).

Subsec. (g)(8). Pub. L. 114–255, §3038(a)(3), redesignated par. (4) as (8).

Subsec. (g)(8)(C)(i). Pub. L. 114–255, §3038(a)(5)(A)(i), amended cl. (i) generally. Prior to amendment, cl. (i) read as follows: "In carrying out this subsection, the Office shall ensure timely and effective premarket reviews by overseeing the timeliness of and coordinating reviews involving more than one agency center."

Subsec. (g)(8)(C)(ii). Pub. L. 114–255, §3038(a)(5)(A)(ii), inserted "and alignment" after "the timeliness" in two places.

Subsec. (g)(8)(C)(iii) to (vi). Pub. L. 114–255, §3038(a)(5)(A)(iii), added cls. (iii) to (vi).

Subsec. (g)(8)(G). Pub. L. 114–255, §3038(a)(5)(B)(i), inserted "(except with respect to clause (iv), beginning not later than one year after December 13, 2016)" after "October 26, 2002" in introductory provisions.

Subsec. (g)(8)(G)(iv). Pub. L. 114–255, §3038(a)(5)(B)(ii)–(iv), added cl. (iv).

Subsec. (g)(9). Pub. L. 114–255, §3038(a)(3), redesignated par. (5) as (9).

Subsec. (g)(9)(C). Pub. L. 114–255, §3038(a)(6)(A), substituted semicolon for comma at end of cl. (i), semicolon for ", and" at end of cl. (ii), and "; and" for period at end of cl. (iii), and added cl. (iv).

Subsec. (g)(9)(D). Pub. L. 114–255, §3038(a)(6)(B), added subpar. (D).

2013—Subsec. (d)(4). Pub. L. 113–54, §204(b), added par. (4).

Subsec. (e). Pub. L. 113–54, §204(a)(1)–(4), added pars. (1) to (6) and struck out former pars. (1) to (3). Prior to amendment, pars. (1) to (3) set out certain disclosure and licensing requirements for wholesale distributors and defined "authorized distributors of record" and "wholesale distribution".

2004—Subsec. (f)(1)(A)(ii). Pub. L. 108–282, §102(b)(5)(F)(i), substituted "360b of this title, a conditionally-approved application under section 360ccc of this title, or an index listing under section 360ccc–1 of this title" for "360b of this title".

Subsec. (f)(3). Pub. L. 108–282, §102(b)(5)(F)(ii), substituted "section 360b, 360ccc, or 360ccc–1" for "section 360b".

2002—Subsec. (g)(1). Pub. L. 107–250, §204(1)(A), substituted "shall in accordance with this subsection assign an agency center" for "shall designate a component of the Food and Drug Administration" in first sentence of introductory provisions.

Subsec. (g)(1)(A) to (C). Pub. L. 107–250, §204(1)(B), substituted "the agency center charged" for "the persons charged".

Subsec. (g)(4). Pub. L. 107–250, §204(3), added par. (4). Former par. (4) redesignated (5).

Subsec. (g)(5). Pub. L. 107–250, §204(2), (4), redesignated par. (4) as (5), added subpar. (A), and redesignated former subpars. (A) and (B) as (B) and (C), respectively.

1997—Subsec. (b)(1)(A) to (C). Pub. L. 105–115, §126(c)(1), redesignated subpars. (B) and (C) as (A) and (B), respectively, and struck out former subpar. (A), which read as follows: "is a habit-forming drug to which section 352(d) of this title applies; or".

Subsec. (b)(3). Pub. L. 105–115, §126(c)(2), struck out reference to section 352(d) of this title before "355".

Subsec. (b)(4). Pub. L. 105–115, §126(a), amended par. (4) generally. Prior to amendment, par. (4) read as follows: "A drug which is subject to paragraph (1) of this subsection shall be deemed to be misbranded if at any time prior to dispensing its label fails to bear the statement 'Caution: Federal law prohibits dispensing without prescription'. A drug to which paragraph (1) of this subsection does not apply shall be deemed to be misbranded if at any time prior to dispensing its label bears the caution statement quoted in the preceding sentence."

Subsec. (g)(4)(A). Pub. L. 105–115, §123(e)(1), substituted "section 351(i)" for "section 351(a)" and "262(i)" for "262(a)".

Subsec. (g)(4)(B)(iii). Pub. L. 105–115, §123(e)(2), substituted "biologics license application under subsection (a)" for "product or establishment license under subsection (a) or (d)".

1996—Subsec. (f)(1)(A). Pub. L. 104–250 inserted ", other than a veterinary feed directive drug intended for use in animal feed or an animal feed bearing or containing a veterinary feed directive drug," after "other than man" in introductory provisions.

1992—Subsec. (d)(1). Pub. L. 102–353, §4(1), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "Except as provided in paragraphs (2) and (3), no representative of a drug manufacturer or distributor may distribute any drug sample."

Subsec. (d)(2). Pub. L. 102–353, §4(2), substituted "authorized distributor of record" for "distributor" wherever appearing.

Subsec. (d)(3). Pub. L. 102–353, §4(2), substituted "authorized distributor of record" for "distributor" and "authorized distributors of record" for "distributors" wherever appearing.

Subsec. (e)(1). Pub. L. 102–353, §4(3), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "Each person who is engaged in the wholesale distribution of drugs subject to subsection (b) of this section and who is not an authorized distributor of record of such drugs shall provide to each wholesale distributor of such drugs a statement identifying each sale of the drug (including the date of the sale) before the sale to such wholesale distributor. Each manufacturer shall maintain at its corporate offices a current list of such authorized distributors."

Subsec. (e)(2)(A). Pub. L. 102–353, §2(a), (d), temporarily inserted "or has registered with the Secretary in accordance with paragraph (3)". See Termination Date of 1992 Amendment note below.

Subsec. (e)(3). Pub. L. 102–353, §2(b), (d), temporarily added par. (3). Former par. (3) redesignated (4). See Termination Date of 1992 Amendment note below.

Subsec. (e)(4). Pub. L. 102–353, §4(4), inserted "and subsection (d) of this section" after "For the purposes of this subsection".

Pub. L. 102–353, §2(b), (d), temporarily redesignated par. (3) as (4). See Termination Date of 1992 Amendment note below.

Subsec. (f)(1)(B). Pub. L. 102–353, §2(c), which directed the substitution of "an order" for "and order", could not be executed because "and order" did not appear in subpar. (B).

Subsec. (g)(3). Pub. L. 102–300 substituted "clearance" for "approval".

1991—Subsec. (c). Pub. L. 102–108, §2(d)(3), redesignated subsec. (c), relating to veterinary prescription drugs, as (f). Former subsec. (f) redesignated (g).

Subsec. (c)(2), (3)(B)(v). Pub. L. 102–108, §2(d)(1), made technical amendment to reference to subsection (b) of this section involving corresponding provision of original act.

Subsec. (d)(3)(E). Pub. L. 102–108, §2(d)(2), made technical amendment to reference to subsection (c)(1) of this section involving corresponding provision of original act.

Subsec. (f). Pub. L. 102–108, §2(d)(4), redesignated subsec. (f), relating to regulation of combination products, as (g).

Pub. L. 102–108, §2(d)(3), redesignated subsec. (c), relating to veterinary prescription drugs, as (f).

Subsec. (g). Pub. L. 102–108, §2(d)(4), redesignated subsec. (f), relating to regulation of combination products, as (g).

1990—Pub. L. 101–629, §16(a)(1), substituted "Exemptions and consideration for certain drugs, devices, and biological products" for "Exemptions in case of drugs and devices" in section catchline.

Subsec. (f). Pub. L. 101–629, §16(a)(2), added subsec. (f).

1988—Subsec. (c). Pub. L. 100–670 added subsec. (c) relating to veterinary prescription drugs.

Pub. L. 100–293, §4, added subsec. (c) relating to sales restrictions.

Subsec. (d). Pub. L. 100–293, §5, added subsec. (d).

Subsec. (e). Pub. L. 100–293, §6, added subsec. (e).

1970—Subsec. (b)(2). Pub. L. 91–601 included exemption from packaging requirements of subsec. (p) of section 352 of this title.

1962—Subsec. (b)(1)(C). Pub. L. 87–781 substituted "approved" for "effective".

1951—Subsec. (b). Act Oct. 26, 1951, amended subsec. (b) generally to protect the public from abuses in the sale of potent prescription drugs, and to relieve retail pharmacists and the public from unnecessary restrictions on the dispensation of drugs that are safe to use without supervision of a doctor.

Statutory Notes and Related Subsidiaries

Effective Date of 2013 Amendment

Pub. L. 113–54, title II, §204(c), Nov. 27, 2013, 127 Stat. 636, provided that: "The amendments made by subsections (a) and (b) [enacting section 360eee–2 of this title and amending this section] shall take effect on January 1, 2015."

Effective Date of 1997 Amendment

Amendment by Pub. L. 105–115 effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as a note under section 321 of this title.

Termination Date of 1992 Amendment

Pub. L. 102–353, §2(d), Aug. 26, 1992, 106 Stat. 941, provided that: "Effective September 14, 1994, the amendments made by subsections (a) and (b) [amending this section] shall no longer be in effect."

Effective Date of 1988 Amendment

Pub. L. 100–293, §8, Apr. 22, 1988, 102 Stat. 100, provided that:

"(a) General Rule.—Except as provided in subsection (b), this Act and the amendments made by this Act [amending this section and sections 331, 333, and 381 of this title and enacting provisions set out as notes under this section and section 301 of this title] shall take effect upon the expiration of 90 days after the date of the enactment of this Act [Apr. 22, 1988].

"(b) Exception.—

"(1) Section 503(d) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 353(d)] (as added by section 5 of this Act) shall take effect upon the expiration of 180 days after the date of the enactment of this Act [Apr. 22, 1988].

"(2) The Secretary of Health and Human Services shall by regulation issue the guidelines required by section 503(e)(2)(B) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 353(e)(2)(B)] (as added by section 6 of this Act) not later than 180 days after the date of the enactment of this Act. Section 503(e)(2)(A) of such Act shall take effect upon the expiration of 2 years after the date such regulations are promulgated and take effect."

Effective Date of 1970 Amendment

Amendment by Pub. L. 91–601 effective Dec. 30, 1970, and regulations establishing special packaging standards effective no sooner than 180 days or later than one year from date regulations are final, or an earlier date published in Federal Register, see section 8 of Pub. L. 91–601, set out as an Effective Date note under section 1471 of Title 15, Commerce and Trade.

Effective Date of 1962 Amendment

Amendment by Pub. L. 87–781 effective Oct. 10, 1962, see section 107 of Pub. L. 87–781, set out as a note under section 321 of this title.

Effective Date of 1951 Amendment

Amendment by act Oct. 26, 1951, effective six months after Oct. 26, 1951, see section 3 of act Oct. 26, 1951, set out as a note under section 333 of this title.

Transfer of Functions

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

Effective Medication Guides

Pub. L. 104–180, title VI, §601, Aug. 6, 1996, 110 Stat. 1593, provided that:

"(a) In General.—Not later than 30 days after the date of enactment of this Act [Aug. 6, 1996], the Secretary of the Department of Health and Human Services shall request that national organizations representing health care professionals, consumer organizations, voluntary health agencies, the pharmaceutical industry, drug wholesalers, patient drug information database companies, and other relevant parties collaborate to develop a long-range comprehensive action plan to achieve goals consistent with the goals of the proposed rule of the Food and Drug Administration on 'Prescription Drug Product Labeling: Medication Guide Requirements' (60 Fed. Reg. 44182; relating to the provision of oral and written prescription information to consumers).

"(b) Goals.—Goals consistent with the proposed rule described in subsection (a) are the distribution of useful written information to 75 percent of individuals receiving new precriptions [sic] by the year 2000 and to 95 percent by the year 2006.

"(c) Plan.—The plan described in subsection (a) shall—

"(1) identify the plan goals;

"(2) assess the effectiveness of the current private-sector approaches used to provide oral and written prescription information to consumers;

"(3) develop guidelines for providing effective oral and written prescription information consistent with the findings of any such assessment;

"(4) contain elements necessary to ensure the transmittal of useful information to the consuming public, including being scientifically accurate, non-promotional in tone and content, sufficiently specific and comprehensive as to adequately inform consumers about the use of the product, and in an understandable, legible format that is readily comprehensible and not confusing to consumers expected to use the product.[;]

"(5) develop a mechanism to assess periodically the quality of the oral and written prescription information and the frequency with which the information is provided to consumers; and

"(6) provide for compliance with relevant State board regulations.

"(d) LIMITATION ON THE AUTHORITY OF THE SECRETARY.—The Secretary of the Department of Health and Human Services shall have no authority to implement the proposed rule described in subsection (a), or to develop any similar regulation, policy statement, or other guideline specifying a uniform content or format for written information voluntarily provided to consumers about prescription drugs if, (1) not later than 120 days after the date of enactment of this Act [Aug. 6, 1996], the national organizations described in subsection (a) develop and submit to the Secretary for Health and Human Services a comprehensive, long-range action plan (as described in subsection (a)) which shall be acceptable to the Secretary of Health and Human Services; (2) the aforementioned plan is submitted to the Secretary of Health and Human Services for review and acceptance: *Provided*, That the Secretary shall give due consideration to the submitted plan and that any such acceptance shall not be arbitrarily withheld; and (3) the implementation of (a) a plan accepted by the Secretary commences within 30 days of the Secretary's acceptance of such plan, or (b) the plan submitted to the Secretary commences within 60 days of the submission of such plan if the Secretary fails to take any action on the plan within 30 days of the submission of the plan. The Secretary shall accept, reject or suggest modifications to the plan submitted within 30 days of its submission. The Secretary may confer with and assist private parties in the development of the plan described in subsections (a) and (b).

"(e) SECRETARY REVIEW.—Not later than January 1, 2001, the Secretary of the Department of Health and Human Services shall review the status of private-sector initiatives designed to achieve the goals of the plan described in subsection (a), and if such goals are not achieved, the limitation in subsection (d) shall not apply, and the Secretary shall seek public comment on other initiatives that may be carried out to meet such goals."

CONGRESSIONAL FINDINGS

Pub. L. 100–293, §2, Apr. 22, 1988, 102 Stat. 95, provided that: "The Congress finds the following:

"(1) American consumers cannot purchase prescription drugs with the certainty that the products are safe and effective.

"(2) The integrity of the distribution system for prescription drugs is insufficient to prevent the introduction and eventual retail sale of substandard, ineffective, or even counterfeit drugs.

"(3) The existence and operation of a wholesale submarket, commonly known as the 'diversion market', prevents effective control over or even routine knowledge of the true sources of prescription drugs in a significant number of cases.

"(4) Large amounts of drugs are being reimported to the United States as American goods returned. These imports are a health and safety risk to American consumers because they may have become subpotent or adulterated during foreign handling and shipping.

"(5) The ready market for prescription drug reimports has been the catalyst for a continuing series of frauds against American manufacturers and has provided the cover for the importation of foreign counterfeit drugs.

"(6) The existing system of providing drug samples to physicians through manufacturer's representatives has been abused for decades and has resulted in the sale to consumers of misbranded, expired, and adulterated pharmaceuticals.

"(7) The bulk resale of below wholesale priced prescription drugs by health care entities, for ultimate sale at retail, helps fuel the diversion market and is an unfair form of competition to wholesalers and retailers that must pay otherwise prevailing market prices.

"(8) The effect of these several practices and conditions is to create an unacceptable risk that counterfeit, adulterated, misbranded, subpotent, or expired drugs will be sold to American consumers."

[1] *So in original. No subpar. (B) has been enacted.*

[2] *So in original. The word "and" probably should appear.*

[3] *So in original. The semicolon probably should be a period.*

[4] *See References in Text note below.*

§353a. Pharmacy compounding

(a) In general

Sections 351(a)(2)(B), 352(f)(1), and 355 of this title shall not apply to a drug product if the drug product is compounded for an identified individual patient based on the receipt of a valid prescription order or a notation, approved by the prescribing practitioner, on the prescription order that a compounded product is necessary for the identified patient, if the drug product meets the requirements of this section, and if the compounding—

(1) is by—

(A) a licensed pharmacist in a State licensed pharmacy or a Federal facility, or

(B) a licensed physician,

on the prescription order for such individual patient made by a licensed physician or other licensed practitioner authorized by State law to prescribe drugs; or

(2)(A) is by a licensed pharmacist or licensed physician in limited quantities before the receipt of a valid prescription order for such individual patient; and

(B) is based on a history of the licensed pharmacist or licensed physician receiving valid prescription orders for the compounding of the drug product, which orders have been generated solely within an established relationship between—

(i) the licensed pharmacist or licensed physician; and

(ii)(I) such individual patient for whom the prescription order will be provided; or

(II) the physician or other licensed practitioner who will write such prescription order.

(b) Compounded drug

(1) Licensed pharmacist and licensed physician

A drug product may be compounded under subsection (a) if the licensed pharmacist or licensed physician—

(A) compounds the drug product using bulk drug substances, as defined in regulations of the Secretary published at section 207.3(a)(4) of title 21 of the Code of Federal Regulations—

(i) that—

(I) comply with the standards of an applicable United States Pharmacopoeia or National Formulary monograph, if a monograph exists, and the United States Pharmacopoeia chapter on pharmacy compounding;

(II) if such a monograph does not exist, are drug substances that are components of drugs approved by the Secretary; or

(III) if such a monograph does not exist and the drug substance is not a component of a drug approved by the Secretary, that appear on a list developed by the Secretary through regulations issued by the Secretary under subsection (c);

(ii) that are manufactured by an establishment that is registered under section 360 of this title (including a foreign establishment that is registered under section 360(i) of this title); and

(iii) that are accompanied by valid certificates of analysis for each bulk drug substance;

(B) compounds the drug product using ingredients (other than bulk drug substances) that comply with the standards of an applicable United States Pharmacopoeia or National Formulary monograph, if a monograph exists, and the United States Pharmacopoeia chapter on pharmacy compounding;

(C) does not compound a drug product that appears on a list published by the Secretary in the Federal Register of drug products that have been withdrawn or removed from the market because such drug products or components of such drug products have been found to be unsafe or not effective; and

(D) does not compound regularly or in inordinate amounts (as defined by the Secretary) any drug products that are essentially copies of a commercially available drug product.

(2) Definition

For purposes of paragraph (1)(D), the term "essentially a copy of a commercially available drug product" does not include a drug product in which there is a change, made for an identified individual patient, which produces for that patient a significant difference, as determined by the prescribing practitioner, between the compounded drug and the comparable commercially available drug product.

(3) Drug product

A drug product may be compounded under subsection (a) only if—

(A) such drug product is not a drug product identified by the Secretary by regulation as a drug product that presents demonstrable difficulties for compounding that reasonably demonstrate an adverse effect on the safety or effectiveness of that drug product; and

(B) such drug product is compounded in a State—

(i) that has entered into a memorandum of understanding with the Secretary which addresses the distribution of inordinate amounts of compounded drug products interstate and provides for appropriate investigation by a State agency of complaints relating to compounded drug products distributed outside such State; or

(ii) that has not entered into the memorandum of understanding described in clause (i) and the licensed pharmacist, licensed pharmacy, or licensed physician distributes (or causes to be distributed) compounded drug products out of the State in which they are compounded in quantities that do not exceed 5 percent of the total prescription orders dispensed or distributed by such pharmacy or physician.

The Secretary shall, in consultation with the National Association of Boards of Pharmacy, develop a standard memorandum of understanding for use by the States in complying with subparagraph (B)(i).

(c) Regulations

(1) In general

The Secretary shall issue regulations to implement this section. Before issuing regulations to implement subsections (b)(1)(A)(i)(III), (b)(1)(C), or (b)(3)(A), the Secretary shall convene and consult an advisory committee on compounding unless the Secretary determines that the issuance of such regulations before consultation is necessary to protect the public health. The advisory committee shall include representatives from the National Association of Boards of Pharmacy, the United States Pharmacopoeia, pharmacy, physician, and consumer organizations, and other experts selected by the Secretary.

(2) Limiting compounding

The Secretary, in consultation with the United States Pharmacopoeia Convention, Incorporated, shall promulgate regulations identifying drug substances that may be used in compounding under subsection (b)(1)(A)(i)(III) for which a monograph does not exist or which are not components of drug products approved by the Secretary. The Secretary shall include in the regulation the criteria for such substances, which shall include historical use, reports in peer reviewed medical literature, or other criteria the Secretary may identify.

(d) Application

This section shall not apply to—

(1) compounded positron emission tomography drugs as defined in section 321(ii) of this title; or

(2) radiopharmaceuticals.

(e) "Compounding" defined

As used in this section, the term "compounding" does not include mixing, reconstituting, or other such acts that are performed in accordance with directions contained in approved labeling provided by the product's manufacturer and other manufacturer directions consistent with that labeling.

(June 25, 1938, ch. 675, §503A, as added Pub. L. 105–115, title I, §127(a), Nov. 21, 1997, 111 Stat. 2328; amended Pub. L. 113–54, title I, §106(a), Nov. 27, 2013, 127 Stat. 598.)

Editorial Notes

Amendments

2013—Subsec. (a). Pub. L. 113–54, §106(a)(1), struck out "unsolicited" before "receipt of a valid prescription" in introductory provisions.

Subsec. (b)(1)(A)(i)(III). Pub. L. 113–54, §106(a)(4), substituted "subsection (c)" for "subsection (d)".

Subsecs. (c) to (f). Pub. L. 113–54, §106(a)(2), (3), redesignated subsecs. (d) to (f) as (c) to (e), respectively, and struck out former subsec. (c). Prior to amendment, subsec. (c) read as follows: "A drug may be compounded under subsection (a) of this section only if the pharmacy, licensed pharmacist, or licensed physician does not advertise or promote the compounding of any particular drug, class of drug, or type of drug. The pharmacy, licensed pharmacist, or licensed physician may advertise and promote the compounding service provided by the licensed pharmacist or licensed physician."

Statutory Notes and Related Subsidiaries

Effective Date

Pub. L. 105–115, title I, §127(b), Nov. 21, 1997, 111 Stat. 2330, provided that: "Section 503A of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 353a], added by subsection (a), shall take effect upon the expiration of the 1-year period beginning on the date of the enactment of this Act [Nov. 21, 1997]."

§353a–1. Enhanced communication

(a) Submissions from State boards of pharmacy

In a manner specified by the Secretary of Health and Human Services (referred to in this section as the "Secretary"), the Secretary shall receive submissions from State boards of pharmacy—

(1) describing actions taken against compounding pharmacies, as described in subsection (b); or

(2) expressing concerns that a compounding pharmacy may be acting contrary to section 353a of this title.

(b) Content of submissions from State boards of pharmacy

An action referred to in subsection (a)(1) is, with respect to a pharmacy that compounds drugs, any of the following:

(1) The issuance of a warning letter, or the imposition of sanctions or penalties, by a State for violations of a State's pharmacy regulations pertaining to compounding.

(2) The suspension or revocation of a State-issued pharmacy license or registration for violations of a State's pharmacy regulations pertaining to compounding.

(3) The recall of a compounded drug due to concerns relating to the quality or purity of such drug.

(c) Consultation

The Secretary shall implement subsection (a) in consultation with the National Association of Boards of Pharmacy.

(d) Notifying State boards of pharmacy

The Secretary shall immediately notify State boards of pharmacy when—

(1) the Secretary receives a submission under subsection (a)(1); or

(2) the Secretary makes a determination that a pharmacy is acting contrary to section 353a of this title.

(Pub. L. 113–54, title I, §105, Nov. 27, 2013, 127 Stat. 597.)

Editorial Notes

CODIFICATION

Section was enacted as part of the Compounding Quality Act and also as part of the Drug Quality and Security Act, and not as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

§353b. Outsourcing facilities

(a) In general

Sections 352(f)(1), 355, and 360eee–1 of this title shall not apply to a drug compounded by or under the direct supervision of a licensed pharmacist in a facility that elects to register as an outsourcing facility if each of the following conditions is met:

(1) Registration and reporting

The drug is compounded in an outsourcing facility that is in compliance with the requirements of subsection (b).

(2) Bulk drug substances

The drug is compounded in an outsourcing facility that does not compound using bulk drug substances (as defined in section 207.3(a)(4) of title 21, Code of Federal Regulations (or any successor regulation)), unless—

(A)(i) the bulk drug substance appears on a list established by the Secretary identifying bulk drug substances for which there is a clinical need, by—

(I) publishing a notice in the Federal Register proposing bulk drug substances to be included on the list, including the rationale for such proposal;

(II) providing a period of not less than 60 calendar days for comment on the notice; and

(III) publishing a notice in the Federal Register designating bulk drug substances for inclusion on the list; or

(ii) the drug compounded from such bulk drug substance appears on the drug shortage list in effect under section 356e of this title at the time of compounding, distribution, and dispensing;

(B) if an applicable monograph exists under the United States Pharmacopeia, the National Formulary, or another compendium or pharmacopeia recognized by the Secretary for purposes of this paragraph, the bulk drug substances each comply with the monograph;

(C) the bulk drug substances are each manufactured by an establishment that is registered under section 360 of this title (including a foreign establishment that is registered under section 360(i) of this title); and

(D) the bulk drug substances are each accompanied by a valid certificate of analysis.

(3) Ingredients (other than bulk drug substances)

If any ingredients (other than bulk drug substances) are used in compounding the drug, such ingredients comply with the standards of the applicable United States Pharmacopeia or National Formulary monograph, if such monograph exists, or of another compendium or pharmacopeia recognized by the Secretary for purposes of this paragraph if any.

(4) Drugs withdrawn or removed because unsafe or not effective

The drug does not appear on a list published by the Secretary of drugs that have been withdrawn or removed from the market because such drugs or components of such drugs have been found to be unsafe or not effective.

(5) Essentially a copy of an approved drug

The drug is not essentially a copy of one or more approved drugs.

(6) Drugs presenting demonstrable difficulties for compounding

The drug—

(A) is not identified (directly or as part of a category of drugs) on a list published by the Secretary, through the process described in subsection (c), of drugs or categories of drugs that present demonstrable difficulties for compounding that are reasonably likely to lead to an adverse effect on

the safety or effectiveness of the drug or category of drugs, taking into account the risks and benefits to patients; or

(B) is compounded in accordance with all applicable conditions identified on the list described in subparagraph (A) as conditions that are necessary to prevent the drug or category of drugs from presenting the demonstrable difficulties described in subparagraph (A).

(7) Elements to assure safe use

In the case of a drug that is compounded from a drug that is the subject of a risk evaluation and mitigation strategy approved with elements to assure safe use pursuant to section 355–1 of this title, or from a bulk drug substance that is a component of such drug, the outsourcing facility demonstrates to the Secretary prior to beginning compounding that such facility will utilize controls comparable to the controls applicable under the relevant risk evaluation and mitigation strategy.

(8) Prohibition on wholesaling

The drug will not be sold or transferred by an entity other than the outsourcing facility that compounded such drug. This paragraph does not prohibit administration of a drug in a health care setting or dispensing a drug pursuant to a prescription executed in accordance with section 353(b)(1) of this title.

(9) Fees

The drug is compounded in an outsourcing facility that has paid all fees owed by such facility pursuant to section 379j–62 of this title.

(10) Labeling of drugs

(A) Label

The label of the drug includes—

(i) the statement "This is a compounded drug." or a reasonable comparable alternative statement (as specified by the Secretary) that prominently identifies the drug as a compounded drug;

(ii) the name, address, and phone number of the applicable outsourcing facility; and

(iii) with respect to the drug—

(I) the lot or batch number;

(II) the established name of the drug;

(III) the dosage form and strength;

(IV) the statement of quantity or volume, as appropriate;

(V) the date that the drug was compounded;

(VI) the expiration date;

(VII) storage and handling instructions;

(VIII) the National Drug Code number, if available;

(IX) the statement "Not for resale", and, if the drug is dispensed or distributed other than pursuant to a prescription for an individual identified patient, the statement "Office Use Only"; and

(X) subject to subparagraph (B)(i), a list of active and inactive ingredients, identified by established name and the quantity or proportion of each ingredient.

(B) Container

The container from which the individual units of the drug are removed for dispensing or for administration (such as a plastic bag containing individual product syringes) shall include—

(i) the information described under subparagraph (A)(iii)(X), if there is not space on the label for such information;

(ii) the following information to facilitate adverse event reporting: www.fda.gov/medwatch and 1–800–FDA–1088 (or any successor Internet Web site or phone number); and

(iii) directions for use, including, as appropriate, dosage and administration.

(C) Additional information

The label and labeling of the drug shall include any other information as determined necessary and specified in regulations promulgated by the Secretary.

(11) Outsourcing facility requirement

The drug is compounded in an outsourcing facility in which the compounding of drugs occurs only in accordance with this section.

(b) Registration of outsourcing facilities and reporting of drugs

(1) Registration of outsourcing facilities

(A) Annual registration

Upon electing and in order to become an outsourcing facility, and during the period beginning on October 1 and ending on December 31 of each year thereafter, a facility—

(i) shall register with the Secretary its name, place of business, and unique facility identifier (which shall conform to the requirements for the unique facility identifier established under section 360 of this title), and a point of contact email address; and

(ii) shall indicate whether the outsourcing facility intends to compound a drug that appears on the list in effect under section 356e of this title during the subsequent calendar year.

(B) Availability of registration for inspection; list

(i) Registrations

The Secretary shall make available for inspection, to any person so requesting, any registration filed pursuant to this paragraph.

(ii) List

The Secretary shall make available on the public Internet Web site of the Food and Drug Administration a list of the name of each facility registered under this subsection as an outsourcing facility, the State in which each such facility is located, whether the facility compounds from bulk drug substances, and whether any such compounding from bulk drug substances is for sterile or nonsterile drugs.

(2) Drug reporting by outsourcing facilities

(A) In general

Upon initially registering as an outsourcing facility, once during the month of June of each year, and once during the month of December of each year, each outsourcing facility that registers with the Secretary under paragraph (1) shall submit to the Secretary a report—

(i) identifying the drugs compounded by such outsourcing facility during the previous 6-month period; and

(ii) with respect to each drug identified under clause (i), providing the active ingredient, the source of such active ingredient, the National Drug Code number of the source drug or bulk active ingredient, if available, the strength of the active ingredient per unit, the dosage form and route of administration, the package description, the number of individual units produced, and the National Drug Code number of the final product, if assigned.

(B) Form

Each report under subparagraph (A) shall be prepared in such form and manner as the Secretary may prescribe by regulation or guidance.

(C) Confidentiality

Reports submitted under this paragraph shall be exempt from inspection under paragraph (1)(B)(i), unless the Secretary finds that such an exemption would be inconsistent with the protection of the public health.

(3) Electronic registration and reporting

Registrations and drug reporting under this subsection (including the submission of updated information) shall be submitted to the Secretary by electronic means unless the Secretary grants a request for waiver of such requirement because use of electronic means is not reasonable for the person requesting waiver.

(4) Risk-based inspection frequency

(A) In general

Outsourcing facilities—

(i) shall be subject to inspection pursuant to section 374 of this title; and

(ii) shall not be eligible for the exemption under section 374(a)(2)(A) of this title.

(B) Risk-based schedule

The Secretary, acting through one or more officers or employees duly designated by the Secretary, shall inspect outsourcing facilities in accordance with a risk-based schedule established by the Secretary.

(C) Risk factors

In establishing the risk-based schedule, the Secretary shall inspect outsourcing facilities according to the known safety risks of such outsourcing facilities, which shall be based on the following factors:

(i) The compliance history of the outsourcing facility.

(ii) The record, history, and nature of recalls linked to the outsourcing facility.

(iii) The inherent risk of the drugs compounded at the outsourcing facility.

(iv) The inspection frequency and history of the outsourcing facility, including whether the outsourcing facility has been inspected pursuant to section 374 of this title within the last 4 years.

(v) Whether the outsourcing facility has registered under this paragraph as an entity that intends to compound a drug that appears on the list in effect under section 356e of this title.

(vi) Any other criteria deemed necessary and appropriate by the Secretary for purposes of allocating inspection resources.

(5) Adverse event reporting

Outsourcing facilities shall submit adverse event reports to the Secretary in accordance with the content and format requirements established through guidance or regulation under section 310.305 of title 21, Code of Federal Regulations (or any successor regulations).

(c) Regulations

(1) In general

The Secretary shall implement the list described in subsection (a)(6) through regulations.

(2) Advisory committee on compounding

Before issuing regulations to implement subsection (a)(6), the Secretary shall convene and consult an advisory committee on compounding. The advisory committee shall include representatives from the National Association of Boards of Pharmacy, the United States Pharmacopeia, pharmacists with current experience and expertise in compounding, physicians with background and knowledge in compounding, and patient and public health advocacy organizations.

(3) Interim list

(A) In general

Before the effective date of the regulations finalized to implement subsection (a)(6), the Secretary may designate drugs, categories of drugs, or conditions as described such [1] subsection by—

(i) publishing a notice of such substances, drugs, categories of drugs, or conditions proposed for designation, including the rationale for such designation, in the Federal Register;

(ii) providing a period of not less than 60 calendar days for comment on the notice; and

(iii) publishing a notice in the Federal Register designating such drugs, categories of drugs, or conditions.

(B) Sunset of notice

Any notice provided under subparagraph (A) shall not be effective after the earlier of—

(i) the date that is 5 years after November 27, 2013; or

(ii) the effective date of the final regulations issued to implement subsection (a)(6).

(4) Updates

The Secretary shall review, and update as necessary, the regulations containing the lists of drugs, categories of drugs, or conditions described in subsection (a)(6) regularly, but not less than once every 4 years. Nothing in the previous sentence prohibits submissions to the Secretary, before or during any 4-year period described in such sentence, requesting updates to such lists.

(d) [2] Definitions

In this section:

(1) The term "compounding" includes the combining, admixing, mixing, diluting, pooling, reconstituting, or otherwise altering of a drug or bulk drug substance to create a drug.

(2) The term "essentially a copy of an approved drug" means—

(A) a drug that is identical or nearly identical to an approved drug, or a marketed drug not subject to section 353(b) of this title and not subject to approval in an application submitted under section 355 of this title, unless, in the case of an approved drug, the drug appears on the drug shortage list in effect under section 356e of this title at the time of compounding, distribution, and dispensing; or

(B) a drug, a component of which is a bulk drug substance that is a component of an approved drug or a marketed drug that is not subject to section 353(b) of this title and not subject to approval in an application submitted under section 355 of this title, unless there is a change that produces for an individual patient a clinical difference, as determined by the prescribing practitioner, between the compounded drug and the comparable approved drug.

(3) The term "approved drug" means a drug that is approved under section 355 of this title and does not appear on the list described in subsection (a)(4) of drugs that have been withdrawn or removed from the market because such drugs or components of such drugs have been found to be unsafe or not effective.

(4)(A) The term "outsourcing facility" means a facility at one geographic location or address that—

(i) is engaged in the compounding of sterile drugs;

(ii) has elected to register as an outsourcing facility; and

(iii) complies with all of the requirements of this section.

(B) An outsourcing facility is not required to be a licensed pharmacy.

(C) An outsourcing facility may or may not obtain prescriptions for identified individual patients.

(5) The term "sterile drug" means a drug that is intended for parenteral administration, an ophthalmic or oral inhalation drug in aqueous format, or a drug that is required to be sterile under Federal or State law.

(d) [2] Obligation to pay fees

Payment of the fee under section 379j–62 of this title, as described in subsection (a)(9), shall not relieve an outsourcing facility that is licensed as a pharmacy in any State that requires pharmacy licensing fees of its obligation to pay such State fees.

(June 25, 1938, ch. 675, §503B, as added Pub. L. 113–54, title I, §102(a)(2), Nov. 27, 2013, 127 Stat. 588.)

Editorial Notes

Prior Provisions

A prior section 503B of act June 25, 1938, ch. 675, was renumbered section 503C by Pub. L. 113–54, §102(a)(1), Nov. 27, 2013, 127 Stat. 587, and transferred to section 353c of this title.

[1] *So in original.*

[2] *So in original. Two subsecs. (d) have been enacted.*

§353c. Prereview of television advertisements

(a) In general

The Secretary may require the submission of any television advertisement for a drug (including any script, story board, rough, or a completed video production of the television advertisement) to the Secretary for review under this section not later than 45 days before dissemination of the television advertisement.

(b) Review

In conducting a review of a television advertisement under this section, the Secretary may make recommendations with respect to information included in the label of the drug—

(1) on changes that are—

(A) necessary to protect the consumer good and well-being; or

(B) consistent with prescribing information for the product under review; and

(2) if appropriate and if information exists, on statements for inclusion in the advertisement to address the specific efficacy of the drug as it relates to specific population groups, including elderly populations, children, and racial and ethnic minorities.

(c) No authority to require changes

Except as provided by subsection (e), this section does not authorize the Secretary to make or direct changes in any material submitted pursuant to subsection (a).

(d) Elderly populations, children, racially and ethnically diverse communities

In formulating recommendations under subsection (b), the Secretary shall take into consideration the impact of the advertised drug on elderly populations, children, and racially and ethnically diverse communities.

(e) Specific disclosures

(1) Serious risk; safety protocol

In conducting a review of a television advertisement under this section, if the Secretary determines that the advertisement would be false or misleading without a specific disclosure about a serious risk listed in the labeling of the drug involved, the Secretary may require inclusion of such disclosure in the advertisement.

(2) Date of approval

In conducting a review of a television advertisement under this section, the Secretary may require the advertisement to include, for a period not to exceed 2 years from the date of the approval of the drug under section 355 of this title or section 262 of title 42, a specific disclosure of such date of approval if the Secretary determines that the advertisement would otherwise be false or misleading.

(f) Rule of construction

Nothing in this section may be construed as having any effect on requirements under section 352(n) of this title or on the authority of the Secretary under section 314.550, 314.640, 601.45, or 601.94 of title 21, Code of Federal Regulations (or successor regulations).

(June 25, 1938, ch. 675, §503C, formerly §503B, as added Pub. L. 110–85, title IX, §901(d)(2), Sept. 27, 2007, 121 Stat. 939, renumbered §503C, Pub. L. 113–54, title I, §102(a)(1), Nov. 27, 2013, 127 Stat. 587.)

Editorial Notes

Codification

Section was formerly classified to section 353b of this title prior to renumbering by Pub. L. 113–54.

Statutory Notes and Related Subsidiaries

Effective Date

Section effective 180 days after Sept. 27, 2007, see section 909 of Pub. L. 110–85, set out as an Effective Date of 2007 Amendment note under section 331 of this title.

§353d. Process to update labeling for certain generic drugs

(a) Definitions

For purposes of this section:

(1) The term "covered drug" means a drug approved under section 355(c) of this title—

(A) for which there are no unexpired patents included in the list under section 355(j)(7) of this title and no unexpired period of exclusivity;

(B) for which the approval of the application has been withdrawn for reasons other than safety or effectiveness; and

(C) for which—

(i)(I) there is new scientific evidence available pertaining to new or existing conditions of use that is not reflected in the approved labeling;

(II) the approved labeling does not reflect current legal and regulatory requirements for content or format; or

(III) there is a relevant accepted use in clinical practice that is not reflected in the approved labeling; and

(ii) updating the approved labeling would benefit the public health.

(2) The term "period of exclusivity", with respect to a drug approved under section 355(c) of this title, means any period of exclusivity under clause (ii), (iii), or (iv) of section 355(c)(3)(E) of this title, clause (ii), (iii), or (iv) of section 355(j)(5)(F) of this title, or section 355a, 355f, or 360cc of this title.

(3) The term "generic version" means a drug approved under section 355(j) of this title whose reference listed drug is a covered drug.

(4) The term "relevant accepted use" means a use for a drug in clinical practice that is supported by scientific evidence that appears to the Secretary to meet the standards for approval under section 355 of this title.

(5) The term "selected drug" means a covered drug for which the Secretary has determined through the process under subsection (c) that the labeling should be changed.

(b) Identification of covered drugs

The Secretary may identify covered drugs for which labeling updates would provide a public health benefit. To assist in identifying covered drugs, the Secretary may do one or both of the following:

(1) Enter into cooperative agreements or contracts with public or private entities to review the available scientific evidence concerning such drugs.

(2) Seek public input concerning such drugs, including input on whether there is a relevant accepted use in clinical practice that is not reflected in the approved labeling of such drugs or whether new scientific evidence is available regarding the conditions of use for such drug, by—

(A) holding one or more public meetings;

(B) opening a public docket for the submission of public comments; or

(C) other means, as the Secretary determines appropriate.

(c) Selection of drugs for updating

If the Secretary determines, with respect to a covered drug, that the available scientific evidence meets the standards under section 355 of this title for adding or modifying information to the labeling or providing supplemental information to the labeling regarding the use of the covered drug, the Secretary may initiate the process under subsection (d).

(d) Initiation of the process of updating

If the Secretary determines that labeling changes are appropriate for a selected drug pursuant to subsection (c), the Secretary shall provide notice to the holders of approved applications for a generic

version of such drug that—

(1) summarizes the findings supporting the determination of the Secretary that the available scientific evidence meets the standards under section 355 of this title for adding or modifying information or providing supplemental information to the labeling of the covered drug pursuant to subsection (c);

(2) provides a clear statement regarding the additional, modified, or supplemental information for such labeling, according to the determination by the Secretary (including, as applicable, modifications to add the relevant accepted use to the labeling of the drug as an additional indication for the drug); and

(3) states whether the statement under paragraph (2) applies to the selected drug as a class of covered drugs or only to a specific drug product.

(e) Response to notification

Within 30 days of receipt of notification provided by the Secretary pursuant to subsection (d), the holder of an approved application for a generic version of the selected drug shall—

(1) agree to change the approved labeling to reflect the additional, modified, or supplemental information the Secretary has determined to be appropriate; or

(2) notify the Secretary that the holder of the approved application does not believe that the requested labeling changes are warranted and submit a statement detailing the reasons why such changes are not warranted.

(f) Review of application holder's response

(1) In general

Upon receipt of the application holder's response, the Secretary shall promptly review each statement received under subsection (e)(2) and determine which labeling changes pursuant to the Secretary's notice under subsection (d) are appropriate, if any. If the Secretary disagrees with the reasons why such labeling changes are not warranted, the Secretary shall provide opportunity for discussions with the application holders to reach agreement on whether the labeling for the covered drug should be updated to reflect available scientific evidence, and if so, the content of such labeling changes.

(2) Changes to labeling

After considering all responses from the holder of an approved application under paragraph (1) or (2) of subsection (e), and any discussion under paragraph (1), the Secretary may order such holder to make the labeling changes the Secretary determines are appropriate. Such holder of an approved application shall—

(A) update its paper labeling for the drug at the next printing of that labeling;

(B) update any electronic labeling for the drug within 30 days of such order; and

(C) submit the revised labeling through the form, "Supplement—Changes Being Effected".

(g) Violation

If the holder of an approved application for the generic version of the selected drug does not comply with the requirements of subsection (f)(2), such generic version of the selected drug shall be deemed to be misbranded under section 352 of this title.

(h) Limitations; generic drugs

(1) In general

With respect to any labeling change required under this section, the generic version shall be deemed to have the same conditions of use and the same labeling as its reference listed drug for purposes of clauses (i) and (v) of section 355(j)(2)(A) of this title. Any labeling change so required shall not have any legal effect for the applicant that is different than the legal effect that would have resulted if a supplemental application had been submitted and approved to conform the labeling of the generic version to a change in the labeling of the reference drug.

(2) Supplemental applications

Changes to labeling made in accordance with this section shall not be eligible for an exclusivity period under this chapter.

(3) Selection of drugs

The Secretary shall not identify a drug as a covered drug or select a drug label for updating under subsection (b) or (c) solely based on the availability of new safety information. Upon identification of a drug as a covered drug under subsection (b), the Secretary may then consider the availability of new safety information (as defined in section 355–1(b) of this title) in determining whether the drug is a selected drug and in determining what labeling changes are appropriate.

(i) Rules of construction

(1) Approval standards

This section shall not be construed as altering the applicability of the standards for approval of an application under section 355 of this title. No order shall be issued under this subsection unless the scientific evidence supporting the changed labeling meets the standards for approval applicable to any change to labeling under section 355 of this title.

(2) Removal of information

Nothing in this section shall be construed to give the Secretary additional authority to remove approved indications for drugs, other than the authority described in this section.

(3) Secretary authority

Nothing in this section shall be construed to limit the authority of the Secretary to require labeling changes under section 355(o) of this title.

(4) Maintenance of labeling

Nothing in this section shall be construed to affect the responsibility of the holder of an approved application under section 355(j) of this title to maintain its labeling in accordance with existing requirements, including subpart B of part 201 and sections 314.70 and 314.97 of title 21, Code of Federal Regulations (or any successor regulations).

(j) Reports

Not later than 4 years after December 27, 2020, and every 4 years thereafter, the Secretary shall prepare and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate, a report that—

(1) describes the actions of the Secretary under this section, including—

(A) the number of covered drugs and description of the types of drugs the Secretary has selected for labeling changes and the rationale for such recommended changes; and

(B) the number of times the Secretary entered into discussions concerning a disagreement with an application holder or holders and a summary of the decision regarding a labeling change, if any; and

(2) includes any recommendations of the Secretary for modifying the program under this section.

(June 25, 1938, ch. 675, §503D, as added Pub. L. 116–260, div. BB, title III, §324, Dec. 27, 2020, 134 Stat. 2933.)

§354. Veterinary feed directive drugs

(a) Lawful veterinary feed directive requirement

(1) A drug intended for use in or on animal feed which is limited by an approved application filed pursuant to section 360b(b) of this title, a conditionally-approved application filed pursuant to section 360ccc of this title, or an index listing pursuant to section 360ccc–1 of this title to use under the professional supervision of a licensed veterinarian is a veterinary feed directive drug. Any animal feed bearing or containing a veterinary feed directive drug shall be fed to animals only by or upon a lawful veterinary feed directive issued by a licensed veterinarian in the course of the veterinarian's professional practice. When labeled, distributed, held, and used in accordance with this section, a veterinary feed directive drug and any animal feed bearing or containing a veterinary feed directive drug shall be exempt from section 352(f) of this title.

(2) A veterinary feed directive is lawful if it—

(A) contains such information as the Secretary may by general regulation or by order require; and

(B) is in compliance with the conditions and indications for use of the drug set forth in the notice published pursuant to section 360b(i) of this title, or the index listing pursuant to section 360ccc–1(e) of this title.

(3)(A) Any persons involved in the distribution or use of animal feed bearing or containing a veterinary feed directive drug and the licensed veterinarian issuing the veterinary feed directive shall maintain a copy of the veterinary feed directive applicable to each such feed, except in the case of a person distributing such feed to another person for further distribution. Such person distributing the feed shall maintain a written acknowledgment from the person to whom the feed is shipped stating that that person shall not ship or move such feed to an animal production facility without a veterinary feed directive or ship such feed to another person for further distribution unless that person has provided the same written acknowledgment to its immediate supplier.

(B) Every person required under subparagraph (A) to maintain records, and every person in charge or custody thereof, shall, upon request of an officer or employee designated by the Secretary, permit such officer or employee at all reasonable times to have access to and copy and verify such records.

(C) Any person who distributes animal feed bearing or containing a veterinary feed directive drug shall upon first engaging in such distribution notify the Secretary of that person's name and place of business. The failure to provide such notification shall be deemed to be an act which results in the drug being misbranded.

(b) Labeling and advertising

A veterinary feed directive drug and any feed bearing or containing a veterinary feed directive drug shall be deemed to be misbranded if their labeling fails to bear such cautionary statement and such other information as the Secretary may by general regulation or by order prescribe, or their advertising fails to conform to the conditions and indications for use published pursuant to section 360b(i) of this title, or the index listing pursuant to section 360ccc–1(e) of this title or fails to contain the general cautionary statement prescribed by the Secretary.

(c) Nonprescription status

Neither a drug subject to this section, nor animal feed bearing or containing such a drug, shall be deemed to be a prescription article under any Federal or State law.

(June 25, 1938, ch. 675, §504, as added Pub. L. 104–250, §5(b), Oct. 9, 1996, 110 Stat. 3155; amended Pub. L. 108–282, title I, §102(b)(5)(G), (H), Aug. 2, 2004, 118 Stat. 903.)

Editorial Notes

Prior Provisions

A prior section 354, act June 25, 1938, ch. 675, §504, 52 Stat. 1052, which directed Secretary to promulgate regulations for listing of coal-tar colors, was repealed effective July 12, 1960, subject to provisions of section 203 of Pub. L. 86–618, by Pub. L. 86–618, title I, §103(a)(2), title II, §202, July 12, 1960, 74 Stat. 398, 404.

Amendments

2004—Subsec. (a)(1). Pub. L. 108–282, §102(b)(5)(G), substituted "360b(b) of this title, a conditionally-approved application filed pursuant to section 360ccc of this title, or an index listing pursuant to section 360ccc–1 of this title" for "360b(b) of this title".

Subsecs. (a)(2)(B), (b). Pub. L. 108–282, §102(b)(5)(H), substituted "360b(i) of this title, or the index listing pursuant to section 360ccc–1(e) of this title" for "360b(i) of this title".

§355. New drugs

(a) Necessity of effective approval of application

No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed pursuant to subsection (b) or (j) is effective with respect to such drug.

(b) Filing application; contents

(1)(A) Any person may file with the Secretary an application with respect to any drug subject to the provisions of subsection (a). Such persons shall submit to the Secretary as part of the application—

(i) full reports of investigations which have been made to show whether such drug is safe for use and whether such drug is effective in use;

(ii) a full list of the articles used as components of such drug;

(iii) a full statement of the composition of such drug;

(iv) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug;

(v) such samples of such drug and of the articles used as components thereof as the Secretary may require;

(vi) specimens of the labeling proposed to be used for such drug;

(vii) any assessments required under section 355c of this title; and

(viii) the patent number and expiration date of each patent for which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner of the patent engaged in the manufacture, use, or sale of the drug, and that—

(I) claims the drug for which the applicant submitted the application and is a drug substance (active ingredient) patent or a drug product (formulation or composition) patent; or

(II) claims a method of using such drug for which approval is sought or has been granted in the application.

(B) If an application is filed under this subsection for a drug, and a patent of the type described in subparagraph (A)(viii) is issued after the filing date but before approval of the application, the applicant shall amend the application to include the patent number and expiration date.

(2) An application submitted under paragraph (1) for a drug for which the investigations described in clause (A) of such paragraph and relied upon by the applicant for approval of the application were not conducted by or for the applicant and for which the applicant has not obtained a right of reference or use from the person by or for whom the investigations were conducted shall also include—

(A) a certification, in the opinion of the applicant and to the best of his knowledge, with respect to each patent which claims the drug for which such investigations were conducted or which claims a use for such drug for which the applicant is seeking approval under this subsection and for which information is required to be filed under paragraph (1) or subsection (c)—

(i) that such patent information has not been filed,

(ii) that such patent has expired,

(iii) of the date on which such patent will expire, or

(iv) that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted; and

(B) if with respect to the drug for which investigations described in paragraph (1)(A) were conducted information was filed under paragraph (1) or subsection (c) for a method of use patent which does not claim a use for which the applicant is seeking approval under this subsection, a statement that the method of use patent does not claim such a use.

(3) NOTICE OF OPINION THAT PATENT IS INVALID OR WILL NOT BE INFRINGED.—

(A) AGREEMENT TO GIVE NOTICE.—An applicant that makes a certification described in paragraph (2)(A)(iv) shall include in the application a statement that the applicant will give notice as required by this paragraph.

(B) TIMING OF NOTICE.—An applicant that makes a certification described in paragraph (2)(A)(iv) shall give notice as required under this paragraph—

(i) if the certification is in the application, not later than 20 days after the date of the postmark on the notice with which the Secretary informs the applicant that the application has been filed; or

(ii) if the certification is in an amendment or supplement to the application, at the time at which the applicant submits the amendment or supplement, regardless of whether the applicant has already given notice with respect to another such certification contained in the application or in an amendment or supplement to the application.

(C) RECIPIENTS OF NOTICE.—An applicant required under this paragraph to give notice shall give notice to—

(i) each owner of the patent that is the subject of the certification (or a representative of the owner designated to receive such a notice); and

(ii) the holder of the approved application under this subsection for the drug that is claimed by the patent or a use of which is claimed by the patent (or a representative of the holder designated to receive such a notice).

(D) CONTENTS OF NOTICE.—A notice required under this paragraph shall—

(i) state that an application that contains data from bioavailability or bioequivalence studies has been submitted under this subsection for the drug with respect to which the certification is made to obtain approval to engage in the commercial manufacture, use, or sale of the drug before the expiration of the patent referred to in the certification; and

(ii) include a detailed statement of the factual and legal basis of the opinion of the applicant that the patent is invalid or will not be infringed.

(4)(A) An applicant may not amend or supplement an application referred to in paragraph (2) to seek approval of a drug that is a different drug than the drug identified in the application as submitted to the Secretary.

(B) With respect to the drug for which such an application is submitted, nothing in this subsection or subsection (c)(3) prohibits an applicant from amending or supplementing the application to seek approval of a different strength.

(5)(A) The Secretary shall issue guidance for the individuals who review applications submitted under paragraph (1) or under section 262 of title 42, which shall relate to promptness in conducting the review, technical excellence, lack of bias and conflict of interest, and knowledge of regulatory and scientific standards, and which shall apply equally to all individuals who review such applications.

(B) The Secretary shall meet with a sponsor of an investigation or an applicant for approval for a drug under this subsection or section 262 of title 42 if the sponsor or applicant makes a reasonable written request for a meeting for the purpose of reaching agreement on the design and size—

(i)(I) of clinical trials intended to form the primary basis of an effectiveness claim; or

(II) in the case where human efficacy studies are not ethical or feasible, of animal and any associated clinical trials which, in combination, are intended to form the primary basis of an effectiveness claim; or

(ii) with respect to an application for approval of a biological product under section 262(k) of title 42, of any necessary clinical study or studies.

The sponsor or applicant shall provide information necessary for discussion and agreement on the design and size of the clinical trials. Minutes of any such meeting shall be prepared by the Secretary and made available to the sponsor or applicant upon request.

(C) Any agreement regarding the parameters of the design and size of clinical trials of a new drug under this paragraph that is reached between the Secretary and a sponsor or applicant shall be reduced to writing and made part of the administrative record by the Secretary. Such agreement shall not be changed after the testing begins, except—

(i) with the written agreement of the sponsor or applicant; or

(ii) pursuant to a decision, made in accordance with subparagraph (D) by the director of the reviewing division, that a substantial scientific issue essential to determining the safety or effectiveness of the drug has been identified after the testing has begun.

(D) A decision under subparagraph (C)(ii) by the director shall be in writing and the Secretary shall provide to the sponsor or applicant an opportunity for a meeting at which the director and the sponsor or applicant will be present and at which the director will document the scientific issue involved.

(E) The written decisions of the reviewing division shall be binding upon, and may not directly or indirectly be changed by, the field or compliance division personnel unless such field or compliance division personnel demonstrate to the reviewing division why such decision should be modified.

(F) No action by the reviewing division may be delayed because of the unavailability of information from or action by field personnel unless the reviewing division determines that a delay is necessary to assure the marketing of a safe and effective drug.

(G) For purposes of this paragraph, the reviewing division is the division responsible for the review of an application for approval of a drug under this subsection or section 262 of title 42 (including all scientific and medical matters, chemistry, manufacturing, and controls).

(6) An application submitted under this subsection shall be accompanied by the certification required under section 282(j)(5)(B) of title 42. Such certification shall not be considered an element of such application.

(c) Period for approval of application; period for, notice, and expedition of hearing; period for issuance of order

(1) Within one hundred and eighty days after the filing of an application under subsection (b), or such additional period as may be agreed upon by the Secretary and the applicant, the Secretary shall either—

(A) approve the application if he then finds that none of the grounds for denying approval specified in subsection (d) applies, or

(B) give the applicant notice of an opportunity for a hearing before the Secretary under subsection (d) on the question whether such application is approvable. If the applicant elects to accept the opportunity for hearing by written request within thirty days after such notice, such hearing shall commence not more than ninety days after the expiration of such thirty days unless the Secretary and the applicant otherwise agree. Any such hearing shall thereafter be conducted on an expedited basis and the Secretary's order thereon shall be issued within ninety days after the date fixed by the Secretary for filing final briefs.

(2) Not later than 30 days after the date of approval of an application submitted under subsection (b), the holder of the approved application shall file with the Secretary the patent number and the expiration date of any patent described in subsection (b)(1)(A)(viii), except that a patent that is identified as claiming a method of using such drug shall be filed only if the patent claims a method of use approved in the application. If a patent described in subsection (b)(1)(A)(viii) is issued after the date of approval of an application submitted under subsection (b), the holder of the approved application shall, not later than 30 days after the date of issuance of the patent, file the patent number and the expiration date of the patent, except that a patent that claims a method of using such drug shall be filed only if approval for such use has been granted in the application. If the patent information described in subsection (b) could not be filed with the submission of an application under subsection (b) because the application was filed before the patent information was required under subsection (b) or a patent was issued after the application was approved under such subsection, the holder of an approved application shall file with the Secretary the patent number and the expiration date of any patent described in subsection (b)(1)(A)(viii). If the holder of an approved application could not file patent information under subsection (b) because it was not required at the time the application was approved, the holder shall file such information under this subsection not later than thirty days after September 24, 1984, and if the holder of an approved application could not file patent information under subsection (b) because no patent of the type for which information is required to be submitted in subsection (b)(1)(A)(viii) had been issued when an application was filed or approved, the holder shall file such information under this subsection not later than thirty days after the date the patent involved is issued. Upon the submission of patent information under this subsection, the Secretary shall publish it. Patent information that is not the type of patent information required by subsection (b)(1)(A)(viii) shall not be submitted under this paragraph.

(3) The approval of an application filed under subsection (b) which contains a certification required by paragraph (2) of such subsection shall be made effective on the last applicable date determined by applying the following to each certification made under subsection (b)(2)(A):

(A) If the applicant only made a certification described in clause (i) or (ii) of subsection (b)(2)(A) or in both such clauses, the approval may be made effective immediately.

(B) If the applicant made a certification described in clause (iii) of subsection (b)(2)(A), the approval may be made effective on the date certified under clause (iii).

(C) If the applicant made a certification described in clause (iv) of subsection (b)(2)(A), the approval shall be made effective immediately unless, before the expiration of 45 days after the date on which the notice described in subsection (b)(3) is received, an action is brought for infringement of the patent that is the subject of the certification and for which information was submitted to the Secretary under paragraph (2) or subsection (b)(1) before the date on which the application (excluding an amendment or supplement to the application) was submitted. If such an action is brought before the expiration of such days, the approval may be made effective upon the expiration of the thirty-month period beginning on the date of the receipt of the notice provided under subsection (b)(3) or such shorter or longer period as the court may order because either party to the action failed to reasonably cooperate in expediting the action, except that—

(i) if before the expiration of such period the district court decides that the patent is invalid or not infringed (including any substantive determination that there is no cause of action for patent infringement or invalidity), the approval shall be made effective on—

(I) the date on which the court enters judgment reflecting the decision; or

(II) the date of a settlement order or consent decree signed and entered by the court stating that the patent that is the subject of the certification is invalid or not infringed;

(ii) if before the expiration of such period the district court decides that the patent has been infringed—

(I) if the judgment of the district court is appealed, the approval shall be made effective on—

(aa) the date on which the court of appeals decides that the patent is invalid or not infringed (including any substantive determination that there is no cause of action for patent infringement or invalidity); or

(bb) the date of a settlement order or consent decree signed and entered by the court of appeals stating that the patent that is the subject of the certification is invalid or not infringed; or

(II) if the judgment of the district court is not appealed or is affirmed, the approval shall be made effective on the date specified by the district court in a court order under section 271(e)(4)(A) of title 35;

(iii) if before the expiration of such period the court grants a preliminary injunction prohibiting the applicant from engaging in the commercial manufacture or sale of the drug until the court decides the issues of patent validity and infringement and if the court decides that such patent is invalid or not infringed, the approval shall be made effective as provided in clause (i); or

(iv) if before the expiration of such period the court grants a preliminary injunction prohibiting the applicant from engaging in the commercial manufacture or sale of the drug until the court decides the issues of patent validity and infringement and if the court decides that such patent has been infringed, the approval shall be made effective as provided in clause (ii).

In such an action, each of the parties shall reasonably cooperate in expediting the action.

(D) Civil action to obtain patent certainty.—

(i) Declaratory judgment absent infringement action.—

(I) In general.—No action may be brought under section 2201 of title 28 by an applicant referred to in subsection (b)(2) for a declaratory judgment with respect to a patent which is the subject of the certification referred to in subparagraph (C) unless—

(aa) the 45-day period referred to in such subparagraph has expired;

(bb) neither the owner of such patent nor the holder of the approved application under subsection (b) for the drug that is claimed by the patent or a use of which is claimed by the patent brought a civil action against the applicant for infringement of the patent before the expiration of such period; and

(cc) in any case in which the notice provided under paragraph (2)(B) relates to noninfringement, the notice was accompanied by a document described in subclause (III).

(II) Filing of civil action.—If the conditions described in items (aa), (bb), and as applicable, (cc) of subclause (I) have been met, the applicant referred to in such subclause may, in accordance with section 2201 of title 28, bring a civil action under such section against the owner or holder referred to in such subclause (but not against any owner or holder that has brought such a civil action against the applicant, unless that civil action was dismissed without prejudice) for a declaratory judgment that the patent is invalid or will not be infringed by the drug for which the applicant seeks approval, except that such civil action may be brought for a declaratory judgment that the patent will not be infringed only in a case in which the condition described in subclause (I)(cc) is applicable. A civil action referred to in this subclause shall be brought in the judicial district where the defendant has its principal place of business or a regular and established place of business.

(III) Offer of confidential access to application.—For purposes of subclause (I)(cc), the document described in this subclause is a document providing an offer of confidential access to the application that is in the custody of the applicant referred to in subsection (b)(2) for the purpose of determining whether an action referred to in subparagraph (C) should be brought. The document providing the offer of confidential access shall contain such restrictions as to persons entitled to access, and on the use and disposition of any information accessed, as would apply had a protective order been entered for the purpose of protecting trade secrets and other confidential business information. A request for access to an application under an offer of confidential access shall be considered acceptance of the offer of confidential access with the restrictions as to persons entitled to access, and on the use and disposition of any information accessed, contained in the offer of confidential access, and those restrictions and other terms of the offer of confidential access shall be considered terms of an enforceable contract. Any person provided an offer of confidential access shall review the application for the sole and limited purpose of evaluating possible infringement of the patent that is the subject of the certification under subsection (b)(2)(A)(iv) and for no other purpose, and may not disclose information of no relevance to any issue of patent infringement to any person other than a person provided an offer of confidential access. Further, the application may be redacted by the applicant to remove any information of no relevance to any issue of patent infringement.

(ii) Counterclaim to infringement action.—

(I) In general.—If an owner of the patent or the holder of the approved application under subsection (b) for the drug that is claimed by the patent or a use of which is claimed by the patent brings a patent infringement action against the applicant, the applicant may assert a counterclaim seeking an order requiring the holder to correct or delete the patent information submitted by the holder under subsection (b) or this subsection on the ground that the patent does not claim either—

(aa) the drug for which the application was approved; or

(bb) an approved method of using the drug.

(II) No independent cause of action.—Subclause (I) does not authorize the assertion of a claim described in subclause (I) in any civil action or proceeding other than a counterclaim described in subclause (I).

(iii) No damages.—An applicant shall not be entitled to damages in a civil action under clause (i) or a counterclaim under clause (ii).

(E)(i) Repealed. Pub. L. 117–9, §1(b)(1)(A), Apr. 23, 2021, 135 Stat. 258.

(ii) If an application submitted under subsection (b) for a drug, no active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations)) of which has been approved in any other application under subsection (b), is approved after September 24, 1984, no application which refers to the drug for which the subsection (b) application was submitted and for which the investigations described in subsection (b)(1)(A)(i) and relied upon by the applicant for approval of the application were not conducted by or for the applicant and for which the applicant has not obtained a right of reference or use from the person by or for whom the investigations were

conducted may be submitted under subsection (b) before the expiration of five years from the date of the approval of the application under subsection (b), except that such an application may be submitted under subsection (b) after the expiration of four years from the date of the approval of the subsection (b) application if it contains a certification of patent invalidity or noninfringement described in clause (iv) of subsection (b)(2)(A). The approval of such an application shall be made effective in accordance with this paragraph except that, if an action for patent infringement is commenced during the one-year period beginning forty-eight months after the date of the approval of the subsection (b) application, the thirty-month period referred to in subparagraph (C) shall be extended by such amount of time (if any) which is required for seven and one-half years to have elapsed from the date of approval of the subsection (b) application.

(iii) If an application submitted under subsection (b) for a drug, which includes an active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations)) that has been approved in another application approved under subsection (b), is approved after September 24, 1984, and if such application contains reports of new clinical investigations (other than bioavailability studies) essential to the approval of the application and conducted or sponsored by the applicant, the Secretary may not make the approval of an application submitted under subsection (b) for the conditions of approval of such drug in the approved subsection (b) application effective before the expiration of three years from the date of the approval of the application under subsection (b) if the investigations described in subsection (b)(1)(A)(i) and relied upon by the applicant for approval of the application were not conducted by or for the applicant and if the applicant has not obtained a right of reference or use from the person by or for whom the investigations were conducted.

(iv) If a supplement to an application approved under subsection (b) is approved after September 24, 1984, and the supplement contains reports of new clinical investigations (other than bioavailabilty [1] studies) essential to the approval of the supplement and conducted or sponsored by the person submitting the supplement, the Secretary may not make the approval of an application submitted under subsection (b) for a change approved in the supplement effective before the expiration of three years from the date of the approval of the supplement under subsection (b) if the investigations described in subsection (b)(1)(A)(i) and relied upon by the applicant for approval of the application were not conducted by or for the applicant and if the applicant has not obtained a right of reference or use from the person by or for whom the investigations were conducted.

(v) If an application (or supplement to an application) submitted under subsection (b) for a drug, which includes an active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations)) that has been approved in another application under subsection (b), was approved during the period beginning January 1, 1982, and ending on September 24, 1984, the Secretary may not make the approval of an application submitted under this subsection and for which the investigations described in subsection (b)(1)(A)(i) and relied upon by the applicant for approval of the application were not conducted by or for the applicant and for which the applicant has not obtained a right of reference or use from the person by or for whom the investigations were conducted and which refers to the drug for which the subsection (b) application was submitted effective before the expiration of two years from September 24, 1984.

(4) A drug manufactured in a pilot or other small facility may be used to demonstrate the safety and effectiveness of the drug and to obtain approval for the drug prior to manufacture of the drug in a larger facility, unless the Secretary makes a determination that a full scale production facility is necessary to ensure the safety or effectiveness of the drug.

(5)(A) The Secretary may rely upon qualified data summaries to support the approval of a supplemental application, with respect to a qualified indication for a drug, submitted under subsection (b), if such supplemental application complies with subparagraph (B).

(B) A supplemental application is eligible for review as described in subparagraph (A) only if—

(i) there is existing data available and acceptable to the Secretary demonstrating the safety of the drug; and

(ii) all data used to develop the qualified data summaries are submitted to the Secretary as part of the supplemental application.

(C) The Secretary shall post on the Internet website of the Food and Drug Administration and update annually—

(i) the number of applications reviewed solely under subparagraph (A) or section 262(a)(2)(E) of title 42;

(ii) the average time for completion of review under subparagraph (A) or section 262(a)(2)(E) of title 42;

(iii) the average time for review of supplemental applications where the Secretary did not use review flexibility under subparagraph (A) or section 262(a)(2)(E) of title 42; and

(iv) the number of applications reviewed under subparagraph (A) or section 262(a)(2)(E) of title 42 for which the Secretary made use of full data sets in addition to the qualified data summary.

(D) In this paragraph—

(i) the term "qualified indication" means an indication for a drug that the Secretary determines to be appropriate for summary level review under this paragraph; and

(ii) the term "qualified data summary" means a summary of clinical data that demonstrates the safety and effectiveness of a drug with respect to a qualified indication.

(d) Grounds for refusing application; approval of application; "substantial evidence" defined

If the Secretary finds, after due notice to the applicant in accordance with subsection (c) and giving him an opportunity for a hearing, in accordance with said subsection, that (1) the investigations, reports of which are required to be submitted to the Secretary pursuant to subsection (b), do not include adequate tests by all methods reasonably applicable to show whether or not such drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof; (2) the results of such tests show that such drug is unsafe for use under such conditions or do not show that such drug is safe for use under such conditions; (3) the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug are inadequate to preserve its identity, strength, quality, and purity; (4) upon the basis of the information submitted to him as part of the application, or upon the basis of any other information before him with respect to such drug, he has insufficient information to determine whether such drug is safe for use under such conditions; or (5) evaluated on the basis of the information submitted to him as part of the application and any other information before him with respect to such drug, there is a lack of substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof; or (6) the application failed to contain the patent information prescribed by subsection (b); or (7) based on a fair evaluation of all material facts, such labeling is false or misleading in any particular; he shall issue an order refusing to approve the application. If, after such notice and opportunity for hearing, the Secretary finds that clauses (1) through (6) do not apply, he shall issue an order approving the application. As used in this subsection and subsection (e), the term "substantial evidence" means evidence consisting of adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and responsibly be concluded by such experts that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling or proposed labeling thereof. If the Secretary determines, based on relevant science, that data from one adequate and well-controlled clinical investigation and confirmatory evidence (obtained prior to or after such investigation) are sufficient to establish effectiveness, the Secretary may consider such data and evidence to constitute substantial evidence for purposes of the preceding sentence. The Secretary shall implement a structured risk-benefit assessment framework in the new drug approval process to facilitate the balanced consideration of benefits and risks, a consistent and systematic approach to the discussion and regulatory decisionmaking, and the communication of the benefits and risks of new drugs. Nothing in the preceding sentence shall alter the criteria for evaluating an application for marketing approval of a drug.

(e) Withdrawal of approval; grounds; immediate suspension upon finding imminent hazard to public health

The Secretary shall, after due notice and opportunity for hearing to the applicant, withdraw approval of an application with respect to any drug under this section if the Secretary finds (1) that clinical or other

experience, tests, or other scientific data show that such drug is unsafe for use under the conditions of use upon the basis of which the application was approved; (2) that new evidence of clinical experience, not contained in such application or not available to the Secretary until after such application was approved, or tests by new methods, or tests by methods not deemed reasonably applicable when such application was approved, evaluated together with the evidence available to the Secretary when the application was approved, shows that such drug is not shown to be safe for use under the conditions of use upon the basis of which the application was approved; or (3) on the basis of new information before him with respect to such drug, evaluated together with the evidence available to him when the application was approved, that there is a lack of substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling thereof; or (4) the patent information prescribed by subsection (c) was not filed within thirty days after the receipt of written notice from the Secretary specifying the failure to file such information; or (5) that the application contains any untrue statement of a material fact: *Provided*, That if the Secretary (or in his absence the officer acting as Secretary) finds that there is an imminent hazard to the public health, he may suspend the approval of such application immediately, and give the applicant prompt notice of his action and afford the applicant the opportunity for an expedited hearing under this subsection; but the authority conferred by this proviso to suspend the approval of an application shall not be delegated. The Secretary may also, after due notice and opportunity for hearing to the applicant, withdraw the approval of an application submitted under subsection (b) or (j) with respect to any drug under this section if the Secretary finds (1) that the applicant has failed to establish a system for maintaining required records, or has repeatedly or deliberately failed to maintain such records or to make required reports, in accordance with a regulation or order under subsection (k) or to comply with the notice requirements of section 360(k)(2) of this title, or the applicant has refused to permit access to, or copying or verification of, such records as required by paragraph (2) of such subsection; or (2) that on the basis of new information before him, evaluated together with the evidence before him when the application was approved, the methods used in, or the facilities and controls used for, the manufacture, processing, and packing of such drug are inadequate to assure and preserve its identity, strength, quality, and purity and were not made adequate within a reasonable time after receipt of written notice from the Secretary specifying the matter complained of; or (3) that on the basis of new information before him, evaluated together with the evidence before him when the application was approved, the labeling of such drug, based on a fair evaluation of all material facts, is false or misleading in any particular and was not corrected within a reasonable time after receipt of written notice from the Secretary specifying the matter complained of. Any order under this subsection shall state the findings upon which it is based. The Secretary may withdraw the approval of an application submitted under this section, or suspend the approval of such an application, as provided under this subsection, without first ordering the applicant to submit an assessment of the approved risk evaluation and mitigation strategy for the drug under section 355–1(g)(2)(D) of this title.

(f) Revocation of order refusing, withdrawing or suspending approval of application

Whenever the Secretary finds that the facts so require, he shall revoke any previous order under subsection (d) or (e) refusing, withdrawing, or suspending approval of an application and shall approve such application or reinstate such approval, as may be appropriate.

(g) Service of orders

Orders of the Secretary issued under this section shall be served (1) in person by any officer or employee of the department designated by the Secretary or (2) by mailing the order by registered mail or by certified mail addressed to the applicant or respondent at his last-known address in the records of the Secretary.

(h) Appeal from order

An appeal may be taken by the applicant from an order of the Secretary refusing or withdrawing approval of an application under this section. Such appeal shall be taken by filing in the United States court of appeals for the circuit wherein such applicant resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit, within sixty days after the entry of such order, a written petition praying that the order of the Secretary be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary, or any officer designated by him

for that purpose, and thereupon the Secretary shall certify and file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have exclusive jurisdiction to affirm or set aside such order, except that until the filing of the record the Secretary may modify or set aside his order. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary or unless there were reasonable grounds for failure so to do. The finding of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive. If any person shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence to be taken before the Secretary and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts by reason of the additional evidence so taken, and he shall file with the court such modified findings which, if supported by substantial evidence, shall be conclusive, and his recommendation, if any, for the setting aside of the original order. The judgment of the court affirming or setting aside any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28. The commencement of proceedings under this subsection shall not, unless specifically ordered by the court to the contrary, operate as a stay of the Secretary's order.

(i) Exemptions of drugs for research; discretionary and mandatory conditions; direct reports to Secretary

(1) The Secretary shall promulgate regulations for exempting from the operation of the foregoing subsections of this section drugs intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety and effectiveness of drugs. Such regulations may, within the discretion of the Secretary, among other conditions relating to the protection of the public health, provide for conditioning such exemption upon—

(A) the submission to the Secretary, before any clinical testing of a new drug is undertaken, of reports, by the manufacturer or the sponsor of the investigation of such drug, of preclinical tests (including tests on animals) of such drug adequate to justify the proposed clinical testing;

(B) the manufacturer or the sponsor of the investigation of a new drug proposed to be distributed to investigators for clinical testing obtaining a signed agreement from each of such investigators that patients to whom the drug is administered will be under his personal supervision, or under the supervision of investigators responsible to him, and that he will not supply such drug to any other investigator, or to clinics, for administration to human beings;

(C) the establishment and maintenance of such records, and the making of such reports to the Secretary, by the manufacturer or the sponsor of the investigation of such drug, of data (including but not limited to analytical reports by investigators) obtained as the result of such investigational use of such drug, as the Secretary finds will enable him to evaluate the safety and effectiveness of such drug in the event of the filing of an application pursuant to subsection (b); and

(D) the submission to the Secretary by the manufacturer or the sponsor of the investigation of a new drug of a statement of intent regarding whether the manufacturer or sponsor has plans for assessing pediatric safety and efficacy.

(2) Subject to paragraph (3), a clinical investigation of a new drug may begin 30 days after the Secretary has received from the manufacturer or sponsor of the investigation a submission containing such information about the drug and the clinical investigation, including—

(A) information on design of the investigation and adequate reports of basic information, certified by the applicant to be accurate reports, necessary to assess the safety of the drug for use in clinical investigation; and

(B) adequate information on the chemistry and manufacturing of the drug, controls available for the drug, and primary data tabulations from animal or human studies.

(3)(A) At any time, the Secretary may prohibit the sponsor of an investigation from conducting the investigation (referred to in this paragraph as a "clinical hold") if the Secretary makes a determination

described in subparagraph (B). The Secretary shall specify the basis for the clinical hold, including the specific information available to the Secretary which served as the basis for such clinical hold, and confirm such determination in writing.

(B) For purposes of subparagraph (A), a determination described in this subparagraph with respect to a clinical hold is that—

(i) the drug involved represents an unreasonable risk to the safety of the persons who are the subjects of the clinical investigation, taking into account the qualifications of the clinical investigators, information about the drug, the design of the clinical investigation, the condition for which the drug is to be investigated, and the health status of the subjects involved; or

(ii) the clinical hold should be issued for such other reasons as the Secretary may by regulation establish (including reasons established by regulation before November 21, 1997).

(C) Any written request to the Secretary from the sponsor of an investigation that a clinical hold be removed shall receive a decision, in writing and specifying the reasons therefor, within 30 days after receipt of such request. Any such request shall include sufficient information to support the removal of such clinical hold.

(4) Regulations under paragraph (1) shall provide that such exemption shall be conditioned upon the manufacturer, or the sponsor of the investigation, requiring that experts using such drugs for investigational purposes certify to such manufacturer or sponsor that they will inform any human beings to whom such drugs, or any controls used in connection therewith, are being administered, or their representatives, that such drugs are being used for investigational purposes and will obtain the consent of such human beings or their representatives, except where it is not feasible, it is contrary to the best interests of such human beings, or the proposed clinical testing poses no more than minimal risk to such human beings and includes appropriate safeguards as prescribed to protect the rights, safety, and welfare of such human beings. Nothing in this subsection shall be construed to require any clinical investigator to submit directly to the Secretary reports on the investigational use of drugs. The Secretary shall update such regulations to require inclusion in the informed consent documents and process a statement that clinical trial information for such clinical investigation has been or will be submitted for inclusion in the registry data bank pursuant to subsection (j) of section 282 of title 42.

(j) Abbreviated new drug applications

(1) Any person may file with the Secretary an abbreviated application for the approval of a new drug.

(2)(A) An abbreviated application for a new drug shall contain—

(i) information to show that the conditions of use prescribed, recommended, or suggested in the labeling proposed for the new drug have been previously approved for a drug listed under paragraph (7) (hereinafter in this subsection referred to as a "listed drug");

(ii)(I) if the listed drug referred to in clause (i) has only one active ingredient, information to show that the active ingredient of the new drug is the same as that of the listed drug;

(II) if the listed drug referred to in clause (i) has more than one active ingredient, information to show that the active ingredients of the new drug are the same as those of the listed drug, or

(III) if the listed drug referred to in clause (i) has more than one active ingredient and if one of the active ingredients of the new drug is different and the application is filed pursuant to the approval of a petition filed under subparagraph (C), information to show that the other active ingredients of the new drug are the same as the active ingredients of the listed drug, information to show that the different active ingredient is an active ingredient of a listed drug or of a drug which does not meet the requirements of section 321(p) of this title, and such other information respecting the different active ingredient with respect to which the petition was filed as the Secretary may require;

(iii) information to show that the route of administration, the dosage form, and the strength of the new drug are the same as those of the listed drug referred to in clause (i) or, if the route of administration, the dosage form, or the strength of the new drug is different and the application is filed pursuant to the approval of a petition filed under subparagraph (C), such information respecting the route of administration, dosage form, or strength with respect to which the petition was filed as the Secretary may require;

(iv) information to show that the new drug is bioequivalent to the listed drug referred to in clause (i), except that if the application is filed pursuant to the approval of a petition filed under subparagraph (C), information to show that the active ingredients of the new drug are of the same pharmacological or therapeutic class as those of the listed drug referred to in clause (i) and the new drug can be expected to have the same therapeutic effect as the listed drug when administered to patients for a condition of use referred to in clause (i);

(v) information to show that the labeling proposed for the new drug is the same as the labeling approved for the listed drug referred to in clause (i) except for changes required because of differences approved under a petition filed under subparagraph (C) or because the new drug and the listed drug are produced or distributed by different manufacturers;

(vi) the items specified in clauses (ii) through (vi) of subsection (b)(1)(A);

(vii) a certification, in the opinion of the applicant and to the best of his knowledge, with respect to each patent which claims the listed drug referred to in clause (i) or which claims a use for such listed drug for which the applicant is seeking approval under this subsection and for which information is required to be filed under subsection (b) or (c)—

(I) that such patent information has not been filed,

(II) that such patent has expired,

(III) of the date on which such patent will expire, or

(IV) that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted; and

(viii) if with respect to the listed drug referred to in clause (i) information was filed under subsection (b) or (c) for a method of use patent which does not claim a use for which the applicant is seeking approval under this subsection, a statement that the method of use patent does not claim such a use.

The Secretary may not require that an abbreviated application contain information in addition to that required by clauses (i) through (viii).

(B) NOTICE OF OPINION THAT PATENT IS INVALID OR WILL NOT BE INFRINGED.—

(i) AGREEMENT TO GIVE NOTICE.—An applicant that makes a certification described in subparagraph (A)(vii)(IV) shall include in the application a statement that the applicant will give notice as required by this subparagraph.

(ii) TIMING OF NOTICE.—An applicant that makes a certification described in subparagraph (A)(vii)(IV) shall give notice as required under this subparagraph—

(I) if the certification is in the application, not later than 20 days after the date of the postmark on the notice with which the Secretary informs the applicant that the application has been filed; or

(II) if the certification is in an amendment or supplement to the application, at the time at which the applicant submits the amendment or supplement, regardless of whether the applicant has already given notice with respect to another such certification contained in the application or in an amendment or supplement to the application.

(iii) RECIPIENTS OF NOTICE.—An applicant required under this subparagraph to give notice shall give notice to—

(I) each owner of the patent that is the subject of the certification (or a representative of the owner designated to receive such a notice); and

(II) the holder of the approved application under subsection (b) for the drug that is claimed by the patent or a use of which is claimed by the patent (or a representative of the holder designated to receive such a notice).

(iv) CONTENTS OF NOTICE.—A notice required under this subparagraph shall—

(I) state that an application that contains data from bioavailability or bioequivalence studies has been submitted under this subsection for the drug with respect to which the certification is made to obtain approval to engage in the commercial manufacture, use, or sale of the drug before the expiration of the patent referred to in the certification; and

(II) include a detailed statement of the factual and legal basis of the opinion of the applicant that the patent is invalid or will not be infringed.

(C) If a person wants to submit an abbreviated application for a new drug which has a different active ingredient or whose route of administration, dosage form, or strength differ from that of a listed drug, such person shall submit a petition to the Secretary seeking permission to file such an application. The Secretary shall approve or disapprove a petition submitted under this subparagraph within ninety days of the date the petition is submitted. The Secretary shall approve such a petition unless the Secretary finds—

(i) that investigations must be conducted to show the safety and effectiveness of the drug or of any of its active ingredients, the route of administration, the dosage form, or strength which differ from the listed drug; or

(ii) that any drug with a different active ingredient may not be adequately evaluated for approval as safe and effective on the basis of the information required to be submitted in an abbreviated application.

(D)(i) An applicant may not amend or supplement an application to seek approval of a drug referring to a different listed drug from the listed drug identified in the application as submitted to the Secretary.

(ii) With respect to the drug for which an application is submitted, nothing in this subsection prohibits an applicant from amending or supplementing the application to seek approval of a different strength.

(iii) Within 60 days after December 8, 2003, the Secretary shall issue guidance defining the term "listed drug" for purposes of this subparagraph.

(3)(A) The Secretary shall issue guidance for the individuals who review applications submitted under paragraph (1), which shall relate to promptness in conducting the review, technical excellence, lack of bias and conflict of interest, and knowledge of regulatory and scientific standards, and which shall apply equally to all individuals who review such applications.

(B) The Secretary shall meet with a sponsor of an investigation or an applicant for approval for a drug under this subsection if the sponsor or applicant makes a reasonable written request for a meeting for the purpose of reaching agreement on the design and size of bioavailability and bioequivalence studies needed for approval of such application. The sponsor or applicant shall provide information necessary for discussion and agreement on the design and size of such studies. Minutes of any such meeting shall be prepared by the Secretary and made available to the sponsor or applicant.

(C) Any agreement regarding the parameters of design and size of bioavailability and bioequivalence studies of a drug under this paragraph that is reached between the Secretary and a sponsor or applicant shall be reduced to writing and made part of the administrative record by the Secretary. Such agreement shall not be changed after the testing begins, except—

(i) with the written agreement of the sponsor or applicant; or

(ii) pursuant to a decision, made in accordance with subparagraph (D) by the director of the reviewing division, that a substantial scientific issue essential to determining the safety or effectiveness of the drug has been identified after the testing has begun.

(D) A decision under subparagraph (C)(ii) by the director shall be in writing and the Secretary shall provide to the sponsor or applicant an opportunity for a meeting at which the director and the sponsor or applicant will be present and at which the director will document the scientific issue involved.

(E) The written decisions of the reviewing division shall be binding upon, and may not directly or indirectly be changed by, the field or compliance office personnel unless such field or compliance office personnel demonstrate to the reviewing division why such decision should be modified.

(F) No action by the reviewing division may be delayed because of the unavailability of information from or action by field personnel unless the reviewing division determines that a delay is necessary to assure the marketing of a safe and effective drug.

(G) For purposes of this paragraph, the reviewing division is the division responsible for the review of an application for approval of a drug under this subsection (including scientific matters, chemistry, manufacturing, and controls).

(4) Subject to paragraph (5), the Secretary shall approve an application for a drug unless the Secretary finds—

(A) the methods used in, or the facilities and controls used for, the manufacture, processing, and packing of the drug are inadequate to assure and preserve its identity, strength, quality, and purity;

(B) information submitted with the application is insufficient to show that each of the proposed conditions of use have been previously approved for the listed drug referred to in the application;

(C)(i) if the listed drug has only one active ingredient, information submitted with the application is insufficient to show that the active ingredient is the same as that of the listed drug;

(ii) if the listed drug has more than one active ingredient, information submitted with the application is insufficient to show that the active ingredients are the same as the active ingredients of the listed drug, or

(iii) if the listed drug has more than one active ingredient and if the application is for a drug which has an active ingredient different from the listed drug, information submitted with the application is insufficient to show—

(I) that the other active ingredients are the same as the active ingredients of the listed drug, or

(II) that the different active ingredient is an active ingredient of a listed drug or a drug which does not meet the requirements of section 321(p) of this title,

or no petition to file an application for the drug with the different ingredient was approved under paragraph (2)(C);

(D)(i) if the application is for a drug whose route of administration, dosage form, or strength of the drug is the same as the route of administration, dosage form, or strength of the listed drug referred to in the application, information submitted in the application is insufficient to show that the route of administration, dosage form, or strength is the same as that of the listed drug, or

(ii) if the application is for a drug whose route of administration, dosage form, or strength of the drug is different from that of the listed drug referred to in the application, no petition to file an application for the drug with the different route of administration, dosage form, or strength was approved under paragraph (2)(C);

(E) if the application was filed pursuant to the approval of a petition under paragraph (2)(C), the application did not contain the information required by the Secretary respecting the active ingredient, route of administration, dosage form, or strength which is not the same;

(F) information submitted in the application is insufficient to show that the drug is bioequivalent to the listed drug referred to in the application or, if the application was filed pursuant to a petition approved under paragraph (2)(C), information submitted in the application is insufficient to show that the active ingredients of the new drug are of the same pharmacological or therapeutic class as those of the listed drug referred to in paragraph (2)(A)(i) and that the new drug can be expected to have the same therapeutic effect as the listed drug when administered to patients for a condition of use referred to in such paragraph;

(G) information submitted in the application is insufficient to show that the labeling proposed for the drug is the same as the labeling approved for the listed drug referred to in the application except for changes required because of differences approved under a petition filed under paragraph (2)(C) or because the drug and the listed drug are produced or distributed by different manufacturers;

(H) information submitted in the application or any other information available to the Secretary shows that (i) the inactive ingredients of the drug are unsafe for use under the conditions prescribed, recommended, or suggested in the labeling proposed for the drug, or (ii) the composition of the drug is unsafe under such conditions because of the type or quantity of inactive ingredients included or the manner in which the inactive ingredients are included;

(I) the approval under subsection (c) of the listed drug referred to in the application under this subsection has been withdrawn or suspended for grounds described in the first sentence of subsection (e), the Secretary has published a notice of opportunity for hearing to withdraw approval of the listed drug under subsection (c) for grounds described in the first sentence of subsection (e), the approval under this subsection of the listed drug referred to in the application under this subsection has been withdrawn or suspended under paragraph (6), or the Secretary has determined that the listed drug has been withdrawn from sale for safety or effectiveness reasons;

(J) the application does not meet any other requirement of paragraph (2)(A); or

(K) the application contains an untrue statement of material fact.

(5)(A) Within one hundred and eighty days of the initial receipt of an application under paragraph (2) or within such additional period as may be agreed upon by the Secretary and the applicant, the Secretary shall approve or disapprove the application.

(B) The approval of an application submitted under paragraph (2) shall be made effective on the last applicable date determined by applying the following to each certification made under paragraph (2)(A)(vii):

(i) If the applicant only made a certification described in subclause (I) or (II) of paragraph (2)(A)(vii) or in both such subclauses, the approval may be made effective immediately.

(ii) If the applicant made a certification described in subclause (III) of paragraph (2)(A)(vii), the approval may be made effective on the date certified under subclause (III).

(iii) If the applicant made a certification described in subclause (IV) of paragraph (2)(A)(vii), the approval shall be made effective immediately unless, before the expiration of 45 days after the date on which the notice described in paragraph (2)(B) is received, an action is brought for infringement of the patent that is the subject of the certification and for which information was submitted to the Secretary under subsection (b)(1) or (c)(2) before the date on which the application (excluding an amendment or supplement to the application), which the Secretary later determines to be substantially complete, was submitted. If such an action is brought before the expiration of such days, the approval shall be made effective upon the expiration of the thirty-month period beginning on the date of the receipt of the notice provided under paragraph (2)(B)(i) or such shorter or longer period as the court may order because either party to the action failed to reasonably cooperate in expediting the action, except that—

(I) if before the expiration of such period the district court decides that the patent is invalid or not infringed (including any substantive determination that there is no cause of action for patent infringement or invalidity), the approval shall be made effective on—

(aa) the date on which the court enters judgment reflecting the decision; or

(bb) the date of a settlement order or consent decree signed and entered by the court stating that the patent that is the subject of the certification is invalid or not infringed;

(II) if before the expiration of such period the district court decides that the patent has been infringed—

(aa) if the judgment of the district court is appealed, the approval shall be made effective on—

(AA) the date on which the court of appeals decides that the patent is invalid or not infringed (including any substantive determination that there is no cause of action for patent infringement or invalidity); or

(BB) the date of a settlement order or consent decree signed and entered by the court of appeals stating that the patent that is the subject of the certification is invalid or not infringed; or

(bb) if the judgment of the district court is not appealed or is affirmed, the approval shall be made effective on the date specified by the district court in a court order under section 271(e)(4)(A) of title 35;

(III) if before the expiration of such period the court grants a preliminary injunction prohibiting the applicant from engaging in the commercial manufacture or sale of the drug until the court decides the issues of patent validity and infringement and if the court decides that such patent is invalid or not infringed, the approval shall be made effective as provided in subclause (I); or

(IV) if before the expiration of such period the court grants a preliminary injunction prohibiting the applicant from engaging in the commercial manufacture or sale of the drug until the court decides the issues of patent validity and infringement and if the court decides that such patent has been infringed, the approval shall be made effective as provided in subclause (II).

In such an action, each of the parties shall reasonably cooperate in expediting the action.

(iv) 180-DAY EXCLUSIVITY PERIOD.—

(I) EFFECTIVENESS OF APPLICATION.—Subject to subparagraph (D), if the application contains a certification described in paragraph (2)(A)(vii)(IV) and is for a drug for which a first applicant has

submitted an application containing such a certification, the application shall be made effective on the date that is 180 days after the date of the first commercial marketing of the drug (including the commercial marketing of the listed drug) by any first applicant.

(II) DEFINITIONS.—In this paragraph:

(aa) 180-DAY EXCLUSIVITY PERIOD.—The term "180-day exclusivity period" means the 180-day period ending on the day before the date on which an application submitted by an applicant other than a first applicant could become effective under this clause.

(bb) FIRST APPLICANT.—As used in this subsection, the term "first applicant" means an applicant that, on the first day on which a substantially complete application containing a certification described in paragraph (2)(A)(vii)(IV) is submitted for approval of a drug, submits a substantially complete application that contains and lawfully maintains a certification described in paragraph (2)(A)(vii)(IV) for the drug.

(cc) SUBSTANTIALLY COMPLETE APPLICATION.—As used in this subsection, the term "substantially complete application" means an application under this subsection that on its face is sufficiently complete to permit a substantive review and contains all the information required by paragraph (2)(A).

(dd) TENTATIVE APPROVAL.—

(AA) IN GENERAL.—The term "tentative approval" means notification to an applicant by the Secretary that an application under this subsection meets the requirements of paragraph (2)(A), but cannot receive effective approval because the application does not meet the requirements of this subparagraph, there is a period of exclusivity for the listed drug under subparagraph (F) or section 355a of this title, or there is a 7-year period of exclusivity for the listed drug under section 360cc of this title.

(BB) LIMITATION.—A drug that is granted tentative approval by the Secretary is not an approved drug and shall not have an effective approval until the Secretary issues an approval after any necessary additional review of the application.

(v) 180-DAY EXCLUSIVITY PERIOD FOR COMPETITIVE GENERIC THERAPIES.—

(I) EFFECTIVENESS OF APPLICATION.—Subject to subparagraph (D)(iv), if the application is for a drug that is the same as a competitive generic therapy for which any first approved applicant has commenced commercial marketing, the application shall be made effective on the date that is 180 days after the date of the first commercial marketing of the competitive generic therapy (including the commercial marketing of the listed drug) by any first approved applicant.

(II) LIMITATION.—The exclusivity period under subclause (I) shall not apply with respect to a competitive generic therapy that has previously received an exclusivity period under subclause (I).

(III) DEFINITIONS.—In this clause and subparagraph (D)(iv):

(aa) The term "competitive generic therapy" means a drug—

(AA) that is designated as a competitive generic therapy under section 356h of this title; and

(BB) for which there are no unexpired patents or exclusivities on the list of products described in section 355(j)(7)(A) of this title at the time of submission.

(bb) The term "first approved applicant" means any applicant that has submitted an application that—

(AA) is for a competitive generic therapy that is approved on the first day on which any application for such competitive generic therapy is approved;

(BB) is not eligible for a 180-day exclusivity period under clause (iv) for the drug that is the subject of the application for the competitive generic therapy; and

(CC) is not for a drug for which all drug versions have forfeited eligibility for a 180-day exclusivity period under clause (iv) pursuant to subparagraph (D).

(C) CIVIL ACTION TO OBTAIN PATENT CERTAINTY.—

(i) DECLARATORY JUDGMENT ABSENT INFRINGEMENT ACTION.—

(I) IN GENERAL.—No action may be brought under section 2201 of title 28 by an applicant under paragraph (2) for a declaratory judgment with respect to a patent which is the subject of the

certification referred to in subparagraph (B)(iii) unless—

(aa) the 45-day period referred to in such subparagraph has expired;

(bb) neither the owner of such patent nor the holder of the approved application under subsection (b) for the drug that is claimed by the patent or a use of which is claimed by the patent brought a civil action against the applicant for infringement of the patent before the expiration of such period; and

(cc) in any case in which the notice provided under paragraph (2)(B) relates to noninfringement, the notice was accompanied by a document described in subclause (III).

(II) Filing of civil action.—If the conditions described in items (aa), (bb), and as applicable, (cc) of subclause (I) have been met, the applicant referred to in such subclause may, in accordance with section 2201 of title 28, bring a civil action under such section against the owner or holder referred to in such subclause (but not against any owner or holder that has brought such a civil action against the applicant, unless that civil action was dismissed without prejudice) for a declaratory judgment that the patent is invalid or will not be infringed by the drug for which the applicant seeks approval, except that such civil action may be brought for a declaratory judgment that the patent will not be infringed only in a case in which the condition described in subclause (I)(cc) is applicable. A civil action referred to in this subclause shall be brought in the judicial district where the defendant has its principal place of business or a regular and established place of business.

(III) Offer of confidential access to application.—For purposes of subclause (I)(cc), the document described in this subclause is a document providing an offer of confidential access to the application that is in the custody of the applicant under paragraph (2) for the purpose of determining whether an action referred to in subparagraph (B)(iii) should be brought. The document providing the offer of confidential access shall contain such restrictions as to persons entitled to access, and on the use and disposition of any information accessed, as would apply had a protective order been entered for the purpose of protecting trade secrets and other confidential business information. A request for access to an application under an offer of confidential access shall be considered acceptance of the offer of confidential access with the restrictions as to persons entitled to access, and on the use and disposition of any information accessed, contained in the offer of confidential access, and those restrictions and other terms of the offer of confidential access shall be considered terms of an enforceable contract. Any person provided an offer of confidential access shall review the application for the sole and limited purpose of evaluating possible infringement of the patent that is the subject of the certification under paragraph (2)(A)(vii)(IV) and for no other purpose, and may not disclose information of no relevance to any issue of patent infringement to any person other than a person provided an offer of confidential access. Further, the application may be redacted by the applicant to remove any information of no relevance to any issue of patent infringement.

(ii) Counterclaim to infringement action.—

(I) In general.—If an owner of the patent or the holder of the approved application under subsection (b) for the drug that is claimed by the patent or a use of which is claimed by the patent brings a patent infringement action against the applicant, the applicant may assert a counterclaim seeking an order requiring the holder to correct or delete the patent information submitted by the holder under subsection (b) or (c) on the ground that the patent does not claim either—

(aa) the drug for which the application was approved; or

(bb) an approved method of using the drug.

(II) No independent cause of action.—Subclause (I) does not authorize the assertion of a claim described in subclause (I) in any civil action or proceeding other than a counterclaim described in subclause (I).

(iii) No damages.—An applicant shall not be entitled to damages in a civil action under clause (i) or a counterclaim under clause (ii).

(D) Forfeiture of 180-day exclusivity period.—

(i) DEFINITION OF FORFEITURE EVENT.—In this subparagraph, the term "forfeiture event", with respect to an application under this subsection, means the occurrence of any of the following:

(I) FAILURE TO MARKET.—The first applicant fails to market the drug by the later of—

(aa) the earlier of the date that is—

(AA) 75 days after the date on which the approval of the application of the first applicant is made effective under subparagraph (B)(iii); or

(BB) 30 months after the date of submission of the application of the first applicant; or

(bb) with respect to the first applicant or any other applicant (which other applicant has received tentative approval), the date that is 75 days after the date as of which, as to each of the patents with respect to which the first applicant submitted and lawfully maintained a certification qualifying the first applicant for the 180-day exclusivity period under subparagraph (B)(iv), at least 1 of the following has occurred:

(AA) In an infringement action brought against that applicant with respect to the patent or in a declaratory judgment action brought by that applicant with respect to the patent, a court enters a final decision from which no appeal (other than a petition to the Supreme Court for a writ of certiorari) has been or can be taken that the patent is invalid or not infringed.

(BB) In an infringement action or a declaratory judgment action described in subitem (AA), a court signs a settlement order or consent decree that enters a final judgment that includes a finding that the patent is invalid or not infringed.

(CC) The patent information submitted under subsection (b) or (c) is withdrawn by the holder of the application approved under subsection (b).

(II) WITHDRAWAL OF APPLICATION.—The first applicant withdraws the application or the Secretary considers the application to have been withdrawn as a result of a determination by the Secretary that the application does not meet the requirements for approval under paragraph (4).

(III) AMENDMENT OF CERTIFICATION.—The first applicant amends or withdraws the certification for all of the patents with respect to which that applicant submitted a certification qualifying the applicant for the 180-day exclusivity period.

(IV) FAILURE TO OBTAIN TENTATIVE APPROVAL.—The first applicant fails to obtain tentative approval of the application within 30 months after the date on which the application is filed, unless the failure is caused by a change in or a review of the requirements for approval of the application imposed after the date on which the application is filed.

(V) AGREEMENT WITH ANOTHER APPLICANT, THE LISTED DRUG APPLICATION HOLDER, OR A PATENT OWNER.—The first applicant enters into an agreement with another applicant under this subsection for the drug, the holder of the application for the listed drug, or an owner of the patent that is the subject of the certification under paragraph (2)(A)(vii)(IV), the Federal Trade Commission or the Attorney General files a complaint, and there is a final decision of the Federal Trade Commission or the court with regard to the complaint from which no appeal (other than a petition to the Supreme Court for a writ of certiorari) has been or can be taken that the agreement has violated the antitrust laws (as defined in section 12 of title 15, except that the term includes section 45 of title 15 to the extent that that section applies to unfair methods of competition).

(VI) EXPIRATION OF ALL PATENTS.—All of the patents as to which the applicant submitted a certification qualifying it for the 180-day exclusivity period have expired.

(ii) FORFEITURE.—The 180-day exclusivity period described in subparagraph (B)(iv) shall be forfeited by a first applicant if a forfeiture event occurs with respect to that first applicant.

(iii) SUBSEQUENT APPLICANT.—If all first applicants forfeit the 180-day exclusivity period under clause (ii)—

(I) approval of any application containing a certification described in paragraph (2)(A)(vii)(IV) shall be made effective in accordance with subparagraph (B)(iii); and

(II) no applicant shall be eligible for a 180-day exclusivity period.

(iv) SPECIAL FORFEITURE RULE FOR COMPETITIVE GENERIC THERAPY.—The 180-day exclusivity period described in subparagraph (B)(v) shall be forfeited by a first approved applicant if the applicant fails to market the competitive generic therapy within 75 days after the date on which the approval of the first approved applicant's application for the competitive generic therapy is made effective.

(E) If the Secretary decides to disapprove an application, the Secretary shall give the applicant notice of an opportunity for a hearing before the Secretary on the question of whether such application is approvable. If the applicant elects to accept the opportunity for hearing by written request within thirty days after such notice, such hearing shall commence not more than ninety days after the expiration of such thirty days unless the Secretary and the applicant otherwise agree. Any such hearing shall thereafter be conducted on an expedited basis and the Secretary's order thereon shall be issued within ninety days after the date fixed by the Secretary for filing final briefs.

(F)(i) Repealed. Pub. L. 117–9, §1(b)(1)(B), Apr. 23, 2021, 135 Stat. 258.

(ii) If an application submitted under subsection (b) for a drug, no active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations)) of which has been approved in any other application under subsection (b), is approved after September 24, 1984, no application may be submitted under this subsection which refers to the drug for which the subsection (b) application was submitted before the expiration of five years from the date of the approval of the application under subsection (b), except that such an application may be submitted under this subsection after the expiration of four years from the date of the approval of the subsection (b) application if it contains a certification of patent invalidity or noninfringement described in subclause (IV) of paragraph (2)(A)(vii). The approval of such an application shall be made effective in accordance with subparagraph (B) except that, if an action for patent infringement is commenced during the one-year period beginning forty-eight months after the date of the approval of the subsection (b) application, the thirty-month period referred to in subparagraph (B)(iii) shall be extended by such amount of time (if any) which is required for seven and one-half years to have elapsed from the date of approval of the subsection (b) application.

(iii) If an application submitted under subsection (b) for a drug, which includes an active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations)) that has been approved in another application approved under subsection (b), is approved after September 24, 1984, and if such application contains reports of new clinical investigations (other than bioavailability studies) essential to the approval of the application and conducted or sponsored by the applicant, the Secretary may not make the approval of an application submitted under this subsection for the conditions of approval of such drug in the subsection (b) application effective before the expiration of three years from the date of the approval of the application under subsection (b) for such drug.

(iv) If a supplement to an application approved under subsection (b) is approved after September 24, 1984, and the supplement contains reports of new clinical investigations (other than bioavailability studies) essential to the approval of the supplement and conducted or sponsored by the person submitting the supplement, the Secretary may not make the approval of an application submitted under this subsection for a change approved in the supplement effective before the expiration of three years from the date of the approval of the supplement under subsection (b).

(v) If an application (or supplement to an application) submitted under subsection (b) for a drug, which includes an active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations)) that has been approved in another application under subsection (b), was approved during the period beginning January 1, 1982, and ending on September 24, 1984, the Secretary may not make the approval of an application submitted under this subsection which refers to the drug for which the subsection (b) application was submitted or which refers to a change approved in a supplement to the subsection (b) application effective before the expiration of two years from September 24, 1984.

(6) If a drug approved under this subsection refers in its approved application to a drug the approval of which was withdrawn or suspended for grounds described in the first sentence of subsection (e) or was withdrawn or suspended under this paragraph or which, as determined by the Secretary, has been withdrawn from sale for safety or effectiveness reasons, the approval of the drug under this subsection shall be withdrawn or suspended—

(A) for the same period as the withdrawal or suspension under subsection (e) or this paragraph, or

(B) if the listed drug has been withdrawn from sale, for the period of withdrawal from sale or, if earlier, the period ending on the date the Secretary determines that the withdrawal from sale is not for safety or effectiveness reasons.

(7)(A)(i) Within sixty days of September 24, 1984, the Secretary shall publish and make available to the public—

(I) a list in alphabetical order of the official and proprietary name of each drug which has been approved for safety and effectiveness under subsection (c) before September 24, 1984;

(II) the date of approval if the drug is approved after 1981 and the number of the application which was approved; and

(III) whether in vitro or in vivo bioequivalence studies, or both such studies, are required for applications filed under this subsection which will refer to the drug published.

(ii) Every thirty days after the publication of the first list under clause (i) the Secretary shall revise the list to include each drug which has been approved for safety and effectiveness under subsection (c) or approved under this subsection during the thirty-day period.

(iii) When patent information submitted under subsection (c) respecting a drug included on the list is to be published by the Secretary, the Secretary shall, in revisions made under clause (ii), include such information for such drug.

(iv) For each drug included on the list, the Secretary shall specify any exclusivity period that is applicable, for which the Secretary has determined the expiration date, and for which such period has not yet expired, under—

(I) clause (ii), (iii), or (iv) of subsection (c)(3)(E);

(II) clause (iv) or (v) of paragraph (5)(B);

(III) clause (ii), (iii), or (iv) of paragraph (5)(F);

(IV) section 355a of this title;

(V) section 355f of this title;

(VI) section 360cc(a) of this title; or

(VII) subsection (u).

(B) A drug approved for safety and effectiveness under subsection (c) or approved under this subsection shall, for purposes of this subsection, be considered to have been published under subparagraph (A) on the date of its approval or September 24, 1984, whichever is later.

(C) If the approval of a drug was withdrawn or suspended for grounds described in the first sentence of subsection (e) or was withdrawn or suspended under paragraph (6) or if the Secretary determines that a drug has been withdrawn from sale for safety or effectiveness reasons, it may not be published in the list under subparagraph (A) or, if the withdrawal or suspension occurred after its publication in such list, it shall be immediately removed from such list—

(i) for the same period as the withdrawal or suspension under subsection (e) or paragraph (6), or

(ii) if the listed drug has been withdrawn from sale, for the period of withdrawal from sale or, if earlier, the period ending on the date the Secretary determines that the withdrawal from sale is not for safety or effectiveness reasons.

A notice of the removal shall be published in the Federal Register.

(D) In the case of a listed drug for which the list under subparagraph (A)(i) includes a patent for such drug, and any claim of the patent has been cancelled or invalidated pursuant to a final decision issued by the Patent Trial and Appeal Board of the United States Patent and Trademark Office or by a court, from which no appeal has been, or can be, taken, if the holder of the applicable application approved under subsection (c) determines that a patent for such drug, or any patent information for such drug, no longer meets the listing requirements under this section—

(i) the holder of such approved application shall notify the Secretary, in writing, within 14 days of such decision of such cancellation or invalidation and request that such patent or patent information, as applicable, be amended or withdrawn in accordance with the decision issued by the Patent Trial and Appeal Board or a court;

(ii) the holder of such approved application shall include in any notification under clause (i) information related to such patent cancellation or invalidation decision and submit such information, including a copy of such decision, to the Secretary; and

(iii) the Secretary shall, in response to a notification under clause (i), amend or remove patent or patent information in accordance with the relevant decision from the Patent Trial and Appeals Board or court, as applicable, except that the Secretary shall not remove from the list any patent or patent information before the expiration of any 180-day exclusivity period under paragraph (5)(B)(iv) that relies on a certification described in paragraph (2)(A)(vii)(IV).

(8) For purposes of this subsection:

(A)(i) The term "bioavailability" means the rate and extent to which the active ingredient or therapeutic ingredient is absorbed from a drug and becomes available at the site of drug action.

(ii) For a drug that is not intended to be absorbed into the bloodstream, the Secretary may assess bioavailability by scientifically valid measurements intended to reflect the rate and extent to which the active ingredient or therapeutic ingredient becomes available at the site of drug action.

(B) A drug shall be considered to be bioequivalent to a listed drug if—

(i) the rate and extent of absorption of the drug do not show a significant difference from the rate and extent of absorption of the listed drug when administered at the same molar dose of the therapeutic ingredient under similar experimental conditions in either a single dose or multiple doses; or

(ii) the extent of absorption of the drug does not show a significant difference from the extent of absorption of the listed drug when administered at the same molar dose of the therapeutic ingredient under similar experimental conditions in either a single dose or multiple doses and the difference from the listed drug in the rate of absorption of the drug is intentional, is reflected in its proposed labeling, is not essential to the attainment of effective body drug concentrations on chronic use, and is considered medically insignificant for the drug.

(C) For a drug that is not intended to be absorbed into the bloodstream, the Secretary may establish alternative, scientifically valid methods to show bioequivalence if the alternative methods are expected to detect a significant difference between the drug and the listed drug in safety and therapeutic effect.

(9) The Secretary shall, with respect to each application submitted under this subsection, maintain a record of—

(A) the name of the applicant,

(B) the name of the drug covered by the application,

(C) the name of each person to whom the review of the chemistry of the application was assigned and the date of such assignment, and

(D) the name of each person to whom the bioequivalence review for such application was assigned and the date of such assignment.

The information the Secretary is required to maintain under this paragraph with respect to an application submitted under this subsection shall be made available to the public after the approval of such application.

(10)(A) If the proposed labeling of a drug that is the subject of an application under this subsection differs from the listed drug due to a labeling revision described under clause (i), the drug that is the subject of such application shall, notwithstanding any other provision of this chapter, be eligible for approval and shall not be considered misbranded under section 352 of this title if—

(i) the application is otherwise eligible for approval under this subsection but for expiration of patent, an exclusivity period, or of a delay in approval described in paragraph (5)(B)(iii), and a revision to the labeling of the listed drug has been approved by the Secretary within 60 days of such expiration;

(ii) the labeling revision described under clause (i) does not include a change to the "Warnings" section of the labeling;

(iii) the sponsor of the application under this subsection agrees to submit revised labeling of the drug that is the subject of such application not later than 60 days after the notification of any changes to such

labeling required by the Secretary; and

(iv) such application otherwise meets the applicable requirements for approval under this subsection.

(B) If, after a labeling revision described in subparagraph (A)(i), the Secretary determines that the continued presence in interstate commerce of the labeling of the listed drug (as in effect before the revision described in subparagraph (A)(i)) adversely impacts the safe use of the drug, no application under this subsection shall be eligible for approval with such labeling.

(11)(A) Subject to subparagraph (B), the Secretary shall prioritize the review of, and act within 8 months of the date of the submission of, an original abbreviated new drug application submitted for review under this subsection that is for a drug—

(i) for which there are not more than 3 approved drug products listed under paragraph (7) and for which there are no blocking patents and exclusivities; or

(ii) that has been included on the list under section 356e of this title.

(B) To qualify for priority review under this paragraph, not later than 60 days prior to the submission of an application described in subparagraph (A) or that the Secretary may prioritize pursuant to subparagraph (D), the applicant shall provide complete, accurate information regarding facilities involved in manufacturing processes and testing of the drug that is the subject of the application, including facilities in corresponding Type II active pharmaceutical ingredients drug master files referenced in an application and sites or organizations involved in bioequivalence and clinical studies used to support the application, to enable the Secretary to make a determination regarding whether an inspection of a facility is necessary. Such information shall include the relevant (as determined by the Secretary) sections of such application, which shall be unchanged relative to the date of the submission of such application, except to the extent that a change is made to such information to exclude a facility that was not used to generate data to meet any application requirements for such submission and that is not the only facility intended to conduct one or more unit operations in commercial production. Information provided by an applicant under this subparagraph shall not be considered the submission of an application under this subsection.

(C) The Secretary may expedite an inspection or reinspection under section 374 of this title of an establishment that proposes to manufacture a drug described in subparagraph (A).

(D) Nothing in this paragraph shall prevent the Secretary from prioritizing the review of other applications as the Secretary determines appropriate.

(12) The Secretary shall publish on the internet website of the Food and Drug Administration, and update at least once every 6 months, a list of all drugs approved under subsection (c) for which all patents and periods of exclusivity under this chapter have expired and for which no application has been approved under this subsection.

(13) Upon the request of an applicant regarding one or more specified pending applications under this subsection, the Secretary shall, as appropriate, provide review status updates indicating the categorical status of the applications by each relevant review discipline.

(k) Records and reports; required information; regulations and orders; access to records

(1) In the case of any drug for which an approval of an application filed under subsection (b) or (j) is in effect, the applicant shall establish and maintain such records, and make such reports to the Secretary, of data relating to clinical experience and other data or information, received or otherwise obtained by such applicant with respect to such drug, as the Secretary may by general regulation, or by order with respect to such application, prescribe on the basis of a finding that such records and reports are necessary in order to enable the Secretary to determine, or facilitate a determination, whether there is or may be ground for invoking subsection (e). Regulations and orders issued under this subsection and under subsection (i) shall have due regard for the professional ethics of the medical profession and the interests of patients and shall provide, where the Secretary deems it to be appropriate, for the examination, upon request, by the persons to whom such regulations or orders are applicable, of similar information received or otherwise obtained by the Secretary.

(2) Every person required under this section to maintain records, and every person in charge or custody thereof, shall, upon request of an officer or employee designated by the Secretary, permit such officer or employee at all reasonable times to have access to and copy and verify such records.

(3) ACTIVE POSTMARKET RISK IDENTIFICATION.—

(A) DEFINITION.—In this paragraph, the term "data" refers to information with respect to a drug approved under this section or under section 262 of title 42, including claims data, patient survey data, standardized analytic files that allow for the pooling and analysis of data from disparate data environments, and any other data deemed appropriate by the Secretary.

(B) DEVELOPMENT OF POSTMARKET RISK IDENTIFICATION AND ANALYSIS METHODS.—The Secretary shall, not later than 2 years after September 27, 2007, in collaboration with public, academic, and private entities—

(i) develop methods to obtain access to disparate data sources including the data sources specified in subparagraph (C);

(ii) develop validated methods for the establishment of a postmarket risk identification and analysis system to link and analyze safety data from multiple sources, with the goals of including, in aggregate—

(I) at least 25,000,000 patients by July 1, 2010; and

(II) at least 100,000,000 patients by July 1, 2012; and

(iii) convene a committee of experts, including individuals who are recognized in the field of protecting data privacy and security, to make recommendations to the Secretary on the development of tools and methods for the ethical and scientific uses for, and communication of, postmarketing data specified under subparagraph (C), including recommendations on the development of effective research methods for the study of drug safety questions.

(C) ESTABLISHMENT OF THE POSTMARKET RISK IDENTIFICATION AND ANALYSIS SYSTEM.—

(i) IN GENERAL.—The Secretary shall, not later than 1 year after the development of the risk identification and analysis methods under subparagraph (B), establish and maintain procedures—

(I) for risk identification and analysis based on electronic health data, in compliance with the regulations promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996, and in a manner that does not disclose individually identifiable health information in violation of paragraph (4)(B);

(II) for the reporting (in a standardized form) of data on all serious adverse drug experiences (as defined in section 355–1(b) of this title) submitted to the Secretary under paragraph (1), and those adverse events submitted by patients, providers, and drug sponsors, when appropriate;

(III) to provide for active adverse event surveillance using the following data sources, as available:

(aa) Federal health-related electronic data (such as data from the Medicare program and the health systems of the Department of Veterans Affairs);

(bb) private sector health-related electronic data (such as pharmaceutical purchase data and health insurance claims data); and

(cc) other data as the Secretary deems necessary to create a robust system to identify adverse events and potential drug safety signals;

(IV) to identify certain trends and patterns with respect to data accessed by the system;

(V) to provide regular reports to the Secretary concerning adverse event trends, adverse event patterns, incidence and prevalence of adverse events, and other information the Secretary determines appropriate, which may include data on comparative national adverse event trends; and

(VI) to enable the program to export data in a form appropriate for further aggregation, statistical analysis, and reporting.

(ii) TIMELINESS OF REPORTING.—The procedures established under clause (i) shall ensure that such data are accessed, analyzed, and reported in a timely, routine, and systematic manner, taking into consideration the need for data completeness, coding, cleansing, and standardized analysis and transmission.

(iii) PRIVATE SECTOR RESOURCES.—To ensure the establishment of the active postmarket risk identification and analysis system under this subsection not later than 1 year after the development of

the risk identification and analysis methods under subparagraph (B), as required under clause (i), the Secretary may, on a temporary or permanent basis, implement systems or products developed by private entities.

(iv) COMPLEMENTARY APPROACHES.—To the extent the active postmarket risk identification and analysis system under this subsection is not sufficient to gather data and information relevant to a priority drug safety question, the Secretary shall develop, support, and participate in complementary approaches to gather and analyze such data and information, including—

(I) approaches that are complementary with respect to assessing the safety of use of a drug in domestic populations not included, or underrepresented, in the trials used to approve the drug (such as older people, people with comorbidities, pregnant women, or children); and

(II) existing approaches such as the Vaccine Adverse Event Reporting System and the Vaccine Safety Datalink or successor databases.

(v) AUTHORITY FOR CONTRACTS.—The Secretary may enter into contracts with public and private entities to fulfill the requirements of this subparagraph.

(4) ADVANCED ANALYSIS OF DRUG SAFETY DATA.—

(A) PURPOSE.—The Secretary shall establish collaborations with public, academic, and private entities, which may include the Centers for Education and Research on Therapeutics under section 299b–1 of title 42, to provide for advanced analysis of drug safety data described in paragraph (3)(C) and other information that is publicly available or is provided by the Secretary, in order to—

(i) improve the quality and efficiency of postmarket drug safety risk-benefit analysis;

(ii) provide the Secretary with routine access to outside expertise to study advanced drug safety questions; and

(iii) enhance the ability of the Secretary to make timely assessments based on drug safety data.

(B) PRIVACY.—Such analysis shall not disclose individually identifiable health information when presenting such drug safety signals and trends or when responding to inquiries regarding such drug safety signals and trends.

(C) PUBLIC PROCESS FOR PRIORITY QUESTIONS.—At least biannually, the Secretary shall seek recommendations from the Drug Safety and Risk Management Advisory Committee (or any successor committee) and from other advisory committees, as appropriate, to the Food and Drug Administration on—

(i) priority drug safety questions; and

(ii) mechanisms for answering such questions, including through—

(I) active risk identification under paragraph (3); and

(II) when such risk identification is not sufficient, postapproval studies and clinical trials under subsection (o)(3).

(D) PROCEDURES FOR THE DEVELOPMENT OF DRUG SAFETY COLLABORATIONS.—

(i) IN GENERAL.—Not later than 180 days after the date of the establishment of the active postmarket risk identification and analysis system under this subsection, the Secretary shall establish and implement procedures under which the Secretary may routinely contract with one or more qualified entities to—

(I) classify, analyze, or aggregate data described in paragraph (3)(C) and information that is publicly available or is provided by the Secretary;

(II) allow for prompt investigation of priority drug safety questions, including—

(aa) unresolved safety questions for drugs or classes of drugs; and

(bb) for a newly-approved drugs,[2] safety signals from clinical trials used to approve the drug and other preapproval trials; rare, serious drug side effects; and the safety of use in domestic populations not included, or underrepresented, in the trials used to approve the drug (such as older people, people with comorbidities, pregnant women, or children);

(III) perform advanced research and analysis on identified drug safety risks;

(IV) focus postapproval studies and clinical trials under subsection (o)(3) more effectively on cases for which reports under paragraph (1) and other safety signal detection is not sufficient to resolve whether there is an elevated risk of a serious adverse event associated with the use of a drug; and

(V) carry out other activities as the Secretary deems necessary to carry out the purposes of this paragraph.

(ii) REQUEST FOR SPECIFIC METHODOLOGY.—The procedures described in clause (i) shall permit the Secretary to request that a specific methodology be used by the qualified entity. The qualified entity shall work with the Secretary to finalize the methodology to be used.

(E) USE OF ANALYSES.—The Secretary shall provide the analyses described in this paragraph, including the methods and results of such analyses, about a drug to the sponsor or sponsors of such drug.

(F) QUALIFIED ENTITIES.—

(i) IN GENERAL.—The Secretary shall enter into contracts with a sufficient number of qualified entities to develop and provide information to the Secretary in a timely manner.

(ii) QUALIFICATION.—The Secretary shall enter into a contract with an entity under clause (i) only if the Secretary determines that the entity has a significant presence in the United States and has one or more of the following qualifications:

(I) The research, statistical, epidemiologic, or clinical capability and expertise to conduct and complete the activities under this paragraph, including the capability and expertise to provide the Secretary de-identified data consistent with the requirements of this subsection.

(II) An information technology infrastructure in place to support electronic data and operational standards to provide security for such data.

(III) Experience with, and expertise on, the development of drug safety and effectiveness research using electronic population data.

(IV) An understanding of drug development or risk/benefit balancing in a clinical setting.

(V) Other expertise which the Secretary deems necessary to fulfill the activities under this paragraph.

(G) CONTRACT REQUIREMENTS.—Each contract with a qualified entity under subparagraph (F)(i) shall contain the following requirements:

(i) ENSURING PRIVACY.—The qualified entity shall ensure that the entity will not use data under this subsection in a manner that—

(I) violates the regulations promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996;

(II) violates sections 552 or 552a of title 5 with regard to the privacy of individually-identifiable beneficiary health information; or

(III) discloses individually identifiable health information when presenting drug safety signals and trends or when responding to inquiries regarding drug safety signals and trends.

Nothing in this clause prohibits lawful disclosure for other purposes.

(ii) COMPONENT OF ANOTHER ORGANIZATION.—If a qualified entity is a component of another organization—

(I) the qualified entity shall establish appropriate security measures to maintain the confidentiality and privacy of such data; and

(II) the entity shall not make an unauthorized disclosure of such data to the other components of the organization in breach of such confidentiality and privacy requirement.

(iii) TERMINATION OR NONRENEWAL.—If a contract with a qualified entity under this subparagraph is terminated or not renewed, the following requirements shall apply:

(I) CONFIDENTIALITY AND PRIVACY PROTECTIONS.—The entity shall continue to comply with the confidentiality and privacy requirements under this paragraph with respect to all data disclosed to

the entity.

(II) DISPOSITION OF DATA.—The entity shall return any data disclosed to such entity under this subsection to which it would not otherwise have access or, if returning the data is not practicable, destroy the data.

(H) COMPETITIVE PROCEDURES.—The Secretary shall use competitive procedures (as defined in section 132 of title 41) to enter into contracts under subparagraph (G).

(I) REVIEW OF CONTRACT IN THE EVENT OF A MERGER OR ACQUISITION.—The Secretary shall review the contract with a qualified entity under this paragraph in the event of a merger or acquisition of the entity in order to ensure that the requirements under this paragraph will continue to be met.

(J) COORDINATION.—In carrying out this paragraph, the Secretary shall provide for appropriate communications to the public, scientific, public health, and medical communities, and other key stakeholders, and to the extent practicable shall coordinate with the activities of private entities, professional associations, or other entities that may have sources of drug safety data.

(5) The Secretary shall—

(A) conduct regular screenings of the Adverse Event Reporting System database and post a quarterly report on the Adverse Event Reporting System Web site of any new safety information or potential signal of a serious risk identified by Adverse [3] Event Reporting System within the last quarter; and [4]

(B) on an annual basis, review the entire backlog of postmarket safety commitments to determine which commitments require revision or should be eliminated, report to the Congress on these determinations, and assign start dates and estimated completion dates for such commitments; and

(C) make available on the Internet website of the Food and Drug Administration—

(i) guidelines, developed with input from experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, that detail best practices for drug safety surveillance using the Adverse Event Reporting System; and

(ii) criteria for public posting of adverse event signals.

(l) Public disclosure of safety and effectiveness data and action package

(1) Safety and effectiveness data and information which has been submitted in an application under subsection (b) for a drug and which has not previously been disclosed to the public shall be made available to the public, upon request, unless extraordinary circumstances are shown—

(A) if no work is being or will be undertaken to have the application approved,

(B) if the Secretary has determined that the application is not approvable and all legal appeals have been exhausted,

(C) if approval of the application under subsection (c) is withdrawn and all legal appeals have been exhausted,

(D) if the Secretary has determined that such drug is not a new drug, or

(E) upon the effective date of the approval of the first application under subsection (j) which refers to such drug or upon the date upon which the approval of an application under subsection (j) which refers to such drug could be made effective if such an application had been submitted.

(2) ACTION PACKAGE FOR APPROVAL.—

(A) ACTION PACKAGE.—The Secretary shall publish the action package for approval of an application under subsection (b) or section 262 of title 42 on the Internet Web site of the Food and Drug Administration—

(i) not later than 30 days after the date of approval of such applications—

(I) for a drug, no active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations)) of which has been approved in any other application under this section; or

(II) for a biological product, no active ingredient of which has been approved in any other application under section 262 of title 42; and

(ii) not later than 30 days after the third request for such action package for approval received under section 552 of title 5 for any other drug or biological product.

(B) IMMEDIATE PUBLICATION OF SUMMARY REVIEW.—Notwithstanding subparagraph (A), the Secretary shall publish, on the Internet Web site of the Food and Drug Administration, the materials described in subparagraph (C)(iv) not later than 48 hours after the date of approval of the drug, except where such materials require redaction by the Secretary.

(C) CONTENTS.—An action package for approval of an application under subparagraph (A) shall be dated and shall include the following:

(i) Documents generated by the Food and Drug Administration related to review of the application.

(ii) Documents pertaining to the format and content of the application generated during drug development.

(iii) Labeling submitted by the applicant.

(iv) A summary review that documents conclusions from all reviewing disciplines about the drug, noting any critical issues and disagreements with the applicant and within the review team and how they were resolved, recommendations for action, and an explanation of any nonconcurrence with review conclusions.

(v) The Division Director and Office Director's decision document which includes—

(I) a brief statement of concurrence with the summary review;

(II) a separate review or addendum to the review if disagreeing with the summary review; and

(III) a separate review or addendum to the review to add further analysis.

(vi) Identification by name of each officer or employee of the Food and Drug Administration who —

(I) participated in the decision to approve the application; and

(II) consents to have his or her name included in the package.

(D) REVIEW.—A scientific review of an application is considered the work of the reviewer and shall not be altered by management or the reviewer once final.

(E) CONFIDENTIAL INFORMATION.—This paragraph does not authorize the disclosure of any trade secret, confidential commercial or financial information, or other matter listed in section 552(b) of title 5.

(m) "Patent" defined

For purposes of this section, the term "patent" means a patent issued by the United States Patent and Trademark Office.

(n) Scientific advisory panels

(1) For the purpose of providing expert scientific advice and recommendations to the Secretary regarding a clinical investigation of a drug or the approval for marketing of a drug under this section or section 262 of title 42, the Secretary shall establish panels of experts or use panels of experts established before November 21, 1997, or both.

(2) The Secretary may delegate the appointment and oversight authority granted under section 394 of this title to a director of a center or successor entity within the Food and Drug Administration.

(3) The Secretary shall make appointments to each panel established under paragraph (1) so that each panel shall consist of—

(A) members who are qualified by training and experience to evaluate the safety and effectiveness of the drugs to be referred to the panel and who, to the extent feasible, possess skill and experience in the development, manufacture, or utilization of such drugs;

(B) members with diverse expertise in such fields as clinical and administrative medicine, pharmacy, pharmacology, pharmacoeconomics, biological and physical sciences, and other related professions;

(C) a representative of consumer interests, and a representative of interests of the drug manufacturing industry not directly affected by the matter to be brought before the panel; and

(D) two or more members who are specialists or have other expertise in the particular disease or condition for which the drug under review is proposed to be indicated.

Scientific, trade, and consumer organizations shall be afforded an opportunity to nominate individuals for appointment to the panels. No individual who is in the regular full-time employ of the United States and engaged in the administration of this chapter may be a voting member of any panel. The Secretary shall designate one of the members of each panel to serve as chairman thereof.

(4) The Secretary shall, as appropriate, provide education and training to each new panel member before such member participates in a panel's activities, including education regarding requirements under this chapter and related regulations of the Secretary, and the administrative processes and procedures related to panel meetings.

(5) Panel members (other than officers or employees of the United States), while attending meetings or conferences of a panel or otherwise engaged in its business, shall be entitled to receive compensation for each day so engaged, including traveltime, at rates to be fixed by the Secretary, but not to exceed the daily equivalent of the rate in effect for positions classified above grade GS–15 of the General Schedule. While serving away from their homes or regular places of business, panel members may be allowed travel expenses (including per diem in lieu of subsistence) as authorized by section 5703 of title 5, for persons in the Government service employed intermittently.

(6) The Secretary shall ensure that scientific advisory panels meet regularly and at appropriate intervals so that any matter to be reviewed by such a panel can be presented to the panel not more than 60 days after the matter is ready for such review. Meetings of the panel may be held using electronic communication to convene the meetings.

(7) Within 90 days after a scientific advisory panel makes recommendations on any matter under its review, the Food and Drug Administration official responsible for the matter shall review the conclusions and recommendations of the panel, and notify the affected persons of the final decision on the matter, or of the reasons that no such decision has been reached. Each such final decision shall be documented including the rationale for the decision.

(o) Postmarket studies and clinical trials; labeling

(1) In general

A responsible person may not introduce or deliver for introduction into interstate commerce the new drug involved if the person is in violation of a requirement established under paragraph (3) or (4) with respect to the drug.

(2) Definitions

For purposes of this subsection:

(A) Responsible person

The term "responsible person" means a person who—

(i) has submitted to the Secretary a covered application that is pending; or

(ii) is the holder of an approved covered application.

(B) Covered application

The term "covered application" means—

(i) an application under subsection (b) for a drug that is subject to section 353(b) of this title; and

(ii) an application under section 262 of title 42.

(C) New safety information; serious risk

The terms "new safety information", "serious risk", and "signal of a serious risk" have the meanings given such terms in section 355–1(b) of this title.

(3) Studies and clinical trials

(A) In general

For any or all of the purposes specified in subparagraph (B), the Secretary may, subject to subparagraph (D), require a responsible person for a drug to conduct a postapproval study or studies

of the drug, or a postapproval clinical trial or trials of the drug, on the basis of scientific data deemed appropriate by the Secretary, including information regarding chemically-related or pharmacologically-related drugs.

(B) Purposes of study or clinical trial

The purposes referred to in this subparagraph with respect to a postapproval study or postapproval clinical trial are the following:

(i) To assess a known serious risk related to the use of the drug involved.

(ii) To assess signals of serious risk related to the use of the drug.

(iii) To identify an unexpected serious risk when available data indicates the potential for a serious risk.

(C) Establishment of requirement after approval of covered application

The Secretary may require a postapproval study or studies or postapproval clinical trial or trials for a drug for which an approved covered application is in effect as of the date on which the Secretary seeks to establish such requirement only if the Secretary becomes aware of new safety information.

(D) Determination by Secretary

(i) Postapproval studies

The Secretary may not require the responsible person to conduct a study under this paragraph, unless the Secretary makes a determination that the reports under subsection (k)(1) and the active postmarket risk identification and analysis system as available under subsection (k)(3) will not be sufficient to meet the purposes set forth in subparagraph (B).

(ii) Postapproval clinical trials

The Secretary may not require the responsible person to conduct a clinical trial under this paragraph, unless the Secretary makes a determination that a postapproval study or studies will not be sufficient to meet the purposes set forth in subparagraph (B).

(E) Notification; timetables; periodic reports

(i) Notification

The Secretary shall notify the responsible person regarding a requirement under this paragraph to conduct a postapproval study or clinical trial by the target dates for communication of feedback from the review team to the responsible person regarding proposed labeling and postmarketing study commitments as set forth in the letters described in section 101(c) of the Food and Drug Administration Amendments Act of 2007.

(ii) Timetable; periodic reports

For each study or clinical trial required to be conducted under this paragraph, the Secretary shall require that the responsible person submit a timetable for completion of the study or clinical trial. With respect to each study required to be conducted under this paragraph or otherwise undertaken by the responsible person to investigate a safety issue, the Secretary shall require the responsible person to periodically report to the Secretary on the status of such study including whether any difficulties in completing the study have been encountered. With respect to each clinical trial required to be conducted under this paragraph or otherwise undertaken by the responsible person to investigate a safety issue, the Secretary shall require the responsible person to periodically report to the Secretary on the status of such clinical trial including whether enrollment has begun, the number of participants enrolled, the expected completion date, whether any difficulties completing the clinical trial have been encountered, and registration information with respect to the requirements under section 282(j) of title 42. If the responsible person fails to comply with such timetable or violates any other requirement of this subparagraph, the responsible person shall be considered in violation of this subsection, unless the responsible person demonstrates good cause for such noncompliance or such other violation. The Secretary shall determine what constitutes good cause under the preceding sentence.

(F) Dispute resolution

The responsible person may appeal a requirement to conduct a study or clinical trial under this paragraph using dispute resolution procedures established by the Secretary in regulation and guidance.

(4) Safety labeling changes requested by Secretary

(A) New safety or new effectiveness information

If the Secretary becomes aware of new information, including any new safety information or information related to reduced effectiveness, that the Secretary determines should be included in the labeling of the drug, the Secretary shall promptly notify the responsible person or, if the same drug approved under subsection (b) is not currently marketed, the holder of an approved application under subsection (j).

(B) Response to notification

Following notification pursuant to subparagraph (A), the responsible person or the holder of the approved application under subsection (j) shall within 30 days—

(i) submit a supplement proposing changes to the approved labeling to reflect the new safety information, including changes to boxed warnings, contraindications, warnings, precautions, or adverse reactions, or new effectiveness information; or

(ii) notify the Secretary that the responsible person or the holder of the approved application under subsection (j) does not believe a labeling change is warranted and submit a statement detailing the reasons why such a change is not warranted.

(C) Review

Upon receipt of such supplement, the Secretary shall promptly review and act upon such supplement. If the Secretary disagrees with the proposed changes in the supplement or with the statement setting forth the reasons why no labeling change is necessary, the Secretary shall initiate discussions to reach agreement on whether the labeling for the drug should be modified to reflect the new safety or new effectiveness information, and if so, the contents of such labeling changes.

(D) Discussions

Such discussions shall not extend for more than 30 days after the response to the notification under subparagraph (B), unless the Secretary determines an extension of such discussion period is warranted.

(E) Order

Within 15 days of the conclusion of the discussions under subparagraph (D), the Secretary may issue an order directing the responsible person or the holder of the approved application under subsection (j) to make such a labeling change as the Secretary deems appropriate to address the new safety or new effectiveness information. Within 15 days of such an order, the responsible person or the holder of the approved application under subsection (j) shall submit a supplement containing the labeling change.

(F) Dispute resolution

Within 5 days of receiving an order under subparagraph (E), the responsible person or the holder of the approved application under subsection (j) may appeal using dispute resolution procedures established by the Secretary in regulation and guidance.

(G) Violation

If the responsible person or the holder of the approved application under subsection (j) has not submitted a supplement within 15 days of the date of such order under subparagraph (E), and there is no appeal or dispute resolution proceeding pending, the responsible person or holder shall be considered to be in violation of this subsection. If at the conclusion of any dispute resolution procedures the Secretary determines that a supplement must be submitted and such a supplement is not submitted within 15 days of the date of that determination, the responsible person or holder shall be in violation of this subsection.

(H) Public health threat

Notwithstanding subparagraphs (A) through (F), if the Secretary concludes that such a labeling change is necessary to protect the public health, the Secretary may accelerate the timelines in such subparagraphs.

(I) Rule of construction

This paragraph shall not be construed to affect the responsibility of the responsible person or the holder of the approved application under subsection (j) to maintain its label in accordance with existing requirements, including subpart B of part 201 and sections 314.70 and 601.12 of title 21, Code of Federal Regulations (or any successor regulations).

(5) Non-delegation

Determinations by the Secretary under this subsection for a drug shall be made by individuals at or above the level of individuals empowered to approve a drug (such as division directors within the Center for Drug Evaluation and Research).

(p) Risk evaluation and mitigation strategy

(1) In general

A person may not introduce or deliver for introduction into interstate commerce a new drug if—

(A)(i) the application for such drug is approved under subsection (b) or (j) and is subject to section 353(b) of this title; or

(ii) the application for such drug is approved under section 262 of title 42; and

(B) a risk evaluation and mitigation strategy is required under section 355–1 of this title with respect to the drug and the person fails to maintain compliance with the requirements of the approved strategy or with other requirements under section 355–1 of this title, including requirements regarding assessments of approved strategies.

(2) Certain postmarket studies

The failure to conduct a postmarket study under section 356 of this title, subpart H of part 314, or subpart E of part 601 of title 21, Code of Federal Regulations (or any successor regulations), is deemed to be a violation of paragraph (1).

(q) Petitions and civil actions regarding approval of certain applications

(1) In general

(A) Determination

The Secretary shall not delay approval of a pending application submitted under subsection (b)(2) or (j) of this section or section 262(k) of title 42 because of any request to take any form of action relating to the application, either before or during consideration of the request, unless—

(i) the request is in writing and is a petition submitted to the Secretary pursuant to section 10.30 or 10.35 of title 21, Code of Federal Regulations (or any successor regulations); and

(ii) the Secretary determines, upon reviewing the petition, that a delay is necessary to protect the public health.

Consideration of the petition shall be separate and apart from review and approval of any application.

(B) Notification

If the Secretary determines under subparagraph (A) that a delay is necessary with respect to an application, the Secretary shall provide to the applicant, not later than 30 days after making such determination, the following information:

(i) Notification of the fact that a determination under subparagraph (A) has been made.

(ii) If applicable, any clarification or additional data that the applicant should submit to the docket on the petition to allow the Secretary to review the petition promptly.

(iii) A brief summary of the specific substantive issues raised in the petition which form the basis of the determination.

(C) Format

The information described in subparagraph (B) shall be conveyed via either, at the discretion of the Secretary—

(i) a document; or

(ii) a meeting with the applicant involved.

(D) Public disclosure

Any information conveyed by the Secretary under subparagraph (C) shall be considered part of the application and shall be subject to the disclosure requirements applicable to information in such application.

(E) Denial based on intent to delay

If the Secretary determines that a petition or a supplement to the petition was submitted with the primary purpose of delaying the approval of an application and the petition does not on its face raise valid scientific or regulatory issues, the Secretary may deny the petition at any point based on such determination. The Secretary may issue guidance to describe the factors that will be used to determine under this subparagraph whether a petition is submitted with the primary purpose of delaying the approval of an application.

(F) Final agency action

The Secretary shall take final agency action on a petition not later than 150 days after the date on which the petition is submitted. The Secretary shall not extend such period for any reason, including —

(i) any determination made under subparagraph (A);

(ii) the submission of comments relating to the petition or supplemental information supplied by the petitioner; or

(iii) the consent of the petitioner.

(G) Extension of 30-month period

If the filing of an application resulted in first-applicant status under subsection (j)(5)(D)(i)(IV) and approval of the application was delayed because of a petition, the 30-month period under such subsection is deemed to be extended by a period of time equal to the period beginning on the date on which the Secretary received the petition and ending on the date of final agency action on the petition (inclusive of such beginning and ending dates), without regard to whether the Secretary grants, in whole or in part, or denies, in whole or in part, the petition.

(H) Certification

The Secretary shall not consider a petition for review unless the party submitting such petition does so in written form and the subject document is signed and contains the following certification: "I certify that, to my best knowledge and belief: (a) this petition includes all information and views upon which the petition relies; (b) this petition includes representative data and/or information known to the petitioner which are unfavorable to the petition; and (c) I have taken reasonable steps to ensure that any representative data and/or information which are unfavorable to the petition were disclosed to me. I further certify that the information upon which I have based the action requested herein first became known to the party on whose behalf this petition is submitted on or about the following date: _____. If I received or expect to receive payments, including cash and other forms of consideration, to file this information or its contents, I received or expect to receive those payments from the following persons or organizations: _____. I verify under penalty of perjury that the foregoing is true and correct as of the date of the submission of this petition.", with the date on which such information first became known to such party and the names of such persons or organizations inserted in the first and second blank space, respectively.

(I) Verification

The Secretary shall not accept for review any supplemental information or comments on a petition unless the party submitting such information or comments does so in written form and the subject document is signed and contains the following verification: "I certify that, to my best knowledge and belief: (a) I have not intentionally delayed submission of this document or its contents; and (b) the information upon which I have based the action requested herein first became known to me on or

about _____. If I received or expect to receive payments, including cash and other forms of consideration, to file this information or its contents, I received or expect to receive those payments from the following persons or organizations: _____. I verify under penalty of perjury that the foregoing is true and correct as of the date of the submission of this petition.", with the date on which such information first became known to the party and the names of such persons or organizations inserted in the first and second blank space, respectively.

(2) Exhaustion of administrative remedies

(A) Final agency action within 150 days

The Secretary shall be considered to have taken final agency action on a petition if—

(i) during the 150-day period referred to in paragraph (1)(F), the Secretary makes a final decision within the meaning of section 10.45(d) of title 21, Code of Federal Regulations (or any successor regulation); or

(ii) such period expires without the Secretary having made such a final decision.

(B) Dismissal of certain civil actions

If a civil action is filed against the Secretary with respect to any issue raised in the petition before the Secretary has taken final agency action on the petition within the meaning of subparagraph (A), the court shall dismiss without prejudice the action for failure to exhaust administrative remedies.

(C) Administrative record

For purposes of judicial review related to the approval of an application for which a petition under paragraph (1) was submitted, the administrative record regarding any issue raised by the petition shall include—

(i) the petition filed under paragraph (1) and any supplements and comments thereto;

(ii) the Secretary's response to such petition, if issued; and

(iii) other information, as designated by the Secretary, related to the Secretary's determinations regarding the issues raised in such petition, as long as the information was considered by the agency no later than the date of final agency action as defined under subparagraph (2)(A), and regardless of whether the Secretary responded to the petition at or before the approval of the application at issue in the petition.

(3) Annual report on delays in approvals per petitions

The Secretary shall annually submit to the Congress a report that specifies—

(A) the number of applications that were approved during the preceding 12-month period;

(B) the number of such applications whose effective dates were delayed by petitions referred to in paragraph (1) during such period;

(C) the number of days by which such applications were so delayed; and

(D) the number of such petitions that were submitted during such period.

(4) Exceptions

(A) This subsection does not apply to—

(i) a petition that relates solely to the timing of the approval of an application pursuant to subsection (j)(5)(B)(iv); or

(ii) a petition that is made by the sponsor of an application and that seeks only to have the Secretary take or refrain from taking any form of action with respect to that application.

(B) Paragraph (2) does not apply to a petition addressing issues concerning an application submitted pursuant to section 262(k) of title 42.

(5) Definitions

(A) Application

For purposes of this subsection, the term "application" means an application submitted under subsection (b)(2) or (j) of this section or section 262(k) of title 42.

(B) Petition

For purposes of this subsection, other than paragraph (1)(A)(i), the term "petition" means a request described in paragraph (1)(A)(i).

(r) Postmarket drug safety information for patients and providers

(1) Establishment

Not later than 1 year after September 27, 2007, the Secretary shall improve the transparency of information about drugs and allow patients and health care providers better access to information about drugs by developing and maintaining an Internet Web site that—

(A) provides links to drug safety information listed in paragraph (2) for prescription drugs that are approved under this section or licensed under section 262 of title 42; and

(B) improves communication of drug safety information to patients and providers.

(2) Internet Web site

The Secretary shall carry out paragraph (1) by—

(A) developing and maintaining an accessible, consolidated Internet Web site with easily searchable drug safety information, including the information found on United States Government Internet Web sites, such as the United States National Library of Medicine's Daily Med and Medline Plus Web sites, in addition to other such Web sites maintained by the Secretary;

(B) ensuring that the information provided on the Internet Web site is comprehensive and includes, when available and appropriate—

(i) patient labeling and patient packaging inserts;

(ii) a link to a list of each drug, whether approved under this section or licensed under such section 262, for which a Medication Guide, as provided for under part 208 of title 21, Code of Federal Regulations (or any successor regulations), is required;

(iii) a link to the registry and results data bank provided for under subsections (i) and (j) of section 282 of title 42;

(iv) the most recent safety information and alerts issued by the Food and Drug Administration for drugs approved by the Secretary under this section, such as product recalls, warning letters, and import alerts;

(v) publicly available information about implemented RiskMAPs and risk evaluation and mitigation strategies under subsection (o);

(vi) guidance documents and regulations related to drug safety; and

(vii) other material determined appropriate by the Secretary;

(C) providing access to summaries of the assessed and aggregated data collected from the active surveillance infrastructure under subsection (k)(3) to provide information of known and serious side-effects for drugs approved under this section or licensed under such section 262;

(D) preparing and making publicly available on the Internet website established under paragraph (1) best practices for drug safety surveillance activities for drugs approved under this section or section 262 of title 42;

(E) enabling patients, providers, and drug sponsors to submit adverse event reports through the Internet Web site;

(F) providing educational materials for patients and providers about the appropriate means of disposing of expired, damaged, or unusable medications; and

(G) supporting initiatives that the Secretary determines to be useful to fulfill the purposes of the Internet Web site.

(3) Posting of drug labeling

The Secretary shall post on the Internet Web site established under paragraph (1) the approved professional labeling and any required patient labeling of a drug approved under this section or licensed under such section 262 not later than 21 days after the date the drug is approved or licensed, including in a supplemental application with respect to a labeling change.

(4) Private sector resources

To ensure development of the Internet Web site by the date described in paragraph (1), the Secretary may, on a temporary or permanent basis, implement systems or products developed by private entities.

(5) Authority for contracts

The Secretary may enter into contracts with public and private entities to fulfill the requirements of this subsection.

(6) Review

The Advisory Committee on Risk Communication under section 360bbb–6 of this title shall, on a regular basis, perform a comprehensive review and evaluation of the types of risk communication information provided on the Internet Web site established under paragraph (1) and, through other means, shall identify, clarify, and define the purposes and types of information available to facilitate the efficient flow of information to patients and providers, and shall recommend ways for the Food and Drug Administration to work with outside entities to help facilitate the dispensing of risk communication information to patients and providers.

(s) Referral to advisory committee

The Secretary shall—

(1) refer a drug or biological product to a Food and Drug Administration advisory committee for review at a meeting of such advisory committee prior to the approval of such drug or biological if it is —

(A) a drug, no active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations)) of which has been approved in any other application under this section; or

(B) a biological product, no active ingredient of which has been approved in any other application under section 262 of title 42; or

(2) if the Secretary does not refer a drug or biological product described in paragraph (1) to a Food and Drug Administration advisory committee prior to such approval, provide in the action letter on the application for the drug or biological product a summary of the reasons why the Secretary did not refer the drug or biological product to an advisory committee prior to approval.

(t) Database for authorized generic drugs

(1) In general

(A) Publication

The Commissioner shall—

(i) not later than 9 months after September 27, 2007, publish a complete list on the Internet Web site of the Food and Drug Administration of all authorized generic drugs (including drug trade name, brand company manufacturer, and the date the authorized generic drug entered the market); and

(ii) update the list quarterly to include each authorized generic drug included in an annual report submitted to the Secretary by the sponsor of a listed drug during the preceding 3-month period.

(B) Notification

The Commissioner shall notify relevant Federal agencies, including the Centers for Medicare & Medicaid Services and the Federal Trade Commission, when the Commissioner first publishes the information described in subparagraph (A) that the information has been published and that the information will be updated quarterly.

(2) Inclusion

The Commissioner shall include in the list described in paragraph (1) each authorized generic drug included in an annual report submitted to the Secretary by the sponsor of a listed drug after January 1, 1999.

(3) Authorized generic drug

In this section, the term "authorized generic drug" means a listed drug (as that term is used in subsection (j)) that—

(A) has been approved under subsection (c); and

(B) is marketed, sold, or distributed directly or indirectly to retail class of trade under a different labeling, packaging (other than repackaging as the listed drug in blister packs, unit doses, or similar packaging for use in institutions), product code, labeler code, trade name, or trade mark than the listed drug.

(u) Certain drugs containing single enantiomers

(1) In general

For purposes of subsections (c)(3)(E)(ii) and (j)(5)(F)(ii), if an application is submitted under subsection (b) for a non-racemic drug containing as an active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations)) a single enantiomer that is contained in a racemic drug approved in another application under subsection (b), the applicant may, in the application for such non-racemic drug, elect to have the single enantiomer not be considered the same active moiety as that contained in the approved racemic drug, if—

(A)(i) the single enantiomer has not been previously approved except in the approved racemic drug; and

(ii) the application submitted under subsection (b) for such non-racemic drug—

(I) includes full reports of new clinical investigations (other than bioavailability studies)—

(aa) necessary for the approval of the application under subsections (c) and (d); and

(bb) conducted or sponsored by the applicant; and

(II) does not rely on any clinical investigations that are part of an application submitted under subsection (b) for approval of the approved racemic drug; and

(B) the application submitted under subsection (b) for such non-racemic drug is not submitted for approval of a condition of use—

(i) in a therapeutic category in which the approved racemic drug has been approved; or

(ii) for which any other enantiomer of the racemic drug has been approved.

(2) Limitation

(A) No approval in certain therapeutic categories

Until the date that is 10 years after the date of approval of a non-racemic drug described in paragraph (1) and with respect to which the applicant has made the election provided for by such paragraph, the Secretary shall not approve such non-racemic drug for any condition of use in the therapeutic category in which the racemic drug has been approved.

(B) Labeling

If applicable, the labeling of a non-racemic drug described in paragraph (1) and with respect to which the applicant has made the election provided for by such paragraph shall include a statement that the non-racemic drug is not approved, and has not been shown to be safe and effective, for any condition of use of the racemic drug.

(3) Definition

(A) In general

For purposes of this subsection, the term "therapeutic category" means a therapeutic category identified in the list developed by the United States Pharmacopeia pursuant to section 1395w–104(b)(3)(C)(ii) of title 42 and as in effect on September 27, 2007.

(B) Publication by Secretary

The Secretary shall publish the list described in subparagraph (A) and may amend such list by regulation.

(4) Availability

The election referred to in paragraph (1) may be made only in an application that is submitted to the Secretary after September 27, 2007, and before October 1, 2022.

(v) Antibiotic drugs submitted before November 21, 1997

(1) Antibiotic drugs approved before November 21, 1997

(A) In general

Notwithstanding any provision of the Food and Drug Administration Modernization Act of 1997 or any other provision of law, a sponsor of a drug that is the subject of an application described in subparagraph (B)(i) shall be eligible for, with respect to the drug, the 3-year exclusivity period referred to under clauses (iii) and (iv) of subsection (c)(3)(E) and under clauses (iii) and (iv) of subsection (j)(5)(F), subject to the requirements of such clauses, as applicable.

(B) Application; antibiotic drug described

(i) Application

An application described in this clause is an application for marketing submitted under this section after October 8, 2008, in which the drug that is the subject of the application contains an antibiotic drug described in clause (ii).

(ii) Antibiotic drug

An antibiotic drug described in this clause is an antibiotic drug that was the subject of an application approved by the Secretary under section 357 of this title (as in effect before November 21, 1997).

(2) Antibiotic drugs submitted before November 21, 1997, but not approved

(A) In general

Notwithstanding any provision of the Food and Drug Administration Modernization Act of 1997 or any other provision of law, a sponsor of a drug that is the subject of an application described in subparagraph (B)(i) may elect to be eligible for, with respect to the drug—

(i)(I) the 3-year exclusivity period referred to under clauses (iii) and (iv) of subsection (c)(3)(E) and under clauses (iii) and (iv) of subsection (j)(5)(F), subject to the requirements of such clauses, as applicable; and

(II) the 5-year exclusivity period referred to under clause (ii) of subsection (c)(3)(E) and under clause (ii) of subsection (j)(5)(F), subject to the requirements of such clauses, as applicable; or

(ii) a patent term extension under section 156 of title 35, subject to the requirements of such section.

(B) Application; antibiotic drug described

(i) Application

An application described in this clause is an application for marketing submitted under this section after October 8, 2008, in which the drug that is the subject of the application contains an antibiotic drug described in clause (ii).

(ii) Antibiotic drug

An antibiotic drug described in this clause is an antibiotic drug that was the subject of 1 or more applications received by the Secretary under section 357 of this title (as in effect before November 21, 1997), none of which was approved by the Secretary under such section.

(3) Limitations

(A) Exclusivities and extensions

Paragraphs (1)(A) and (2)(A) shall not be construed to entitle a drug that is the subject of an approved application described in subparagraphs [5] (1)(B)(i) or (2)(B)(i), as applicable, to any market exclusivities or patent extensions other than those exclusivities or extensions described in paragraph (1)(A) or (2)(A).

(B) Conditions of use

Paragraphs (1)(A) and (2)(A)(i) shall not apply to any condition of use for which the drug referred to in subparagraph (1)(B)(i) or (2)(B)(i), as applicable, was approved before October 8, 2008.

(4) Application of certain provisions

Notwithstanding section 125, or any other provision, of the Food and Drug Administration Modernization Act of 1997, or any other provision of law, and subject to the limitations in paragraphs (1), (2), and (3), the provisions of the Drug Price Competition and Patent Term Restoration Act of 1984 shall apply to any drug subject to paragraph (1) or any drug with respect to which an election is made under paragraph (2)(A).

(w) Deadline for determination on certain petitions

The Secretary shall issue a final, substantive determination on a petition submitted pursuant to subsection (b) of section 314.161 of title 21, Code of Federal Regulations (or any successor regulations), no later than 270 days after the date the petition is submitted.

(x) Date of approval in the case of recommended controls under the CSA

(1) In general

In the case of an application under subsection (b) with respect to a drug for which the Secretary provides notice to the sponsor that the Secretary intends to issue a scientific and medical evaluation and recommend controls under the Controlled Substances Act [21 U.S.C. 801 et seq.], approval of such application shall not take effect until the interim final rule controlling the drug is issued in accordance with section 201(j) of the Controlled Substances Act [21 U.S.C. 811(j)].

(2) Date of approval

For purposes of this section, with respect to an application described in paragraph (1), the term "date of approval" shall mean the later of—

(A) the date an application under subsection (b) is approved under subsection (c); or

(B) the date of issuance of the interim final rule controlling the drug.

(y) Contrast agents intended for use with applicable medical imaging devices

(1) In general

The sponsor of a contrast agent for which an application has been approved under this section may submit a supplement to the application seeking approval for a new use following the authorization of a premarket submission for an applicable medical imaging device for that use with the contrast agent pursuant to section 360j(p)(1) of this title.

(2) Review of supplement

In reviewing a supplement submitted under this subsection, the agency center charged with the premarket review of drugs may—

(A) consult with the center charged with the premarket review of devices; and

(B) review information and data submitted to the Secretary by the sponsor of an applicable medical imaging device pursuant to section 360e, 360(k), or 360c(f)(2) of this title so long as the sponsor of such applicable medical imaging device has provided to the sponsor of the contrast agent a right of reference.

(3) Definitions

For purposes of this subsection—

(A) the term "new use" means a use of a contrast agent that is described in the approved labeling of an applicable medical imaging device described in section 360j(p) of this title, but that is not described in the approved labeling of the contrast agent; and

(B) the terms "applicable medical imaging device" and "contrast agent" have the meanings given such terms in section 360j(p) of this title.

(June 25, 1938, ch. 675, §505, 52 Stat. 1052; Pub. L. 86–507, §1(18), June 11, 1960, 74 Stat. 201; Pub. L. 87–781, title I, §§102(b)–(d), 103(a), (b), 104(a)–(d)(2), Oct. 10, 1962, 76 Stat. 781–783, 784, 785; Pub. L. 92–387, §4(d), Aug. 16, 1972, 86 Stat. 562; Pub. L. 98–417, title I, §§101, 102(a)–(b)(5), 103, 104, Sept. 24, 1984, 98 Stat. 1585, 1592, 1593, 1597; Pub. L. 102–282, §5, May 13, 1992, 106 Stat. 161; Pub.

L. 103–80, §3(n), Aug. 13, 1993, 107 Stat. 777; Pub. L. 105–115, title I, §§115, 117, 119, 120, 124(a), Nov. 21, 1997, 111 Stat. 2313, 2315, 2316, 2318, 2324; Pub. L. 106–113, div. B, §1000(a)(9) [title IV, §4732(b)(11)], Nov. 29, 1999, 113 Stat. 1536, 1501A-584; Pub. L. 107–109, §15(c)(1), Jan. 4, 2002, 115 Stat. 1420; Pub. L. 108–155, §2(b)(1), Dec. 3, 2003, 117 Stat. 1941; Pub. L. 108–173, title XI, §§1101(a), (b), 1102(a), 1103(a), Dec. 8, 2003, 117 Stat. 2448, 2452, 2457, 2460; Pub. L. 110–85, title VII, §701(b), title VIII, §801(b)(3)(A), (B), title IX, §§901(a), 903, 905(a), 914(a), 915, 916, 918, 920, 921, title XI, §1113, Sept. 27, 2007, 121 Stat. 903, 921, 922, 943, 944, 953, 957, 958, 960-962, 976; Pub. L. 110–316, title III, §301, Aug. 14, 2008, 122 Stat. 3524; Pub. L. 110–379, §4(a), Oct. 8, 2008, 122 Stat. 4076; Pub. L. 111–31, div. A, title I, §103(e), June 22, 2009, 123 Stat. 1837; Pub. L. 111–148, title VII, §7002(d)(1), title X, §10609, Mar. 23, 2010, 124 Stat. 816, 1014; Pub. L. 112–144, title IX, §905, title XI, §§1101, 1134(a), 1135, July 9, 2012, 126 Stat. 1092, 1108, 1123; Pub. L. 113–5, title III, §301, Mar. 13, 2013, 127 Stat. 179; Pub. L. 114–89, §2(a)(1), Nov. 25, 2015, 129 Stat. 698; Pub. L. 114–255, div. A, title III, §§3024(b), 3031(a), 3075(a), (b), 3101(a)(2)(B), 3102(1), Dec. 13, 2016, 130 Stat. 1099, 1138, 1152, 1156; Pub. L. 115–52, title VI, §601, title VII, §706(b), title VIII, §§801, 802, 808, title IX, §901(a), Aug. 18, 2017, 131 Stat. 1048, 1059, 1068, 1069, 1074, 1076; Pub. L. 115–271, title III, §3041(b), Oct. 24, 2018, 132 Stat. 3942; Pub. L. 116–290, §2(a)–(d)(1), (g), Jan. 5, 2021, 134 Stat. 4889–4892; Pub. L. 117–9, §1(a)(1), (b)(1), Apr. 23, 2021, 135 Stat. 256, 258.)

Editorial Notes

References in Text

Section 264(c) of the Health Insurance Portability and Accountability Act of 1996, referred to in subsec. (k)(3)(C)(i)(I), (4)(G)(i)(I), is section 264(c) of Pub. L. 104–191, which is set out as a note under section 1320d–2 of Title 42, The Public Health and Welfare.

The General Schedule, referred to in subsec. (n)(5), is set out under section 5332 of Title 5, Government Organization and Employees.

Section 101(c) of the Food and Drug Administration Amendments Act of 2007, referred to in subsec. (o)(3)(E)(i), is section 101(c) of Pub. L. 110–85, which is set out as a note under section 379g of this title.

The Food and Drug Administration Modernization Act of 1997, referred to in subsec. (v)(1)(A), (2)(A), (4), is Pub. L. 105–115, Nov. 21, 1997, 111 Stat. 2296. Section 125 of the Act amended sections 321, 331, 335a, 352, 360, 360j, 360aa to 360cc, 360ee, 374, 379g, 381, and 382 of this title, section 45C of Title 26, Internal Revenue Code, section 156 of Title 35, Patents, and section 8126 of Title 38, Veterans' Benefits, repealed sections 356 and 357 of this title, and enacted provisions set out as a note under this section. For complete classification of this Act to the Code, see Short Title of 1997 Amendment note set out under section 301 of this title and Tables.

The Drug Price Competition and Patent Term Restoration Act of 1984, referred to in subsec. (v)(4), is Pub. L. 98–417, Sept. 24, 1984, 98 Stat. 1585. For complete classification of this Act to the Code, see Short Title of 1984 Amendment note set out under section 301 of this title and Tables.

The Controlled Substances Act, referred to in subsec. (x)(1), is title II of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1242, which is classified principally to subchapter I (§801 et seq.) of chapter 13 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 801 of this title and Tables.

Codification

In subsec. (k)(4)(H), "section 132 of title 41" substituted for "section 4(5) of the Federal Procurement Policy Act" on authority of Pub. L. 111–350, §6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts.

Amendments

2021—Subsec. (b)(1). Pub. L. 116–290, §2(a)(1), amended par. (1) generally. Prior to amendment, par. (1) related to requirements for filing an application with respect to any drug subject to the provisions of subsec. (a).

Subsec. (c)(2). Pub. L. 116–290, §2(b)(1), inserted at beginning "Not later than 30 days after the date of approval of an application submitted under subsection (b), the holder of the approved application shall file with the Secretary the patent number and the expiration date of any patent described in subsection (b)(1)(A)(viii), except that a patent that is identified as claiming a method of using such drug shall be filed only if the patent claims a method of use approved in the application. If a patent described in subsection (b)(1)(A)(viii) is issued after the date of approval of an application submitted under subsection (b), the holder of the approved application shall, not later than 30 days after the date of issuance of the patent, file the patent number and the expiration date of the patent, except that a patent that claims a method of using such drug shall be filed only if approval for such use has been granted in the

application."; substituted "described in subsection (b)(1)(A)(viii)." for "which claims the drug for which the application was submitted or which claims a method of using such drug and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug."; inserted "of the type for which information is required to be submitted in subsection (b)(1)(A)(viii)" after "could not file patent information under subsection (b) because no patent"; and inserted at end "Patent information that is not the type of patent information required by subsection (b)(1)(A)(viii) shall not be submitted under this paragraph."

Subsec. (c)(3)(E). Pub. L. 117–9, §1(a)(1)(A), substituted "active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations))" for "active ingredient (including any ester or salt of the active ingredient)" wherever appearing.

Pub. L. 116–290, §2(g)(1), substituted "subsection (b)(1)(A)(i)" for "clause (A) of subsection (b)(1)" wherever appearing.

Subsec. (c)(3)(E)(i). Pub. L. 117–9, §1(b)(1)(A), struck out cl. (i) which read as follows: "If an application (other than an abbreviated new drug application) submitted under subsection (b) for a drug, no active ingredient (including any ester or salt of the active ingredient) of which has been approved in any other application under subsection (b), was approved during the period beginning January 1, 1982, and ending on September 24, 1984, the Secretary may not make the approval of another application for a drug for which the investigations described in subsection (b)(1)(A)(i) and relied upon by the applicant for approval of the application were not conducted by or for the applicant and for which the applicant has not obtained a right of reference or use from the person by or for whom the investigations were conducted effective before the expiration of ten years from the date of the approval of the application previously approved under subsection (b)."

Subsec. (j)(2)(A)(vi). Pub. L. 116–290, §2(g)(2), substituted "clauses (ii) through (vi) of subsection (b)(1)(A)" for "clauses (B) through (F) of subsection (b)(1)".

Subsec. (j)(5)(F). Pub. L. 117–9, §1(a)(1)(B), substituted "active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations))" for "active ingredient (including any ester or salt of the active ingredient)" wherever appearing.

Subsec. (j)(5)(F)(i). Pub. L. 117–9, §1(b)(1)(B), struck out cl. (i) which read as follows: "If an application (other than an abbreviated new drug application) submitted under subsection (b) for a drug, no active ingredient (including any ester or salt of the active ingredient) of which has been approved in any other application under subsection (b), was approved during the period beginning January 1, 1982, and ending on September 24, 1984, the Secretary may not make the approval of an application submitted under this subsection which refers to the drug for which the subsection (b) application was submitted effective before the expiration of ten years from the date of the approval of the application under subsection (b)."

Subsec. (j)(7)(A)(iii). Pub. L. 116–290, §2(b)(2), struck out "(b) or" before "(c)".

Subsec. (j)(7)(A)(iv). Pub. L. 116–290, §2(c), added cl. (iv).

Subsec. (j)(7)(D). Pub. L. 116–290, §2(d)(1), added subpar. (D).

Subsec. (l)(2)(A)(i). Pub. L. 117–9, §1(a)(1)(C)(i), amended cl. (i) generally. Prior to amendment, cl. (i) read as follows: "not later than 30 days after the date of approval of such application for a drug no active ingredient (including any ester or salt of the active ingredient) of which has been approved in any other application under this section or section 262 of title 42; and".

Subsec. (l)(2)(A)(ii). Pub. L. 117–9, §1(a)(1)(C)(ii), inserted "or biological product" before period at end.

Subsec. (s). Pub. L. 117–9, §1(a)(1)(D), amended subsec. (s) generally. Prior to amendment, text read as follows: "Prior to the approval of a drug no active ingredient (including any ester or salt of the active ingredient) of which has been approved in any other application under this section or section 262 of title 42, the Secretary shall—

"(1) refer such drug to a Food and Drug Administration advisory committee for review at a meeting of such advisory committee; or

"(2) if the Secretary does not refer such a drug to a Food and Drug Administration advisory committee prior to the approval of the drug, provide in the action letter on the application for the drug a summary of the reasons why the Secretary did not refer the drug to an advisory committee prior to approval."

Subsec. (u)(1). Pub. L. 117–9, §1(a)(1)(E), in introductory provisions, substituted "active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations))" for "active ingredient (including any ester or salt of the active ingredient)" and "same active moiety" for "same active ingredient".

2018—Subsec. (o)(4)(A). Pub. L. 115–271, §3041(b)(1), substituted "safety or new effectiveness information" for "safety information" in heading and "If the Secretary becomes aware of new information, including any new safety information or information related to reduced effectiveness, that the Secretary determines should be included in the labeling of the drug" for "If the Secretary becomes aware of new safety information that the Secretary believes

should be included in the labeling of the drug" in text. Amendment to heading was executed to reflect the probable intent of Congress, notwithstanding error in text directed to be stricken.

Subsec. (o)(4)(B)(i). Pub. L. 115–271, §3041(b)(2), inserted ", or new effectiveness information" after "adverse reactions".

Subsec. (o)(4)(C). Pub. L. 115–271, §3041(b)(3), substituted "safety or new effectiveness information" for "safety information".

Subsec. (o)(4)(E). Pub. L. 115–271, §3041(b)(4), substituted "safety or new effectiveness information" for "safety information".

2017—Subsec. (j)(5)(B)(v). Pub. L. 115–52, §808(1), added cl. (v).

Subsec. (j)(5)(D)(iv). Pub. L. 115–52, §808(2), added cl. (iv).

Subsec. (j)(11), (12). Pub. L. 115–52, §801, added pars. (11) and (12).

Subsec. (j)(13). Pub. L. 115–52, §802, added par. (13).

Subsec. (k)(5). Pub. L. 115–52, §901(a), made technical amendments to directory language of Pub. L. 114–255, §3075(a). See 2016 Amendment notes below.

Subsec. (u)(4). Pub. L. 115–52, §601, substituted "2022" for "2017".

Subsec. (y). Pub. L. 115–52, §706(b), added subsec. (y).

2016—Subsec. (c)(5). Pub. L. 114–255, §3031(a), added par. (5).

Subsec. (d). Pub. L. 114–255, §3101(a)(2)(B)(i), substituted "marketing approval" for "premarket approval" in last sentence.

Subsec. (i)(4). Pub. L. 114–255, §3024(b), substituted "except where it is not feasible, it is contrary to the best interests of such human beings, or the proposed clinical testing poses no more than minimal risk to such human beings and includes appropriate safeguards as prescribed to protect the rights, safety, and welfare of such human beings" for "except where it is not feasible or it is contrary to the best interests of such human beings".

Subsec. (k)(5)(A). Pub. L. 114–255, §3075(a)(1), as amended by Pub. L. 115–52, §901(a)(1), substituted "screenings" for ", bi-weekly screening".

Pub. L. 114–255, §3102(1)(A), inserted "and" after the semicolon.

Subsec. (k)(5)(B). Pub. L. 114–255, §3075(a)(2), as amended by Pub. L. 115–52, §901(a), substituted "; and" for period at end.

Pub. L. 114–255, §3102(1)(B), (C), redesignated subpar. (C) as (B) and struck out former subpar. (B) which read as follows: "report to Congress not later than 2 year after September 27, 2007, on procedures and processes of the Food and Drug Administration for addressing ongoing post market safety issues identified by the Office of Surveillance and Epidemiology and how recommendations of the Office of Surveillance and Epidemiology are handled within the agency; and".

Subsec. (k)(5)(C). Pub. L. 114–255, §3075(a)(3), as amended by Pub. L. 115–52, §901(a)(1), added subpar. (C).

Pub. L. 114–255, §3102(1)(C), redesignated subpar. (C) as (B).

Subsec. (q)(5)(A). Pub. L. 114–255, §3101(a)(2)(B)(ii), substituted "subsection (b)(2) or (j) of this section or section 262(k) of title 42" for "subsection (b)(2) or (j) of the Act or 262(k) of title 42".

Subsec. (r)(2)(D). Pub. L. 114–255, §3075(b), substituted "and making publicly available on the Internet website established under paragraph (1) best practices for drug safety surveillance activities for drugs approved under this section or section 262 of title 42" for ", by 18 months after approval of a drug or after use of the drug by 10,000 individuals, whichever is later, a summary analysis of the adverse drug reaction reports received for the drug, including identification of any new risks not previously identified, potential new risks, or known risks reported in unusual number;".

2015—Subsec. (x). Pub. L. 114–89 added subsec. (x).

2013—Subsec. (b)(5)(B). Pub. L. 113–5 substituted "size—" for "size of clinical trials intended to form the primary basis of an effectiveness claim or, with respect to an applicant for approval of a biological product under section 262(k) of title 42, any necessary clinical study or studies.", added cls. (i) and (ii), and designated last two sentences as concluding provisions.

2012—Subsec. (d). Pub. L. 112–144, §905, inserted at end "The Secretary shall implement a structured risk-benefit assessment framework in the new drug approval process to facilitate the balanced consideration of benefits and risks, a consistent and systematic approach to the discussion and regulatory decisionmaking, and the communication of the benefits and risks of new drugs. Nothing in the preceding sentence shall alter the criteria for evaluating an application for premarket approval of a drug."

Subsec. (q)(1)(A). Pub. L. 112–144, §1135(1)(A), substituted "subsection (b)(2) or (j) of this section or section 262(k) of title 42" for "subsection (b)(2) or (j)" in introductory provisions.

Subsec. (q)(1)(F). Pub. L. 112–144, §1135(1)(B), substituted "150 days" for "180 days" in introductory provisions.

Subsec. (q)(2)(A). Pub. L. 112–144, §1135(2)(A), substituted "150" for "180" in heading.

Subsec. (q)(2)(A)(i). Pub. L. 112–144, §1135(2)(B), substituted "150-day" for "180-day".

Subsec. (q)(4). Pub. L. 112–144, §1135(3), designated existing provisions as subpar. (A), redesignated former subpars. (A) and (B) as cls. (i) and (ii), respectively, of subpar. (A), and added subpar. (B).

Subsec. (q)(5)(A). Pub. L. 112–144, §1135(4), substituted "subsection (b)(2) or (j) of the Act or 262(k) of title 42" for "subsection (b)(2) or (j)".

Subsec. (u)(1)(A)(ii)(II). Pub. L. 112–144, §1101(b), inserted "clinical" after "any".

Subsec. (u)(4). Pub. L. 112–144, §1101(a), substituted "2017" for "2012".

Subsec. (w). Pub. L. 112–144, §1134(a), added subsec. (w).

2010—Subsec. (b)(5)(B). Pub. L. 111–148, §7002(d)(1), inserted "or, with respect to an applicant for approval of a biological product under section 262(k) of title 42, any necessary clinical study or studies" before period at end of first sentence.

Subsec. (j)(10). Pub. L. 111–148, §10609, added par. (10).

2009—Subsec. (n)(2). Pub. L. 111–31 made technical amendment to reference in original act which appears in text as reference to section 394 of this title.

2008—Subsec. (q)(1)(A). Pub. L. 110–316, §301, inserted concluding provisions.

Subsec. (v). Pub. L. 110–379 added subsec. (v).

2007—Subsec. (b)(6). Pub. L. 110–85, §801(b)(3)(B), added par. (6).

Subsec. (e). Pub. L. 110–85, §903, inserted at end "The Secretary may withdraw the approval of an application submitted under this section, or suspend the approval of such an application, as provided under this subsection, without first ordering the applicant to submit an assessment of the approved risk evaluation and mitigation strategy for the drug under section 355–1(g)(2)(D) of this title."

Subsec. (i)(4). Pub. L. 110–85, §801(b)(3)(A), inserted at end "The Secretary shall update such regulations to require inclusion in the informed consent documents and process a statement that clinical trial information for such clinical investigation has been or will be submitted for inclusion in the registry data bank pursuant to subsection (j) of section 282 of title 42."

Subsec. (k)(3), (4). Pub. L. 110–85, §905(a), added pars. (3) and (4).

Subsec. (k)(5). Pub. L. 110–85, §921, added par. (5).

Subsec. (l). Pub. L. 110–85, §916, designated existing provisions as par. (1), redesignated former pars. (1) to (5) as subpars. (A) to (E), respectively, of par. (1), and added par. (2).

Subsec. (n)(4) to (8). Pub. L. 110–85, §701(b), redesignated pars. (5) to (8) as (4) to (7), respectively, and struck out former par. (4) which read as follows: "Each member of a panel shall publicly disclose all conflicts of interest that member may have with the work to be undertaken by the panel. No member of a panel may vote on any matter where the member or the immediate family of such member could gain financially from the advice given to the Secretary. The Secretary may grant a waiver of any conflict of interest requirement upon public disclosure of such conflict of interest if such waiver is necessary to afford the panel essential expertise, except that the Secretary may not grant a waiver for a member of a panel when the member's own scientific work is involved."

Subsecs. (o), (p). Pub. L. 110–85, §901(a), added subsecs. (o) and (p).

Subsec. (q). Pub. L. 110–85, §914(a), added subsec. (q).

Subsec. (r). Pub. L. 110–85, §915, added subsec. (r).

Subsec. (s). Pub. L. 110–85, §918, added subsec. (s).

Subsec. (t). Pub. L. 110–85, §920, added subsec. (t).

Subsec. (u). Pub. L. 110–85, §1113, added subsec. (u).

2003—Subsec. (b)(1). Pub. L. 108–155, in second sentence, substituted "(F)" for "and (F)" and inserted ", and (G) any assessments required under section 355c of this title" before period at end.

Subsec. (b)(3). Pub. L. 108–173, §1101(b)(1)(A), added par. (3) and struck out former par. (3) which, in subpar. (A), required an applicant making a certification under par. (2)(A)(iv) to include statement that applicant will give notice to each owner of the patent which is the subject of the certification and to the holder of the approved application, in subpar. (B), directed that notice state that an application has been submitted and include a detailed statement of the applicant's opinion that the patent is not valid or will not be infringed, and, in subpar. (C), provided that if an application is amended, notice shall be given when the amended application is submitted.

Subsec. (b)(4), (5). Pub. L. 108–173, §1101(b)(1)(B), added par. (4) and redesignated former par. (4) as (5).

Subsec. (c)(3). Pub. L. 108–173, §1101(b)(2)(A), substituted "by applying the following to each certification made under subsection (b)(2)(A)" for "under the following" in introductory provisions.

Subsec. (c)(3)(C). Pub. L. 108–173, §1101(b)(2)(B)(iii), which directed the substitution of "subsection (b)(3)" for "paragraph (3)(B)" in third sentence, could not be executed because such words do not appear. See note below.

Pub. L. 108–173, §1101(b)(2)(B)(ii)(VI), in concluding provisions, struck out "Until the expiration of forty-five days from the date the notice made under paragraph (3)(B) is received, no action may be brought under section 2201 of title 28 for a declaratory judgment with respect to the patent. Any action brought under such section 2201 shall be brought in the judicial district where the defendant has its principal place of business or a regular and established place of business." after "expediting the action."

Pub. L. 108–173, §1101(b)(2)(B)(i), (ii)(I), in first sentence of introductory provisions, substituted "unless, before the expiration of 45 days after the date on which the notice described in subsection (b)(3) is received, an action is brought for infringement of the patent that is the subject of the certification and for which information was submitted to the Secretary under paragraph (2) or subsection (b)(1) before the date on which the application (excluding an amendment or supplement to the application) was submitted" for "unless an action is brought for infringement of a patent which is the subject of the certification before the expiration of forty-five days from the date the notice provided under paragraph (3)(B) is received" and, in second sentence of introductory provisions, substituted "subsection (b)(3)" for "paragraph (3)(B)".

Subsec. (c)(3)(C)(i). Pub. L. 108–173, §1101(b)(2)(B)(ii)(II), added cl. (i) and struck out former cl. (i) which read as follows: "if before the expiration of such period the court decides that such patent is invalid or not infringed, the approval may be made effective on the date of the court decision,".

Subsec. (c)(3)(C)(ii). Pub. L. 108–173, §1101(b)(2)(B)(ii)(III), added cl. (ii) and struck out former cl. (ii) which read as follows: "if before the expiration of such period the court decides that such patent has been infringed, the approval may be made effective on such date as the court orders under section 271(e)(4)(A) of title 35, or".

Subsec. (c)(3)(C)(iii). Pub. L. 108–173, §1101(b)(2)(B)(ii)(IV), substituted "as provided in clause (i); or" for "on the date of such court decision."

Subsec. (c)(3)(C)(iv). Pub. L. 108–173, §1101(b)(2)(B)(ii)(V), added cl. (iv).

Subsec. (c)(3)(D), (E). Pub. L. 108–173, §1101(b)(2)(C), (D), added subpar. (D) and redesignated former subpar. (D) as (E).

Subsec. (j)(2)(B). Pub. L. 108–173, §1101(a)(1)(A), added subpar. (B) and struck out former subpar. (B) which, in cl. (i), required that an applicant making a certification under subpar. (A)(vii)(IV) include in the application a statement that notice would be given to each owner of the patent and the holder of the approved application, in cl. (ii), required that notice would state that an application had been submitted and that it would include a detailed statement of the basis of the applicant's opinion, and, in cl. (iii), directed that notice of an amended application be given when the amended application had been submitted.

Subsec. (j)(2)(D). Pub. L. 108–173, §1101(a)(1)(B), added subpar. (D).

Subsec. (j)(5)(B). Pub. L. 108–173, §1101(a)(2)(A)(i), substituted "by applying the following to each certification made under paragraph (2)(A)(vii)" for "under the following" in introductory provisions.

Subsec. (j)(5)(B)(iii). Pub. L. 108–173, §1101(a)(2)(A)(ii)(II)(ee), which directed amendment of the second sentence of subsec. (j)(5)(B)(iii) by striking "Until the expiration" and all that follows in the matter after and below subclause (IV), was executed by striking "Until the expiration of forty-five days from the date the notice made under paragraph (2)(B)(i) is received, no action may be brought under section 2201 of title 28, for a declaratory judgment with respect to the patent. Any action brought under section 2201 shall be brought in the judicial district where the defendant has its principal place of business or a regular and established place of business." after "expediting the action." in concluding provisions, to reflect the probable intent of Congress.

Pub. L. 108–173, §1101(a)(2)(A)(ii)(I), in introductory provisions, substituted "unless, before the expiration of 45 days after the date on which the notice described in paragraph (2)(B) is received, an action is brought for infringement of the patent that is the subject of the certification and for which information was submitted to the Secretary under subsection (b)(1) or (c)(2) before the date on which the application (excluding an amendment or supplement to the application), which the Secretary later determines to be substantially complete, was submitted" for "unless an action is brought for infringement of a patent which is the subject of the certification before the expiration of forty-five days from the date the notice provided under paragraph (2)(B)(i) is received".

Subsec. (j)(5)(B)(iii)(I). Pub. L. 108–173, §1101(a)(2)(A)(ii)(II)(aa), added subcl. (I) and struck out former subcl. (I) which read as follows: "if before the expiration of such period the court decides that such patent is invalid or not infringed, the approval shall be made effective on the date of the court decision,".

Subsec. (j)(5)(B)(iii)(II). Pub. L. 108–173, §1101(a)(2)(A)(ii)(II)(bb), added subcl. (II) and struck out former subcl. (II) which read as follows: "if before the expiration of such period the court decides that such patent has been infringed, the approval shall be made effective on such date as the court orders under section 271(e)(4)(A) of title 35, or".

Subsec. (j)(5)(B)(iii)(III). Pub. L. 108–173, §1101(a)(2)(A)(ii)(II)(cc), substituted "as provided in subclause (I); or" for "on the date of such court decision."

Subsec. (j)(5)(B)(iii)(IV). Pub. L. 108–173, §1101(a)(2)(A)(ii)(II)(dd), added subcl. (IV).

Subsec. (j)(5)(B)(iv). Pub. L. 108–173, §1102(a)(1), added cl. (iv) and struck out former cl. (iv) which read as follows: "If the application contains a certification described in subclause (IV) of paragraph (2)(A)(vii) and is for a drug for which a previous application has been submitted under this subsection continuing such a certification, the application shall be made effective not earlier than one hundred and eighty days after—

"(I) the date the Secretary receives notice from the applicant under the previous application of the first commercial marketing of the drug under the previous application, or

"(II) the date of a decision of a court in an action described in clause (iii) holding the patent which is the subject of the certification to be invalid or not infringed,

whichever is earlier."

Subsec. (j)(5)(C). Pub. L. 108–173, §1101(a)(2)(B), (C), added subpar. (C). Former subpar. (C) redesignated (E).

Subsec. (j)(5)(D). Pub. L. 108–173, §1102(a)(2), added subpar. (D).

Pub. L. 108–173, §1101(a)(2)(B), redesignated subpar. (D) as (F).

Subsec. (j)(5)(E), (F). Pub. L. 108–173, §1101(a)(2)(B), redesignated subpars. (C) and (D) as (E) and (F), respectively.

Subsec. (j)(8)(A). Pub. L. 108–173, §1103(a)(1), added subpar. (A) and struck out former subpar. (A) which read as follows: "The term 'bioavailability' means the rate and extent to which the active ingredient or therapeutic ingredient is absorbed from a drug and becomes available at the site of drug action."

Subsec. (j)(8)(C). Pub. L. 108–173, §1103(a)(2), added subpar. (C).

2002—Subsec. (i)(1)(D). Pub. L. 107–109 added subpar. (D).

1999—Subsec. (m). Pub. L. 106–113 substituted "United States Patent and Trademark Office" for "Patent and Trademark Office of the Department of Commerce".

1997—Subsec. (b)(1). Pub. L. 105–115, §115(b), inserted at end "The Secretary shall, in consultation with the Director of the National Institutes of Health and with representatives of the drug manufacturing industry, review and develop guidance, as appropriate, on the inclusion of women and minorities in clinical trials required by clause (A)."

Subsec. (b)(4). Pub. L. 105–115, §119(a), added par. (4).

Subsec. (c)(4). Pub. L. 105–115, §124(a), added par. (4).

Subsec. (d). Pub. L. 105–115, §115(a), inserted at end "If the Secretary determines, based on relevant science, that data from one adequate and well-controlled clinical investigation and confirmatory evidence (obtained prior to or after such investigation) are sufficient to establish effectiveness, the Secretary may consider such data and evidence to constitute substantial evidence for purposes of the preceding sentence."

Subsec. (i). Pub. L. 105–115, §117, inserted "(1)" after "(i)", redesignated former pars. (1) to (3) as subpars. (A) to (C), respectively, of par. (1), added pars. (2) to (4), and struck out closing provisions which read as follows: "Such regulations shall provide that such exemption shall be conditioned upon the manufacturer, or the sponsor of the investigation, requiring that experts using such drugs for investigational purposes certify to such manufacturer or sponsor that they will inform any human beings to whom such drugs, or any controls used in connection therewith, are being administered, or their representatives, that such drugs are being used for investigational purposes and will obtain the consent of such human beings or their representatives, except where they deem it not feasible or, in their professional judgment, contrary to the best interests of such human beings. Nothing in this subsection shall be construed to require any clinical investigator to submit directly to the Secretary reports on the investigational use of drugs."

Subsec. (j)(2)(A)(i). Pub. L. 105–115, §119(b)(2)(A), substituted "paragraph (7)" for "paragraph (6)".

Subsec. (j)(3). Pub. L. 105–115, §119(b)(1)(B), added par. (3). Former par. (3) redesignated (4).

Subsec. (j)(4). Pub. L. 105–115, §119(b)(1)(A), (2)(B), redesignated par. (3) as (4) and in introductory provisions substituted "paragraph (5)" for "paragraph (4)". Former par. (4) redesignated (5).

Subsec. (j)(4)(I). Pub. L. 105–115, §119(b)(2)(C), substituted "paragraph (6)" for "paragraph (5)".

Subsec. (j)(5), (6). Pub. L. 105–115, §119(b)(1)(A), redesignated pars. (4) and (5) as (5) and (6), respectively. Former par. (6) redesignated (7).

Subsec. (j)(7). Pub. L. 105–115, §119(b)(1)(A), (2)(D), redesignated par. (6) as (7) and in subpar. (C) substituted "paragraph (6)" for "paragraph (5)" in two places. Former par. (7) redesignated (8).

Subsec. (j)(8), (9). Pub. L. 105–115, §119(b)(1)(A), redesignated pars. (7) and (8) as (8) and (9), respectively.

Subsec. (n). Pub. L. 105–115, §120, added subsec. (n).

1993—Subsec. (j)(6)(A)(ii). Pub. L. 103–80, §3(n)(1)(A), substituted "Secretary" for "Secretry".

Subsec. (j)(6)(A)(iii). Pub. L. 103–80, §3(n)(1)(B), inserted comma after "published by the Secretary".

Subsec. (k)(1). Pub. L. 103–80, §3(n)(2), substituted "section. Regulations" for "section: *Provided, however*, That regulations".

1992—Subsec. (j)(8). Pub. L. 102–282 added par. (8).

1984—Subsec. (a). Pub. L. 98–417, §102(b)(1), inserted "or (j)" after "subsection (b)".

Subsec. (b). Pub. L. 98–417, §§102(a)(1), 103(a), designated existing provisions of subsec. (b) as par. (1) thereof and redesignated existing cls. (1) through (6) of such par. (1) as cls. (A) through (F) thereof, respectively, inserted requirement that the applicant file with the application the patent number and the expiration date of any patent which claims the drug for which the applicant submitted the application or which claims a method of using such drug and with respect to which a claim of patent infringement could reasonably by asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug, that the applicant amend the application to include such information if an application is filed under this subsection for a drug and a patent which claims such drug or a method of using such drug is issued after the filing date but before approval of the application, and that upon approval of the application, the Secretary publish the information submitted, and added pars. (2) and (3).

Subsec. (c). Pub. L. 98–417, §§102(a)(2), (b)(2), 103(b), designated existing provisions of subsec. (c) as par. (1) thereof and in par. (1) as so designated substituted "subsection (b)" for "this subsection" and redesignated former pars. (1) and (2) as subpars. (A) and (B), respectively, and added pars. (2) and (3).

Subsec. (d)(6), (7). Pub. L. 98–417, §102(a)(3)(A), added cl. (6) relating to the failure of the application to contain the patent information prescribed by subsec. (b) of this section, and redesignated former cl. (6) as (7).

Subsec. (e). Pub. L. 98–417, §102(a)(3)(B), in first sentence, added a new cl. (4) relating to the failure to file the patent information prescribed by subsec. (c) of this section within 30 days after the receipt of written notice from the Secretary specifying the failure to file such information, and redesignated former cl. (4) as (5).

Pub. L. 98–417, §102(b)(3), (4), in second sentence, inserted in provisions preceding cl. (1) "submitted under subsection (b) or (j)" and in cl. (1) substituted "under subsection (k) or to comply with the notice requirements of section 360(k)(2) of this title" for "under subsection (j) or to comply with the notice requirements of section 360(j)(2) of this title".

Subsecs. (j), (k). Pub. L. 98–417, §101, added subsec. (j) and redesignated former subsec. (j) as (k).

Subsec. (k)(1). Pub. L. 98–417, §102(b)(5), substituted "under subsection (b) or (j)" for "pursuant to this section".

Subsecs. (l), (m). Pub. L. 98–417, §104, added subsecs. (l) and (m).

1972—Subsec. (e). Pub. L. 92–387 inserted "or to comply with the notice requirements of section 360(j)(2) of this title" in cl. (1) of second sentence relating to the maintenance of records.

1962—Subsec. (a). Pub. L. 87–781, §104(a), inserted "an approval of" before "an application".

Subsec. (b). Pub. L. 87–781, §102(b), inserted "and whether such drug is effective in use" after "is safe for use".

Subsec. (c). Pub. L. 87–781, §104(b), substituted provisions requiring the Secretary, within 180 days after filing an application, or such additional period as the Secretary and the applicant agree upon, to either approve the application, if meeting the requirements of subsec. (d) of this section, or give notice of opportunity for hearing on question of whether such application is approvable, and providing that if applicant requests hearing in writing within 30 days, the hearing shall begin within 90 days after expiration of said 30 days, unless the Secretary and applicant agree otherwise, that such hearing shall be expedited, and that the Secretary's order shall be issued within 90 days after date for filing final briefs, for provisions which had an application become effective on the sixtieth day after filing thereof unless prior thereto the Secretary postponed the date by written notice to such time, but not more than 180 days after filing, as the Secretary deemed necessary to study and investigate the application.

Subsec. (d). Pub. L. 87–781, §102(c), inserted references to subsec. (c), added cls. (5) and (6), provided that if after notice and opportunity for hearing, the Secretary finds that cls. (1) to (6) do not apply, he shall approve the application, and defined "substantial evidence" as used in this subsection and subsec. (e) of this section.

Subsec. (e). Pub. L. 87–781, §102(d), amended subsec. (e) generally, and among other changes, directed the Secretary to withdraw approval of an application if by tests, other scientific data or experience, or new evidence of clinical experience not contained in the application or available at the time of its approval, the drug is shown to be unsafe, or on the basis of new information, there is shown a lack of substantial evidence that the drug has the effect it is represented to have, and provided that if the Secretary, or acting Secretary, finds there is an imminent hazard to the public health, he may suspend approval immediately, notify the applicant, and give him opportunity for an expedited hearing, that the Secretary may withdraw approval if the applicant fails to establish a system for maintaining required records, or has repeatedly or deliberately failed to maintain records and make reports, or has refused access to, or copying or verification of such records, or if the Secretary finds on new evidence that the methods, facilities and controls in the manufacturing, processing, and packing are inadequate to assure and preserve the drugs' identity, strength, quality and purity, and were not made adequate within a reasonable time after receipt of written notice thereof, or finds on new evidence, that the labeling is false or misleading and was not corrected within a reasonable time after receipt of written notice thereof.

Subsec. (f). Pub. L. 87–781, §104(c), substituted provisions requiring the Secretary to revoke any previous order under subsecs. (d) or (e) of this section refusing, withdrawing, or suspending approval of an application and to

approve such application or reinstate such approval, for provisions which required him to revoke an order refusing effectiveness to an application.

Subsec. (h). Pub. L. 87–781, §104(d)(1), (2), inserted "as provided in section 2112 of title 28", and "except that until the filing of the record the Secretary may modify or set aside his order", substituted "or withdrawing approval of an application under this section" for "to permit the application to become effective, or suspending the effectiveness of the application", "United States court of appeals for the circuit" for "district court of the United States within any district", "Court of Appeals for the District of Columbia Circuit" for "District Court for the District of Columbia", "transmitted by the clerk of the court to" for "served upon", and "by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28" for "as provided in sections 225, 346, and 347 of title 28, as amended, and in section 7, as amended, of the Act entitled 'An Act to establish a Court of Appeals for the District of Columbia', approved February 9, 1893", and eliminated "upon" before "any officer designated", "a transcript of" before "the record" and "and decree" before "of the court affirming".

Subsec. (i). Pub. L. 87–781, §103(b), inserted "the foregoing subsections of" after "operation of", and "and effectiveness" after "safety", and provided that the regulations may condition exemptions upon the submission of reports of preclinical tests to justify the proposed clinical testing, upon the obtaining by the manufacturer or sponsor of the investigation of a new drug of a signed agreement from each of the investigators that patients to whom the drug is administered will be under his supervision or under investigators responsible to him, and that he will not supply such drug to any other investigator, or to clinics, for administration to human beings, or upon the establishment and maintenance of records and reports of data obtained by the investigational use of such drug, as the Secretary finds will enable him to evaluate the safety and effectiveness of such drug, and provided that the regulations shall condition an exemption upon the manufacturer or sponsor of the investigation requiring that experts using such drugs certify that they will inform humans to whom such drugs or any controls connected therewith are administered, or their representatives, and will obtain the consent of such people where feasible and not contrary to the best interests of such people, and that reports on the investigational use of drugs are not required to be submitted directly to the Secretary.

Subsec. (j). Pub. L. 87–781, §103(a), added subsec. (j).

1960—Subsec. (g). Pub. L. 86–507 inserted "or by certified mail" after "registered mail".

Statutory Notes and Related Subsidiaries

Effective Date of 2021 Amendment

Pub. L. 116–290, §2(d)(2), Jan. 5, 2021, 134 Stat. 4891, provided that: "Subparagraph (D) of section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), as added by paragraph (1), applies only with respect to a decision described in such subparagraph that is issued on or after the date of enactment of this Act [Jan. 5, 2021]."

Effective Date of 2012 Amendment

Pub. L. 112–144, title XI, §1134(b), July 9, 2012, 126 Stat. 1123, provided that: "The amendment made by subsection (a) [amending this section] shall apply to any petition that is submitted pursuant to subsection (b) of section 314.161 of title 21, Code of Federal Regulations (or any successor regulations), on or after the date of enactment of this Act [July 9, 2012]."

Effective Date of 2007 Amendment

Pub. L. 110–85, title VII, §701(c), Sept. 27, 2007, 121 Stat. 904, provided that: "The amendments made by this section [enacting section 379d–1 of this title and amending this section] shall take effect on October 1, 2007."

Amendment by sections 901(a), 903, and 905(a) of Pub. L. 110–85 effective 180 days after Sept. 27, 2007, see section 909 of Pub. L. 110–85, set out as a note under section 331 of this title.

Effective Date of 2003 Amendments

Pub. L. 108–173, title XI, §1101(c), Dec. 8, 2003, 117 Stat. 2456, provided that:

"(1) In general.—Except as provided in paragraphs (2) and (3), the amendments made by subsections (a) and (b) [amending this section] apply to any proceeding under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) that is pending on or after the date of the enactment of this Act [Dec. 8, 2003] regardless of the date on which the proceeding was commenced or is commenced.

"(2) Notice of opinion that patent is invalid or will not be infringed.—The amendments made by subsections (a)(1) and (b)(1) apply with respect to any certification under subsection (b)(2)(A)(iv) or (j)(2)(A)(vii)(IV) of section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) submitted on or after August 18,

2003, in an application filed under subsection (b) or (j) of that section or in an amendment or supplement to an application filed under subsection (b) or (j) of that section.

"(3) EFFECTIVE DATE OF APPROVAL.—The amendments made by subsections (a)(2)(A)(ii)(I) and (b)(2)(B)(i) apply with respect to any patent information submitted under subsection (b)(1) or (c)(2) of section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) on or after August 18, 2003."

Pub. L. 108–173, title XI, §1102(b), Dec. 8, 2003, 117 Stat. 2460, provided that:

"(1) IN GENERAL.—Except as provided in paragraph (2), the amendment made by subsection (a) [amending this section] shall be effective only with respect to an application filed under section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)) after the date of the enactment of this Act [Dec. 8, 2003] for a listed drug for which no certification under section 505(j)(2)(A)(vii)(IV) of that Act was made before the date of the enactment of this Act.

"(2) COLLUSIVE AGREEMENTS.—If a forfeiture event described in section 505(j)(5)(D)(i)(V) of that Act occurs in the case of an applicant, the applicant shall forfeit the 180-day period under section 505(j)(5)(B)(iv) of that Act without regard to when the first certification under section 505(j)(2)(A)(vii)(IV) of that Act for the listed drug was made.

"(3) DECISION OF A COURT WHEN THE 180-DAY EXCLUSIVITY PERIOD HAS NOT BEEN TRIGGERED.—With respect to an application filed before, on, or after the date of the enactment of this Act [Dec. 8, 2003] for a listed drug for which a certification under section 505(j)(2)(A)(vii)(IV) of that Act was made before the date of the enactment of this Act and for which neither of the events described in subclause (I) or (II) of section 505(j)(5)(B)(iv) of that Act (as in effect on the day before the date of the enactment of this Act) has occurred on or before the date of the enactment of this Act, the term 'decision of a court' as used in clause (iv) of section 505(j)(5)(B) of that Act means a final decision of a court from which no appeal (other than a petition to the Supreme Court for a writ of certiorari) has been or can be taken."

Amendment by Pub. L. 108–155 effective Dec. 3, 2003, except as otherwise provided, see section 4 of Pub. L. 108–155, set out as an Effective Date note under section 355c of this title.

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by Pub. L. 106–113 effective 4 months after Nov. 29, 1999, see section 1000(a)(9) [title IV, §4731] of Pub. L. 106–113, set out as a note under section 1 of Title 35, Patents.

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–115 effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as a note under section 321 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Pub. L. 98–417, title I, §105, Sept. 24, 1984, 98 Stat. 1597, provided that:

"(a) The Secretary of Health and Human Services shall promulgate, in accordance with the notice and comment requirements of section 553 of title 5, United States Code, such regulations as may be necessary for the administration of section 505 of the Federal Food, Drug, and Cosmetic Act [this section], as amended by sections 101, 102, and 103 of this Act, within one year of the date of enactment of this Act [Sept. 24, 1984].

"(b) During the period beginning sixty days after the date of the enactment of this Act [Sept. 24, 1984], and ending on the date regulations promulgated under subsection (a) take effect, abbreviated new drug applications may be submitted in accordance with the provisions of section 314.2 of title 21 of the Code of Federal Regulations and shall be considered as suitable for any drug which has been approved for safety and effectiveness under section 505(c) of the Federal Food, Drug, and Cosmetic Act [subsec. (c) of this section] before the date of the enactment of this Act. If any such provision is inconsistent with the requirements of section 505(j) of the Federal Food, Drug, and Cosmetic Act, the Secretary shall consider the application under the applicable requirements of such section. The Secretary of Health and Human Services may not approve such an abbreviated new drug application which is filed for a drug which is described in sections 505(c)(3)(D) and 505(j)(4)(D) of the Federal Food, Drug, and Cosmetic Act, except in accordance with such section."

EFFECTIVE DATE OF 1972 AMENDMENT

Amendment by Pub. L. 92–387 effective on first day of sixth month beginning after Aug. 16, 1972, see section 5 of Pub. L. 92–387, set out as a note under section 360 of this title.

EFFECTIVE DATE OF 1962 AMENDMENT

Amendment by Pub. L. 87–781 effective on first day of seventh calendar month following October 1962, see section 107 of Pub. L. 87–781, set out as a note under section 321 of this title.

Construction of Amendment by Pub. L. 110–85

Pub. L. 110–85, title IX, §905(b), Sept. 27, 2007, 121 Stat. 949, provided that: "Nothing in this section [amending this section] or the amendment made by this section shall be construed to prohibit the lawful disclosure or use of data or information by an entity other than as described in paragraph (4)(B) or (4)(G) of section 505(k) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355(k)], as added by subsection (a)."

Construction of Amendments by Pub. L. 102–282

Amendment by Pub. L. 102–282 not to preclude any other civil, criminal, or administrative remedy provided under Federal or State law, including any private right of action against any person for the same action subject to any action or civil penalty under an amendment made by Pub. L. 102–282, see section 7 of Pub. L. 102–282, set out as a note under section 335a of this title.

Transfer of Functions

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

Clarifying FDA Regulation of Non-Addictive Pain Products

Pub. L. 115–271, title III, §3001, Oct. 24, 2018, 132 Stat. 3932, provided that:

"(a) Public Meetings.—Not later than one year after the date of enactment of this Act [Oct. 24, 2018], the Secretary of Health and Human Services (referred to in this section as the 'Secretary'), acting through the Commissioner of Food and Drugs, shall hold not less than one public meeting to address the challenges and barriers of developing non-addictive medical products intended to treat acute or chronic pain or addiction, which may include—

"(1) the manner by which the Secretary may incorporate the risks of misuse and abuse of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) into the risk benefit assessments under subsections (d) and (e) of section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355), section 510(k) of such Act (21 U.S.C. 360(k)), or section 515(c) of such Act (21 U.S.C. 360e(c)), as applicable;

"(2) the application of novel clinical trial designs (consistent with section 3021 of the 21st Century Cures Act (Public Law 114–255) [set out as a note below]), use of real world evidence (consistent with section 505F of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355g)), and use of patient experience data (consistent with section 569C of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360bbb–8c)) for the development of non-addictive medical products intended to treat pain or addiction;

"(3) the evidentiary standards and the development of opioid-sparing data for inclusion in the labeling of medical products intended to treat acute or chronic pain; and

"(4) the application of eligibility criteria under sections 506 and 515B of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 356, 360e–3) for non-addictive medical products intended to treat pain or addiction.

"(b) Guidance.—Not less than one year after the public meetings are conducted under subsection (a) the Secretary shall issue one or more final guidance documents, or update existing guidance documents, to help address challenges to developing non-addictive medical products to treat pain or addiction. Such guidance documents shall include information regarding—

"(1) how the Food and Drug Administration may apply sections 506 and 515B of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 356, 360e–3) to non-addictive medical products intended to treat pain or addiction, including the circumstances under which the Secretary—

"(A) may apply the eligibility criteria under such sections 506 and 515B to non-addictive medical products intended to treat pain or addiction;

"(B) considers the risk of addiction of controlled substances approved to treat pain when establishing unmet medical need; and

"(C) considers pain, pain control, or pain management in assessing whether a disease or condition is a serious or life-threatening disease or condition;

"(2) the methods by which sponsors may evaluate acute and chronic pain, endpoints for non-addictive medical products intended to treat pain, the manner in which endpoints and evaluations of efficacy will be applied

across and within review divisions, taking into consideration the etiology of the underlying disease, and the manner in which sponsors may use surrogate endpoints, intermediate endpoints, and real world evidence;

"(3) the manner in which the Food and Drug Administration will assess evidence to support the inclusion of opioid-sparing data in the labeling of non-addictive medical products intended to treat acute or chronic pain, including—

"(A) alternative data collection methodologies, including the use of novel clinical trial designs (consistent with section 3021 of the 21st Century Cures Act (Public Law 114–255) [set out as a note below]) and real world evidence (consistent with section 505F of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355g)), including patient registries and patient reported outcomes, as appropriate, to support product labeling;

"(B) ethical considerations of exposing subjects to controlled substances in clinical trials to develop opioid-sparing data and considerations on data collection methods that reduce harm, which may include the reduction of opioid use as a clinical benefit;

"(C) endpoints, including primary, secondary, and surrogate endpoints, to evaluate the reduction of opioid use;

"(D) best practices for communication between sponsors and the agency on the development of data collection methods, including the initiation of data collection; and

"(E) the appropriate format in which to submit such data results to the Secretary; and

"(4) the circumstances under which the Food and Drug Administration considers misuse and abuse of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) in making the risk benefit assessment under paragraphs (2) and (4) of subsection (d) of section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) and in finding that a drug is unsafe under paragraph (1) or (2) of subsection (e) of such section.

"(c) DEFINITIONS.—In this section—

"(1) the term 'medical product' means a drug (as defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1))), biological product (as defined in section 351(i) of the Public Health Service Act (42 U.S.C. 262(i))), or device (as defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(h))); and

"(2) the term 'opioid-sparing' means reducing, replacing, or avoiding the use of opioids or other controlled substances intended to treat acute or chronic pain."

GUIDANCE REGARDING REDUCTION IN DRUG EFFECTIVENESS

Pub. L. 115–271, title III, §3041(c), Oct. 24, 2018, 132 Stat. 3943, provided that: "Not less than one year after the date of enactment of this Act [Oct. 24, 2018], the Secretary of Health and Human Services shall issue guidance regarding the circumstances under which the Food and Drug Administration may require postmarket studies or clinical trials to assess the potential reduction in effectiveness of a drug and how such reduction in effectiveness could result in a change to the benefits of the drug and the risks to the patient. Such guidance shall also address how the Food and Drug Administration may apply this section [amending this section and section 355–1 of this title] and the amendments made thereby with respect to circumstances under which the Food and Drug Administration may require postmarket studies or clinical trials and safety labeling changes related to the use of controlled substances for acute or chronic pain."

ANNUAL REPORT ON INSPECTIONS

Pub. L. 115–52, title IX, §902, Aug. 18, 2017, 131 Stat. 1077, provided that: "Not later than March 1 of each year, the Secretary of Health and Human Services shall post on the internet website of the Food and Drug Administration information related to inspections of facilities necessary for approval of a drug under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355), approval of a device under section 515 of such Act (21 U.S.C. 360e), or clearance of a device under section 510(k) of such Act (21 U.S.C. 360(k)) that were conducted during the previous calendar year. Such information shall include the following:

"(1) The median time following a request from staff of the Food and Drug Administration reviewing an application or report to the beginning of the inspection, and the median time from the beginning of an inspection to the issuance of a report pursuant to section 704(b) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 374(b)).

"(2) The median time from the issuance of a report pursuant to such section 704(b) to the sending of a warning letter, issuance of an import alert, or holding of a regulatory meeting for inspections for which the Secretary concluded that regulatory or enforcement action was indicated.

"(3) The median time from the sending of a warning letter, issuance of an import alert, or holding of a regulatory meeting to resolution of the regulatory or enforcement action indicated for inspections for which the

Secretary concluded that such action was indicated.

"(4) The number of times that a facility was issued a report pursuant to such section 704(b) and approval of an application was delayed due to the issuance of a withhold recommendation."

Report on Patient Experience Drug Development

Pub. L. 114–255, div. A, title III, §3004, Dec. 13, 2016, 130 Stat. 1085, provided that: "Not later than June 1 of 2021, 2026, and 2031, the Secretary of Health and Human Services, acting through the Commissioner of Food and Drugs, shall prepare and publish on the Internet website of the Food and Drug Administration a report assessing the use of patient experience data in regulatory decisionmaking, in particular with respect to the review of patient experience data and information on patient-focused drug development tools as part of applications approved under section 505(c) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(c)) or section 351(a) of the Public Health Service Act (42 U.S.C. 262(a))."

Novel Clinical Trial Designs

Pub. L. 114–255, div. A, title III, §3021, Dec. 13, 2016, 130 Stat. 1095, provided that:

"(a) Proposals for Use of Novel Clinical Trial Designs for Drugs and Biological Products.—For purposes of assisting sponsors in incorporating complex adaptive and other novel trial designs into proposed clinical protocols and applications for new drugs under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) and biological products under section 351 of the Public Health Service Act (42 U.S.C. 262), the Secretary of Health and Human Services (referred to in this section as the 'Secretary') shall conduct a public meeting and issue guidance in accordance with subsection (b).

"(b) Guidance Addressing Use of Novel Clinical Trial Designs.—

"(1) In general.—The Secretary, acting through the Commissioner of Food and Drugs, shall update or issue guidance addressing the use of complex adaptive and other novel trial design in the development and regulatory review and approval or licensure for drugs and biological products.

"(2) Contents.—The guidance under paragraph (1) shall address—

"(A) the use of complex adaptive and other novel trial designs, including how such clinical trials proposed or submitted help to satisfy the substantial evidence standard under section 505(d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(d));

"(B) how sponsors may obtain feedback from the Secretary on technical issues related to modeling and simulations prior to—

"(i) completion of such modeling or simulations; or

"(ii) the submission of resulting information to the Secretary;

"(C) the types of quantitative and qualitative information that should be submitted for review; and

"(D) recommended analysis methodologies.

"(3) Public meeting.—Prior to updating or issuing the guidance required by paragraph (1), the Secretary shall consult with stakeholders, including representatives of regulated industry, academia, patient advocacy organizations, consumer groups, and disease research foundations, through a public meeting to be held not later than 18 months after the date of enactment of this Act [Dec. 13, 2016].

"(4) Timing.—The Secretary shall update or issue a draft version of the guidance required by paragraph (1) not later than 18 months after the date of the public meeting required by paragraph (3) and finalize such guidance not later than 1 year after the date on which the public comment period for the draft guidance closes."

Variations From CGMP Streamlined Approach

Pub. L. 114–255, div. A, title III, §3038(c), Dec. 13, 2016, 130 Stat. 1110, provided that: "Not later than 18 months after the date of enactment of this Act [Dec. 13, 2016], the Secretary of Health and Human Services (referred to in this subsection as the 'Secretary') shall identify types of combination products and manufacturing processes with respect to which the Secretary proposes that good manufacturing processes may be adopted that vary from the requirements set forth in section 4.4 of title 21, Code of Federal Regulations (or any successor regulations) or that the Secretary proposes can satisfy the requirements in section 4.4 through alternative or streamlined mechanisms. The Secretary shall identify such types, variations from such requirements, and such mechanisms, in a proposed list published in the Federal Register. After a public comment period regarding the appropriate good manufacturing practices for such types, the Secretary shall publish a final list in the Federal Register, notwithstanding section 553 of title 5, United States Code. The Secretary shall evaluate such types, variations, and mechanisms using a risk-based approach. The Secretary shall periodically review such final list."

FDA Opioid Action Plan

Pub. L. 114–198, title I, §106(a), July 22, 2016, 130 Stat. 702, provided that:

"(1) NEW DRUG APPLICATION.—

"(A) IN GENERAL.—Subject to subparagraph (B), prior to the approval pursuant to an application submitted under section 505(b) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(b)) of a new drug that is an opioid, the Secretary of Health and Human Services (referred to in this section [enacting provisions set out as notes under this section and section 355–1 of this title] as the 'Secretary') shall refer the application to an advisory committee of the Food and Drug Administration to seek recommendations from such advisory committee.

"(B) PUBLIC HEALTH EXEMPTION.—A referral to an advisory committee under subparagraph (A) is not required with respect to a new opioid drug or drugs if the Secretary—

"(i) finds that such a referral is not in the interest of protecting and promoting public health;

"(ii) finds that such a referral is not necessary based on a review of the relevant scientific information; and

"(iii) submits a notice containing the rationale for such findings to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Energy and Commerce of the House of Representatives.

"(2) PEDIATRIC OPIOID LABELING.—The Secretary shall convene the Pediatric Advisory Committee of the Food and Drug Administration to seek recommendations from such Committee regarding a framework for the inclusion of information in the labeling of drugs that are opioids relating to the use of such drugs in pediatric populations before the Secretary approves any labeling or change to labeling for any drug that is an opioid intended for use in a pediatric population.

"(3) SUNSET.—The requirements of paragraphs (1) and (2) shall cease to be effective on October 1, 2022."

GUIDANCE ON EVALUATING THE ABUSE DETERRENCE OF GENERIC SOLID ORAL OPIOID DRUG PRODUCTS

Pub. L. 114–198, title I, §106(c), July 22, 2016, 130 Stat. 703, provided that: "Not later than 18 months after the end of the period for public comment on the draft guidance entitled 'General Principles for Evaluating the Abuse Deterrence of Generic Solid Oral Opioid Drug Products' issued by the Center for Drug Evaluation and Research of the Food and Drug Administration in March 2016, the Commissioner of Food and Drugs shall publish in the Federal Register a final version of such guidance."

GUIDANCE ON PATHOGEN-FOCUSED ANTIBACTERIAL DRUG DEVELOPMENT

Pub. L. 112–144, title VIII, §806, July 9, 2012, 126 Stat. 1082, provided that:

"(a) DRAFT GUIDANCE.—Not later than June 30, 2013, in order to facilitate the development of antibacterial drugs for serious or life-threatening bacterial infections, particularly in areas of unmet need, the Secretary of Health and Human Services shall publish draft guidance that—

"(1) specifies how preclinical and clinical data can be utilized to inform an efficient and streamlined pathogen-focused antibacterial drug development program that meets the approval standards of the Food and Drug Administration; and

"(2) provides advice on approaches for the development of antibacterial drugs that target a more limited spectrum of pathogens.

"(b) FINAL GUIDANCE.—Not later than December 31, 2014, after notice and opportunity for public comment on the draft guidance under subsection (a), the Secretary of Health and Human Services shall publish final guidance consistent with this section."

GUIDANCE ON ABUSE-DETERRENT PRODUCTS

Pub. L. 112–144, title XI, §1122(c), July 9, 2012, 126 Stat. 1113, as amended by Pub. L. 114–255, div. A, title III, §3101(b)(3)(B), Dec. 13, 2016, 130 Stat. 1156, provided that: "Not later than 6 months after the date of enactment of this Act [July 9, 2012], the Secretary [of Health and Human Services] shall issue guidance on the development of abuse-deterrent drug products."

EXTENSION OF PERIOD FOR FIRST APPLICANT TO OBTAIN TENTATIVE APPROVAL WITHOUT FORFEITING 180-DAY-EXCLUSIVITY PERIOD

Pub. L. 112–144, title XI, §1133, July 9, 2012, 126 Stat. 1122, provided that:

"(a) EXTENSION.—

"(1) IN GENERAL.—If a first applicant files an application during the 30-month period ending on the date of enactment of this Act [July 9, 2012] and such application initially contains a certification described in paragraph (2)(A)(vii)(IV) of section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)), or if a first

applicant files an application and the application is amended during such period to first contain such a certification, the phrase '30 months' in paragraph (5)(D)(i)(IV) of such section shall, with respect to such application, be read as meaning—

"(A) during the period beginning on the date of enactment of this Act, and ending on September 30, 2015, '40 months'; and

"(B) during the period beginning on October 1, 2015, and ending on September 30, 2016, '36 months'.

"(2) CONFORMING AMENDMENT.—In the case of an application to which an extended period under paragraph (1) applies, the reference to the 30-month period under section 505(q)(1)(G) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(q)(1)(G)) shall be read to be the applicable period under paragraph (1).

"(b) PERIOD FOR OBTAINING TENTATIVE APPROVAL OF CERTAIN APPLICATIONS.—If an application is filed on or before the date of enactment of this Act [July 9, 2012] and such application is amended during the period beginning on the day after the date of enactment of this Act and ending on September 30, 2017, to first contain a certification described in paragraph (2)(A)(vii)(IV) of section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)), the date of the filing of such amendment (rather than the date of the filing of such application) shall be treated as the beginning of the 30-month period described in paragraph (5)(D)(i)(IV) of such section 505(j).

"(c) DEFINITIONS.—For the purposes of this section, the terms 'application' and 'first applicant' mean application and first applicant, as such terms are used in section 505(j)(5)(D)(i)(IV) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(5)(D)(i)(IV))."

EFFECT OF AMENDMENTS BY PUB. L. 110–85 ON VETERINARY MEDICINE

Pub. L. 110–85, title IX, §907, Sept. 27, 2007, 121 Stat. 950, provided that: "This subtitle [subtitle A (§§901–909) of title IX of Pub. L. 110–85, enacting sections 353c and 355–1 of this title, amending this section and sections 331, 333, and 352 of this title and section 262 of Title 42, The Public Health and Welfare, and enacting provisions set out as notes under this section and sections 331, 352, and 355a of this title], and the amendments made by this subtitle, shall have no effect on the use of drugs approved under section 505 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355] by, or on the lawful written or oral order of, a licensed veterinarian within the context of a veterinarian-client-patient relationship, as provided for under section 512(a)(5) of such Act [21 U.S.C. 360b(a)(5)]."

EFFECT OF AMENDMENT BY PUB. L. 108–173 ON ABBREVIATED NEW DRUG APPLICATIONS

Pub. L. 108–173, title XI, §1103(b), Dec. 8, 2003, 117 Stat. 2461, provided that: "The amendment made by subsection (a) [amending this section] does not alter the standards for approval of drugs under section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j))."

FEDERAL TRADE COMMISSION REVIEW

Pub. L. 108–173, title XI, subtitle B, Dec. 8, 2003, 117 Stat. 2461, as amended by Pub. L. 115–263, §3, Oct. 10, 2018, 132 Stat. 3673; Pub. L. 115–271, title IV, §4004, Oct. 24, 2018, 132 Stat. 3960, provided that:

"SEC. 1111. DEFINITIONS.

"In this subtitle:

"(1) ANDA.—The term 'ANDA' means an abbreviated drug application, as defined under section 201(aa) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 321(aa)].

"(2) ASSISTANT ATTORNEY GENERAL.—The term 'Assistant Attorney General' means the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice.

"(3) BIOSIMILAR BIOLOGICAL PRODUCT.—The term 'biosimilar biological product' means a biological product for which a biosimilar biological product application under section 351(k) of the Public Health Service Act [42 U.S.C. 262(k)] is approved.

"(4) BIOSIMILAR BIOLOGICAL PRODUCT APPLICANT.—The term 'biosimilar biological product applicant' means a person who has filed or received approval for a biosimilar biological product application under section 351(k) of the Public Health Service Act [42 U.S.C. 262(k)].

"(5) BIOSIMILAR BIOLOGICAL PRODUCT APPLICATION.—The term 'biosimilar biological product application' means an application under section 351(k) of the Public Health Service Act [42 U.S.C. 262(k)] for licensure of a biological product as biosimilar to, or interchangeable with, a reference product.

"(6) BRAND NAME DRUG.—The term 'brand name drug' means a drug for which an application is approved under section 505(c) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355(c)], including an application referred to in section 505(b)(2) of such Act [21 U.S.C. 355(b)(2)], or a biological product for which an application is approved under section 351(a) of the Public Health Service Act [42 U.S.C. 262(a)].

"(7) BRAND NAME DRUG COMPANY.—The term 'brand name drug company' means the party that holds the approved application referred to in paragraph (6) for a brand name drug that is a listed drug in an ANDA or a reference product in a biosimilar biological product application, or a party that is the owner of a patent for which information is submitted for such drug under subsection (b) or (c) of section 505 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355(b), (c)] or the owner, or exclusive licensee, of a patent included in a list provided under section 351(l)(3) of the Public Health Service Act [42 U.S.C. 262(l)(3)].

"(8) COMMISSION.—The term 'Commission' means the Federal Trade Commission.

"(9) GENERIC DRUG.—The term 'generic drug' means a drug for which an application under section 505(j) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355(j)] is approved.

"(10) GENERIC DRUG APPLICANT.—The term 'generic drug applicant' means a person who has filed or received approval for an ANDA under section 505(j) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355(j)].

"(11) LISTED DRUG.—The term 'listed drug' means a brand name drug that is listed under section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355(j)(7)].

"(12) REFERENCE PRODUCT.—The term 'reference product' has the meaning given such term in section 351(i) of the Public Health Service Act [42 U.S.C. 262(i)].

"SEC. 1112. NOTIFICATION OF AGREEMENTS.

"(a) AGREEMENT WITH BRAND NAME DRUG COMPANY.—

"(1) REQUIREMENT.—A generic drug applicant that has submitted an ANDA containing a certification under section 505(j)(2)(A)(vii)(IV) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355(j)(2)(A)(vii)(IV)] or a biosimilar biological product applicant who has submitted a biosimilar biological product application and a brand name drug company that enter into an agreement described in paragraph (2) shall each file the agreement in accordance with subsection (c). The agreement shall be filed prior to the date of the first commercial marketing of the generic drug that is the subject of the ANDA or the biosimilar biological product that is the subject of the biosimilar biological product application, as applicable.

"(2) SUBJECT MATTER OF AGREEMENT.—An agreement described in this paragraph between a generic drug applicant or a biosimilar biological product applicant and a brand name drug company is an agreement regarding —

"(A) the manufacture, marketing, or sale of the brand name drug that is the listed drug in the ANDA or the reference product in the biosimilar biological product application involved;

"(B) the manufacture, marketing, or sale of the generic drug for which the ANDA was submitted or of the biosimilar biological product for which the biosimilar biological product application was submitted; or

"(C) as applicable—

"(i) the 180-day period referred to in section 505(j)(5)(B)(iv) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355(j)(5)(B)(iv)] as it applies to such ANDA or to any other ANDA based on the same listed drug; or

"(ii) any of the time periods referred to in section 351(k)(6) of the Public Health Service Act [42 U.S.C. 262(k)(6)] as such period applies to such biosimilar biological product application or to any other biosimilar biological product application based on the same reference product.

"(b) AGREEMENT WITH ANOTHER GENERIC DRUG APPLICANT OR BIOSIMILAR BIOLOGICAL PRODUCT APPLICANT. —

"(1) REQUIREMENT.—

"(A) GENERIC DRUGS.—A generic drug applicant that has submitted an ANDA containing a certification under section 505(j)(2)(A)(vii)(IV) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355(j)(2)(A)(vii)(IV)] with respect to a listed drug and another generic drug applicant that has submitted an ANDA containing such a certification for the same listed drug shall each file the agreement in accordance with subsection (c). The agreement shall be filed prior to the date of the first commercial marketing of either of the generic drugs for which such ANDAs were submitted.

"(B) BIOSIMILAR BIOLOGICAL PRODUCTS.—A biosimilar biological product applicant that has submitted a biosimilar biological product application that references a reference product and another biosimilar biological product applicant that has submitted a biosimilar biological product application that references the same reference product shall each file the agreement in accordance with subsection (c). The agreement shall be filed prior to the date of the first commercial marketing of either of the biosimilar biological products for which such biosimilar biological product applications were submitted.

"(2) SUBJECT MATTER OF AGREEMENT.—An agreement described in this paragraph is, as applicable, an agreement between 2 or more generic drug applicants regarding the 180-day period referred to in section 505(j)(5)(B)(iv) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355(j)(5)(B)(iv)] as it applies to the ANDAs

with which the agreement is concerned,, [sic] an agreement between 2 or more biosimilar biological product applicants regarding a time period referred to in section 351(k)(6) of the Public Health Service Act [42 U.S.C. 262(k)(6)] as it applies to the biosimilar biological product, or an agreement between 2 or more biosimilar biological product applicants regarding the manufacture, marketing, or sale of a biosimilar biological product.

"(c) FILING.—

"(1) AGREEMENT.—The parties that are required in subsection (a) or (b) to file an agreement in accordance with this subsection shall file with the Assistant Attorney General and the Commission the text of any such agreement, except that such parties are not required to file an agreement that solely concerns—

"(A) purchase orders for raw material supplies;

"(B) equipment and facility contracts;

"(C) employment or consulting contracts; or

"(D) packaging and labeling contracts.

"(2) OTHER AGREEMENTS.—The parties that are required in subsection (a) or (b) to file an agreement in accordance with this subsection shall file with the Assistant Attorney General and the Commission the text of any agreements between the parties that are not described in such subsections and are contingent upon, provide a contingent condition for, were entered into within 30 days of, or are otherwise related to an agreement that is required in subsection (a) or (b) to be filed in accordance with this subsection.

"(3) DESCRIPTION.—In the event that any agreement required in subsection (a) or (b) to be filed in accordance with this subsection has not been reduced to text, each of the parties involved shall file written descriptions of such agreement that are sufficient to disclose all the terms and conditions of the agreement.

"SEC. 1113. FILING DEADLINES.

"Any filing required under section 1112 shall be filed with the Assistant Attorney General and the Commission not later than 10 business days after the date the agreements are executed.

"SEC. 1114. DISCLOSURE EXEMPTION.

"Any information or documentary material filed with the Assistant Attorney General or the Commission pursuant to this subtitle shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of the Congress or to any duly authorized committee or subcommittee of the Congress.

"SEC. 1115. ENFORCEMENT.

"(a) CIVIL PENALTY.—Any brand name drug company, generic drug applicant, or biosimilar biological product applicant which fails to comply with any provision of this subtitle shall be liable for a civil penalty of not more than $11,000, for each day during which such entity is in violation of this subtitle. Such penalty may be recovered in a civil action brought by the United States, or brought by the Commission in accordance with the procedures established in section 16(a)(1) of the Federal Trade Commission Act (15 U.S.C. 56(a) [15 U.S.C. 56(a)(1)]).

"(b) COMPLIANCE AND EQUITABLE RELIEF.—If any brand name drug company, generic drug applicant, or biosimilar biological product applicant fails to comply with any provision of this subtitle, the United States district court may order compliance, and may grant such other equitable relief as the court in its discretion determines necessary or appropriate, upon application of the Assistant Attorney General or the Commission.

"SEC. 1116. RULEMAKING.

"The Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of title 5, United States Code, consistent with the purposes of this subtitle—

"(1) may define the terms used in this subtitle;

"(2) may exempt classes of persons or agreements from the requirements of this subtitle; and

"(3) may prescribe such other rules as may be necessary and appropriate to carry out the purposes of this subtitle.

"SEC. 1117. SAVINGS CLAUSE.

"Any action taken by the Assistant Attorney General or the Commission, or any failure of the Assistant Attorney General or the Commission to take action, under this subtitle shall not at any time bar any proceeding or any action with respect to any agreement between a brand name drug company and a generic drug applicant or a biosimilar biological product applicant, any agreement between generic drug applicants, or any agreement between biosimilar biological product applicants, under any other provision of law, nor shall any filing under this subtitle constitute or create a presumption of any violation of any competition laws.

"SEC. 1118. EFFECTIVE DATE.

"This subtitle shall—

"(1) take effect 30 days after the date of the enactment of this Act [Dec. 8, 2003]; and

"(2) shall apply to agreements described in section 1112 that are entered into 30 days after the date of the enactment of this Act."

Report on Patient Access to New Therapeutic Agents for Pediatric Cancer

Pub. L. 107–109, §15(d), Jan. 4, 2002, 115 Stat. 1421, provided that: "Not later than January 31, 2003, the Secretary of Health and Human Services, acting through the Commissioner of Food and Drugs and in consultation with the Director of the National Institutes of Health, shall submit to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Energy and Commerce of the House of Representatives a report on patient access to new therapeutic agents for pediatric cancer, including access to single patient use of new therapeutic agents."

Data Requirements for Drugs and Biologics

Pub. L. 105–115, title I, §118, Nov. 21, 1997, 111 Stat. 2316, provided that: "Within 12 months after the date of enactment of this Act [Nov. 21, 1997], the Secretary of Health and Human Services, acting through the Commissioner of Food and Drugs, shall issue guidance that describes when abbreviated study reports may be submitted, in lieu of full reports, with a new drug application under section 505(b) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(b)) and with a biologics license application under section 351 of the Public Health Service Act (42 U.S.C. 262) for certain types of studies. Such guidance shall describe the kinds of studies for which abbreviated reports are appropriate and the appropriate abbreviated report formats."

Requirements for Review of Approval Procedures and Current Good Manufacturing Practices for Positron Emission Technology

Pub. L. 105–115, title I, §121(c), Nov. 21, 1997, 111 Stat. 2321, provided that:

"(1) Procedures and requirements.—

"(A) In general.—In order to take account of the special characteristics of positron emission tomography drugs and the special techniques and processes required to produce these drugs, not later than 2 years after the date of enactment of this Act [Nov. 21, 1997], the Secretary of Health and Human Services shall establish—

"(i) appropriate procedures for the approval of positron emission tomography drugs pursuant to section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355); and

"(ii) appropriate current good manufacturing practice requirements for such drugs.

"(B) Considerations and consultation.—In establishing the procedures and requirements required by subparagraph (A), the Secretary of Health and Human Services shall take due account of any relevant differences between not-for-profit institutions that compound the drugs for their patients and commercial manufacturers of the drugs. Prior to establishing the procedures and requirements, the Secretary of Health and Human Services shall consult with patient advocacy groups, professional associations, manufacturers, and physicians and scientists licensed to make or use positron emission tomography drugs.

"(2) Submission of new drug applications and abbreviated new drug applications.—

"(A) In general.—Except as provided in subparagraph (B), the Secretary of Health and Human Services shall not require the submission of new drug applications or abbreviated new drug applications under subsection (b) or (j) of section 505 (21 U.S.C. 355), for compounded positron emission tomography drugs that are not adulterated drugs described in section 501(a)(2)(C) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 351(a)(2)(C)) (as amended by subsection (b)), for a period of 4 years after the date of enactment of this Act [Nov. 21, 1997], or for 2 years after the date on which the Secretary establishes procedures and requirements under paragraph (1), whichever is longer.

"(B) Exception.—Nothing in this Act [see Short Title of 1997 Amendment note set out under section 301 of this title] shall prohibit the voluntary submission of such applications or the review of such applications by the Secretary of Health and Human Services. Nothing in this Act shall constitute an exemption for a positron emission tomography drug from the requirements of regulations issued under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i))."

"Compounded Positron Emission Topography Drug" Defined

Pub. L. 105–115, title I, §121(e), Nov. 21, 1997, 111 Stat. 2322, provided that: "As used in this section [amending sections 321 and 351 of this title and enacting provisions set out as notes under this section and section 351 of this title], the term 'compounded positron emission tomography drug' has the meaning given the term in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321)."

Requirements for Radiopharmaceuticals

Pub. L. 105–115, title I, §122, Nov. 21, 1997, 111 Stat. 2322, provided that:

"(a) Requirements.—

"(1) Regulations.—

"(A) Proposed regulations.—Not later than 180 days after the date of enactment of this Act [Nov. 21, 1997], the Secretary of Health and Human Services, after consultation with patient advocacy groups, associations, physicians licensed to use radiopharmaceuticals, and the regulated industry, shall issue proposed regulations governing the approval of radiopharmaceuticals. The regulations shall provide that the determination of the safety and effectiveness of such a radiopharmaceutical under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) or section 351 of the Public Health Service Act (42 U.S.C. 262) shall include consideration of the proposed use of the radiopharmaceutical in the practice of medicine, the pharmacological and toxicological activity of the radiopharmaceutical (including any carrier or ligand component of the radiopharmaceutical), and the estimated absorbed radiation dose of the radiopharmaceutical.

"(B) Final regulations.—Not later than 18 months after the date of enactment of this Act, the Secretary shall promulgate final regulations governing the approval of the radiopharmaceuticals.

"(2) Special rule.—In the case of a radiopharmaceutical, the indications for which such radiopharmaceutical is approved for marketing may, in appropriate cases, refer to manifestations of disease (such as biochemical, physiological, anatomic, or pathological processes) common to, or present in, one or more disease states.

"(b) Definition.—In this section, the term 'radiopharmaceutical' means—

"(1) an article—

"(A) that is intended for use in the diagnosis or monitoring of a disease or a manifestation of a disease in humans; and

"(B) that exhibits spontaneous disintegration of unstable nuclei with the emission of nuclear particles or photons; or

"(2) any nonradioactive reagent kit or nuclide generator that is intended to be used in the preparation of any such article."

Special Rule

Pub. L. 105–115, title I, §123(f), Nov. 21, 1997, 111 Stat. 2324, provided that: "The Secretary of Health and Human Services shall take measures to minimize differences in the review and approval of products required to have approved biologics license applications under section 351 of the Public Health Service Act (42 U.S.C. 262) and products required to have approved new drug applications under section 505(b)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(b)(1))."

Transition

Pub. L. 110–379, §4(b), Oct. 8, 2008, 122 Stat. 4077, provided that:

"(1) With respect to a patent issued on or before the date of the enactment of this Act [Oct. 8, 2008], any patent information required to be filed with the Secretary of Health and Human Services under subsection (b)(1) or (c)(2) of section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) to be listed on a drug to which subsection (v)(1) of such section 505 (as added by this section) applies shall be filed with the Secretary not later than 60 days after the date of the enactment of this Act.

"(2) With respect to any patent information referred to in paragraph (1) of this subsection that is filed with the Secretary within the 60-day period after the date of the enactment of this Act [Oct. 8, 2008], the Secretary shall publish such information in the electronic version of the list referred to at section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)) as soon as it is received, but in no event later than the date that is 90 days after the enactment of this Act.

"(3) With respect to any patent information referred to in paragraph (1) that is filed with the Secretary within the 60-day period after the date of enactment of this Act [Oct. 8, 2008], each applicant that, not later than 120 days after the date of the enactment of this Act, amends an application that is, on or before the date of the enactment of this Act, a substantially complete application (as defined in paragraph (5)(B)(iv) of section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j))) to contain a certification described in paragraph (2)(A)(vii)(IV) of such section 505(j) with respect to that patent shall be deemed to be a first applicant (as defined in paragraph (5)(B)(iv) of such section 505(j))."

Pub. L. 105–115, title I, §125(d), Nov. 21, 1997, 111 Stat. 2326, provided that:

"(1) In general.—An application that was approved by the Secretary of Health and Human Services before the date of the enactment of this Act [Nov. 21, 1997] for the marketing of an antibiotic drug under section 507 of the

Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357), as in effect on the day before the date of the enactment of this Act, shall, on and after such date of enactment, be considered to be an application that was submitted and filed under section 505(b) of such Act (21 U.S.C. 355(b)) and approved for safety and effectiveness under section 505(c) of such Act (21 U.S.C. 355(c)), except that if such application for marketing was in the form of an abbreviated application, the application shall be considered to have been filed and approved under section 505(j) of such Act (21 U.S.C. 355(j)).

"(2) EXCEPTION.—The following subsections of section 505 (21 U.S.C. 355) shall not apply to any application for marketing in which the drug that is the subject of the application contains an antibiotic drug and the antibiotic drug was the subject of any application for marketing received by the Secretary of Health and Human Services under section 507 of such Act (21 U.S.C. 357) before the date of the enactment of this Act [Nov. 21, 1997]:

"(A)(i) Subsections (c)(2), (d)(6), (e)(4), (j)(2)(A)(vii), (j)(2)(A)(viii), (j)(2)(B), (j)(4)(B), and (j)(4)(D); and

"(ii) The third and fourth sentences of subsection (b)(1) (regarding the filing and publication of patent information); and

"(B) Subsections (b)(2)(A), (b)(2)(B), (b)(3), and (c)(3) if the investigations relied upon by the applicant for approval of the application were not conducted by or for the applicant and for which the applicant has not obtained a right of reference or use from the person by or for whom the investigations were conducted.

"(3) PUBLICATION.—For purposes of this section, the Secretary is authorized to make available to the public the established name of each antibiotic drug that was the subject of any application for marketing received by the Secretary for Health and Human Services under section 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357) before the date of enactment of this Act [Nov. 21, 1997]."

TERMINATION OF ADVISORY PANELS

Advisory panels established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a panel established by the President or an officer of the Federal Government, such panel is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a panel established by Congress, its duration is otherwise provided for by law. See sections 3(2) and 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, 776, set out in the Appendix to Title 5, Government Organization and Employees.

APPEALS TAKEN PRIOR TO OCTOBER 10, 1962

Pub. L. 87–781, title I, §104(d)(3), Oct. 10, 1962, 76 Stat. 785, made amendments to subsec. (h) of this section inapplicable to any appeal taken prior to Oct. 10, 1962.

[1] *So in original. Probably should be "bioavailability".*

[2] *So in original. Probably should be "drug,".*

[3] *So in original. Probably should be preceded by "the".*

[4] *So in original. The word "and" probably should not appear.*

[5] *So in original. Probably should be "subparagraph".*

§355–1. Risk evaluation and mitigation strategies

(a) Submission of proposed strategy

(1) Initial approval

If the Secretary, in consultation with the office responsible for reviewing the drug and the office responsible for postapproval safety with respect to the drug, determines that a risk evaluation and mitigation strategy is necessary to ensure that the benefits of the drug outweigh the risks of the drug, and informs the person who submits such application of such determination, then such person shall submit to the Secretary as part of such application a proposed risk evaluation and mitigation strategy. In making such a determination, the Secretary shall consider the following factors:

(A) The estimated size of the population likely to use the drug involved.

(B) The seriousness of the disease or condition that is to be treated with the drug.

(C) The expected benefit of the drug with respect to such disease or condition.

(D) The expected or actual duration of treatment with the drug.

(E) The seriousness of any known or potential adverse events that may be related to the drug and the background incidence of such events in the population likely to use the drug.

(F) Whether the drug is a new molecular entity.

(2) Postapproval requirement

(A) In general

If the Secretary has approved a covered application (including an application approved before the effective date of this section) and did not when approving the application require a risk evaluation and mitigation strategy under paragraph (1), the Secretary, in consultation with the offices described in paragraph (1), may subsequently require such a strategy for the drug involved (including when acting on a supplemental application seeking approval of a new indication for use of the drug) if the Secretary becomes aware of new safety information and makes a determination that such a strategy is necessary to ensure that the benefits of the drug outweigh the risks of the drug.

(B) Submission of proposed strategy

Not later than 120 days after the Secretary notifies the holder of an approved covered application that the Secretary has made a determination under subparagraph (A) with respect to the drug involved, or within such other reasonable time as the Secretary requires to protect the public health, the holder shall submit to the Secretary a proposed risk evaluation and mitigation strategy.

(3) Abbreviated new drug applications

The applicability of this section to an application under section 355(j) of this title is subject to subsection (i).

(4) Non-delegation

Determinations by the Secretary under this subsection for a drug shall be made by individuals at or above the level of individuals empowered to approve a drug (such as division directors within the Center for Drug Evaluation and Research).

(b) Definitions

For purposes of this section:

(1) Adverse drug experience

The term "adverse drug experience" means any adverse event associated with the use of a drug in humans, whether or not considered drug related, including—

(A) an adverse event occurring in the course of the use of the drug in professional practice;

(B) an adverse event occurring from an overdose of the drug, whether accidental or intentional;

(C) an adverse event occurring from abuse of the drug;

(D) an adverse event occurring from withdrawal of the drug; and

(E) any failure of expected pharmacological action of the drug, which may include reduced effectiveness under the conditions of use prescribed in the labeling of such drug, but which may not include reduced effectiveness that is in accordance with such labeling.

(2) Covered application

The term "covered application" means an application referred to in section 355(p)(1)(A) of this title.

(3) New safety information

The term "new safety information", with respect to a drug, means information derived from a clinical trial, an adverse event report, a postapproval study (including a study under section 355(o)(3) of this title), or peer-reviewed biomedical literature; data derived from the postmarket risk identification and analysis system under section 355(k) of this title; or other scientific data deemed appropriate by the Secretary about—

(A) a serious risk or an unexpected serious risk associated with use of the drug that the Secretary has become aware of (that may be based on a new analysis of existing information) since the drug

was approved, since the risk evaluation and mitigation strategy was required, or since the last assessment of the approved risk evaluation and mitigation strategy for the drug; or

(B) the effectiveness of the approved risk evaluation and mitigation strategy for the drug obtained since the last assessment of such strategy.

(4) Serious adverse drug experience

The term "serious adverse drug experience" is an adverse drug experience that—

(A) results in—

(i) death;

(ii) an adverse drug experience that places the patient at immediate risk of death from the adverse drug experience as it occurred (not including an adverse drug experience that might have caused death had it occurred in a more severe form);

(iii) inpatient hospitalization or prolongation of existing hospitalization;

(iv) a persistent or significant incapacity or substantial disruption of the ability to conduct normal life functions; or

(v) a congenital anomaly or birth defect; or

(B) based on appropriate medical judgment, may jeopardize the patient and may require a medical or surgical intervention to prevent an outcome described under subparagraph (A).

(5) Serious risk

The term "serious risk" means a risk of a serious adverse drug experience.

(6) Signal of a serious risk

The term "signal of a serious risk" means information related to a serious adverse drug experience associated with use of a drug and derived from—

(A) a clinical trial;

(B) adverse event reports;

(C) a postapproval study, including a study under section 355(o)(3) of this title;

(D) peer-reviewed biomedical literature;

(E) data derived from the postmarket risk identification and analysis system under section 355(k)(4) of this title; or

(F) other scientific data deemed appropriate by the Secretary.

(7) Responsible person

The term "responsible person" means the person submitting a covered application or the holder of the approved such application.

(8) Unexpected serious risk

The term "unexpected serious risk" means a serious adverse drug experience that is not listed in the labeling of a drug, or that may be symptomatically and pathophysiologically related to an adverse drug experience identified in the labeling, but differs from such adverse drug experience because of greater severity, specificity, or prevalence.

(c) Contents

A proposed risk evaluation and mitigation strategy under subsection (a) shall—

(1) include the timetable required under subsection (d); and

(2) to the extent required by the Secretary, in consultation with the office responsible for reviewing the drug and the office responsible for postapproval safety with respect to the drug, include additional elements described in subsections (e) and (f).

(d) Minimal strategy

For purposes of subsection (c)(1), the risk evaluation and mitigation strategy for a drug shall require a timetable for submission of assessments of the strategy that—

(1) includes an assessment, by the date that is 18 months after the strategy is initially approved;

(2) includes an assessment by the date that is 3 years after the strategy is initially approved;

(3) includes an assessment in the seventh year after the strategy is so approved; and

(4) subject to paragraphs (1), (2), and (3)—

(A) is at a frequency specified in the strategy;

(B) is increased or reduced in frequency as necessary as provided for in subsection (g)(4)(A); and

(C) is eliminated after the 3-year period described in paragraph (1) if the Secretary determines that serious risks of the drug have been adequately identified and assessed and are being adequately managed.

(e) Additional potential elements of strategy

(1) In general

The Secretary, in consultation with the offices described in subsection (c)(2), may under such subsection require that the risk evaluation and mitigation strategy for a drug include 1 or more of the additional elements described in this subsection if the Secretary makes the determination required with respect to each element involved.

(2) Medication Guide; patient package insert

The risk evaluation and mitigation strategy for a drug may require that, as applicable, the responsible person develop for distribution to each patient when the drug is dispensed—

(A) a Medication Guide, as provided for under part 208 of title 21, Code of Federal Regulations (or any successor regulations); and

(B) a patient package insert, if the Secretary determines that such insert may help mitigate a serious risk of the drug.

(3) Communication plan

The risk evaluation and mitigation strategy for a drug may require that the responsible person conduct a communication plan to health care providers, if, with respect to such drug, the Secretary determines that such plan may support implementation of an element of the strategy (including under this paragraph). Such plan may include—

(A) sending letters to health care providers;

(B) disseminating information about the elements of the risk evaluation and mitigation strategy to encourage implementation by health care providers of components that apply to such health care providers, or to explain certain safety protocols (such as medical monitoring by periodic laboratory tests) [1]

(C) disseminating information to health care providers through professional societies about any serious risks of the drug and any protocol to assure safe use; or

(D) disseminating information to health care providers about drug formulations or properties, including information about the limitations or patient care implications of such formulations or properties, and how such formulations or properties may be related to serious adverse drug events associated with use of the drug.

(4) Packaging and disposal

The Secretary may require a risk evaluation mitigation strategy for a drug for which there is a serious risk of an adverse drug experience described in subparagraph (B) or (C) of subsection (b)(1), taking into consideration the factors described in subparagraphs (C) and (D) of subsection (f)(2) and in consultation with other relevant Federal agencies with authorities over drug disposal packaging, which may include requiring that—

(A) the drug be made available for dispensing to certain patients in unit dose packaging, packaging that provides a set duration, or another packaging system that the Secretary determines may mitigate such serious risk; or

(B) the drug be dispensed to certain patients with a safe disposal packaging or safe disposal system for purposes of rendering drugs nonretrievable (as defined in section 1300.05 of title 21, Code of Federal Regulations (or any successor regulation)) if the Secretary determines that such safe disposal packaging or system may mitigate such serious risk and is sufficiently available.

(f) Providing safe access for patients to drugs with known serious risks that would otherwise be unavailable

(1) Allowing safe access to drugs with known serious risks

The Secretary, in consultation with the offices described in subsection (c)(2), may require that the risk evaluation and mitigation strategy for a drug include such elements as are necessary to assure safe use of the drug, because of its inherent toxicity or potential harmfulness, if the Secretary determines that —

(A) the drug, which has been shown to be effective, but is associated with a serious adverse drug experience, can be approved only if, or would be withdrawn unless, such elements are required as part of such strategy to mitigate a specific serious risk listed in the labeling of the drug; and

(B) for a drug initially approved without elements to assure safe use, other elements under subsections (c), (d), and (e) are not sufficient to mitigate such serious risk.

(2) Assuring access and minimizing burden

Such elements to assure safe use under paragraph (1) shall—

(A) be commensurate with the specific serious risk listed in the labeling of the drug;

(B) within 30 days of the date on which any element under paragraph (1) is imposed, be posted publicly by the Secretary with an explanation of how such elements will mitigate the observed safety risk;

(C) considering such risk, not be unduly burdensome on patient access to the drug, considering in particular—

(i) patients with serious or life-threatening diseases or conditions;

(ii) patients who have difficulty accessing health care (such as patients in rural or medically underserved areas); and

(iii) patients with functional limitations; and

(D) to the extent practicable, so as to minimize the burden on the health care delivery system—

(i) conform with elements to assure safe use for other drugs with similar, serious risks; and

(ii) be designed to be compatible with established distribution, procurement, and dispensing systems for drugs.

(3) Elements to assure safe use

The elements to assure safe use under paragraph (1) shall include 1 or more goals to mitigate a specific serious risk listed in the labeling of the drug and, to mitigate such risk, may require that—

(A) health care providers who prescribe the drug have particular training or experience, or are specially certified (the opportunity to obtain such training or certification with respect to the drug shall be available to any willing provider from a frontier area in a widely available training or certification method (including an on-line course or via mail) as approved by the Secretary at reasonable cost to the provider);

(B) pharmacies, practitioners, or health care settings that dispense the drug are specially certified (the opportunity to obtain such certification shall be available to any willing provider from a frontier area);

(C) the drug be dispensed to patients only in certain health care settings, such as hospitals;

(D) the drug be dispensed to patients with evidence or other documentation of safe-use conditions, such as laboratory test results;

(E) each patient using the drug be subject to certain monitoring; or

(F) each patient using the drug be enrolled in a registry.

(4) Implementation system

The elements to assure safe use under paragraph (1) that are described in subparagraphs (B), (C), and (D) of paragraph (3) may include a system through which the applicant is able to take reasonable steps to—

(A) monitor and evaluate implementation of such elements by health care providers, pharmacists, and other parties in the health care system who are responsible for implementing such elements; and

(B) work to improve implementation of such elements by such persons.

(5) Evaluation of elements to assure safe use

The Secretary, through the Drug Safety and Risk Management Advisory Committee (or successor committee) or other advisory committee of the Food and Drug Administration, shall—

(A) seek input from patients, physicians, pharmacists, and other health care providers about how elements to assure safe use under this subsection for 1 or more drugs may be standardized so as not to be—

(i) unduly burdensome on patient access to the drug; and

(ii) to the extent practicable, minimize the burden on the health care delivery system;

(B) periodically evaluate, for 1 or more drugs, the elements to assure safe use of such drug to assess whether the elements—

(i) assure safe use of the drug;

(ii) are not unduly burdensome on patient access to the drug; and

(iii) to the extent practicable, minimize the burden on the health care delivery system; and

(C) considering such input and evaluations—

(i) issue or modify agency guidance about how to implement the requirements of this subsection; and

(ii) modify elements under this subsection for 1 or more drugs as appropriate.

(6) Additional mechanisms to assure access

The mechanisms under section 360bbb of this title to provide for expanded access for patients with serious or life-threatening diseases or conditions may be used to provide access for patients with a serious or life-threatening disease or condition, the treatment of which is not an approved use for the drug, to a drug that is subject to elements to assure safe use under this subsection. The Secretary shall promulgate regulations for how a physician may provide the drug under the mechanisms of section 360bbb of this title.

(7) Repealed. Pub. L. 113–5, title III, §302(c)(1), Mar. 13, 2013, 127 Stat. 185

(8) Limitation

No holder of an approved covered application shall use any element to assure safe use required by the Secretary under this subsection to block or delay approval of an application under section 355(b)(2) or (j) of this title or to prevent application of such element under subsection (i)(1)(B) to a drug that is the subject of an abbreviated new drug application.

(g) Assessment and modification of approved strategy

(1) Voluntary assessments

After the approval of a risk evaluation and mitigation strategy under subsection (a), the responsible person involved may, subject to paragraph (2), submit to the Secretary an assessment of the approved strategy for the drug involved at any time.

(2) Required assessments

A responsible person shall submit an assessment of the approved risk evaluation and mitigation strategy for a drug—

(A) when submitting a supplemental application for a new indication for use under section 355(b) of this title or under section 262 of title 42, unless the drug is not subject to section 353(b) of this title and the risk evaluation and mitigation strategy for the drug includes only the timetable under subsection (d);

(B) when required by the strategy, as provided for in such timetable under subsection (d);

(C) within a time period to be determined by the Secretary, if the Secretary, in consultation with the offices described in subsection (c)(2), determines that an assessment is needed to evaluate whether the approved strategy should be modified to—

(i) ensure the benefits of the drug outweigh the risks of the drug; or

(ii) minimize the burden on the health care delivery system of complying with the strategy.

(3) Requirements for assessments

An assessment under paragraph (1) or (2) of an approved risk evaluation and mitigation strategy for a drug shall include, with respect to each goal included in the strategy, an assessment of the extent to which the approved strategy, including each element of the strategy, is meeting the goal or whether 1 or more such goals or such elements should be modified.

(4) Modification

(A) On initiative of responsible person

After the approval of a risk evaluation and mitigation strategy by the Secretary, the responsible person may, at any time, submit to the Secretary a proposal to modify the approved strategy. Such proposal may propose the addition, modification, or removal of any goal or element of the approved strategy and shall include an adequate rationale to support such proposed addition, modification, or removal of any goal or element of the strategy.

(B) On initiative of Secretary

After the approval of a risk evaluation and mitigation strategy by the Secretary, the Secretary may, at any time, require a responsible person to submit a proposed modification to the strategy within 120 days or within such reasonable time as the Secretary specifies, if the Secretary, in consultation with the offices described in subsection (c)(2), determines that 1 or more goals or elements should be added, modified, or removed from the approved strategy to—

(i) ensure the benefits of the drug outweigh the risks of the drug;

(ii) minimize the burden on the health care delivery system of complying with the strategy; or

(iii) accommodate different, comparable aspects of the elements to assure safe use for a drug that is the subject of an application under section 355(j) of this title, and the applicable listed drug.

(h) Review of proposed strategies; review of assessments and modifications of approved strategies

(1) In general

The Secretary, in consultation with the offices described in subsection (c)(2), shall promptly review each proposed risk evaluation and mitigation strategy for a drug submitted under subsection (a) and each assessment of and proposed modification to an approved risk evaluation and mitigation strategy for a drug submitted under subsection (g), and, if necessary, promptly initiate discussions with the responsible person about such proposed strategy, assessment, or modification.

(2) Action

(A) In general

(i) Timeframe

Unless the dispute resolution process described under paragraph (3) or (4) applies, and, except as provided in clause (ii) or clause (iii) below, the Secretary, in consultation with the offices described in subsection (c)(2), shall review and act on the proposed risk evaluation and mitigation strategy for a drug or any proposed modification to any required strategy within 180 days of receipt of the proposed strategy or modification.

(ii) Minor modifications

The Secretary shall review and act on a proposed minor modification, as defined by the Secretary in guidance, within 60 days of receipt of such modification.

(iii) REMS modification due to safety labeling changes

Not later than 60 days after the Secretary receives a proposed modification to an approved risk evaluation and mitigation strategy to conform the strategy to approved safety labeling changes, including safety labeling changes initiated by the responsible person in accordance with FDA regulatory requirements, or to a safety labeling change that the Secretary has directed the holder of the application to make pursuant to section 355(o)(4) of this title, the Secretary shall review and act on such proposed modification to the approved strategy.

(iv) Guidance

The Secretary shall establish, through guidance, that responsible persons may implement certain modifications to an approved risk evaluation and mitigation strategy following notification to the

Secretary.

(B) Inaction

An approved risk evaluation and mitigation strategy shall remain in effect until the Secretary acts, if the Secretary fails to act as provided under subparagraph (A).

(C) Public availability

Upon acting on a proposed risk evaluation and mitigation strategy or proposed modification to a risk evaluation and mitigation strategy under subparagraph (A), the Secretary shall make publicly available an action letter describing the actions taken by the Secretary under such subparagraph (A).

(3) Dispute resolution at initial approval

If a proposed risk evaluation and mitigation strategy is submitted under subsection (a)(1) in an application for initial approval of a drug and there is a dispute about the strategy, the responsible person shall use the major dispute resolution procedures as set forth in the letters described in section 101(c) of the Food and Drug Administration Amendments Act of 2007.

(4) Dispute resolution in all other cases

(A) Request for review

(i) In general

The responsible person may, after the sponsor is required to make a submission under subsection (a)(2) or (g), request in writing that a dispute about the strategy be reviewed by the Drug Safety Oversight Board under subsection (j), except that the determination of the Secretary to require a risk evaluation and mitigation strategy is not subject to review under this paragraph. The preceding sentence does not prohibit review under this paragraph of the particular elements of such a strategy.

(ii) Scheduling

Upon receipt of a request under clause (i), the Secretary shall schedule the dispute involved for review under subparagraph (B) and, not later than 5 business days of scheduling the dispute for review, shall publish by posting on the Internet or otherwise a notice that the dispute will be reviewed by the Drug Safety Oversight Board.

(B) Scheduling review

If a responsible person requests review under subparagraph (A), the Secretary—

(i) shall schedule the dispute for review at 1 of the next 2 regular meetings of the Drug Safety Oversight Board, whichever meeting date is more practicable; or

(ii) may convene a special meeting of the Drug Safety Oversight Board to review the matter more promptly, including to meet an action deadline on an application (including a supplemental application).

(C) Agreement after discussion or administrative appeals

(i) Further discussion or administrative appeals

A request for review under subparagraph (A) shall not preclude further discussions to reach agreement on the risk evaluation and mitigation strategy, and such a request shall not preclude the use of administrative appeals within the Food and Drug Administration to reach agreement on the strategy, including appeals as described in the letters described in section 101(c) of the Food and Drug Administration Amendments Act of 2007 for procedural or scientific matters involving the review of human drug applications and supplemental applications that cannot be resolved at the divisional level. At the time a review has been scheduled under subparagraph (B) and notice of such review has been posted, the responsible person shall either withdraw the request under subparagraph (A) or terminate the use of such administrative appeals.

(ii) Agreement terminates dispute resolution

At any time before a decision and order is issued under subparagraph (G), the Secretary (in consultation with the offices described in subsection (c)(2)) and the responsible person may reach

an agreement on the risk evaluation and mitigation strategy through further discussion or administrative appeals, terminating the dispute resolution process, and the Secretary shall issue an action letter or order, as appropriate, that describes the strategy.

(D) Meeting of the Board

At a meeting of the Drug Safety Oversight Board described in subparagraph (B), the Board shall—

(i) hear from both parties via written or oral presentation; and

(ii) review the dispute.

(E) Record of proceedings

The Secretary shall ensure that the proceedings of any such meeting are recorded, transcribed, and made public within 90 days of the meeting. The Secretary shall redact the transcript to protect any trade secrets and other information that is exempted from disclosure under section 552 of title 5 or section 552a of title 5.

(F) Recommendation of the Board

Not later than 5 days after any such meeting, the Drug Safety Oversight Board shall provide a written recommendation on resolving the dispute to the Secretary. Not later than 5 days after the Board provides such written recommendation to the Secretary, the Secretary shall make the recommendation available to the public.

(G) Action by the Secretary

(i) Action letter

With respect to a proposal or assessment referred to in paragraph (1), the Secretary shall issue an action letter that resolves the dispute not later than the later of—

(I) the action deadline for the action letter on the application; or

(II) 7 days after receiving the recommendation of the Drug Safety Oversight Board.

(ii) Order

With respect to an assessment of an approved risk evaluation and mitigation strategy under subsection (g)(1) or under any of subparagraphs (B) through (D) of subsection (g)(2), the Secretary shall issue an order, which shall be made public, that resolves the dispute not later than 7 days after receiving the recommendation of the Drug Safety Oversight Board.

(H) Inaction

An approved risk evaluation and mitigation strategy shall remain in effect until the Secretary acts, if the Secretary fails to act as provided for under subparagraph (G).

(I) Effect on action deadline

With respect to a proposal or assessment referred to in paragraph (1), the Secretary shall be considered to have met the action deadline for the action letter on the application if the responsible person requests the dispute resolution process described in this paragraph and if the Secretary has complied with the timing requirements of scheduling review by the Drug Safety Oversight Board, providing a written recommendation, and issuing an action letter under subparagraphs (B), (F), and (G), respectively.

(J) Disqualification

No individual who is an employee of the Food and Drug Administration and who reviews a drug or who participated in an administrative appeal under subparagraph (C)(i) with respect to such drug may serve on the Drug Safety Oversight Board at a meeting under subparagraph (D) to review a dispute about the risk evaluation and mitigation strategy for such drug.

(K) Additional expertise

The Drug Safety Oversight Board may add members with relevant expertise from the Food and Drug Administration, including the Office of Pediatrics, the Office of Women's Health, or the Office of Rare Diseases, or from other Federal public health or health care agencies, for a meeting under subparagraph (D) of the Drug Safety Oversight Board.

(5) Use of advisory committees

The Secretary may convene a meeting of 1 or more advisory committees of the Food and Drug Administration to—

(A) review a concern about the safety of a drug or class of drugs, including before an assessment of the risk evaluation and mitigation strategy or strategies of such drug or drugs is required to be submitted under subparagraph (B) or (C) of subsection (g)(2);

(B) review the risk evaluation and mitigation strategy or strategies of a drug or group of drugs; or

(C) review a dispute under paragraph (3) or (4).

(6) Process for addressing drug class effects

(A) In general

When a concern about a serious risk of a drug may be related to the pharmacological class of the drug, the Secretary, in consultation with the offices described in subsection (c)(2), may defer assessments of the approved risk evaluation and mitigation strategies for such drugs until the Secretary has convened 1 or more public meetings to consider possible responses to such concern.

(B) Notice

If the Secretary defers an assessment under subparagraph (A), the Secretary shall—

(i) give notice of the deferral to the holder of the approved covered application not later than 5 days after the deferral;

(ii) publish the deferral in the Federal Register; and

(iii) give notice to the public of any public meetings to be convened under subparagraph (A), including a description of the deferral.

(C) Public meetings

Such public meetings may include—

(i) 1 or more meetings of the responsible person for such drugs;

(ii) 1 or more meetings of 1 or more advisory committees of the Food and Drug Administration, as provided for under paragraph (6); or

(iii) 1 or more workshops of scientific experts and other stakeholders.

(D) Action

After considering the discussions from any meetings under subparagraph (A), the Secretary may—

(i) announce in the Federal Register a planned regulatory action, including a modification to each risk evaluation and mitigation strategy, for drugs in the pharmacological class;

(ii) seek public comment about such action; and

(iii) after seeking such comment, issue an order addressing such regulatory action.

(7) International coordination

The Secretary, in consultation with the offices described in subsection (c)(2), may coordinate the timetable for submission of assessments under subsection (d), or a study or clinical trial under section 355(o)(3) of this title, with efforts to identify and assess the serious risks of such drug by the marketing authorities of other countries whose drug approval and risk management processes the Secretary deems comparable to the drug approval and risk management processes of the United States. If the Secretary takes action to coordinate such timetable, the Secretary shall give notice to the responsible person.

(8) Effect

Use of the processes described in paragraphs (6) and (7) shall not be the sole source of delay of action on an application or a supplement to an application for a drug.

(i) Abbreviated new drug applications

(1) In general

A drug that is the subject of an abbreviated new drug application under section 355(j) of this title is subject to only the following elements of the risk evaluation and mitigation strategy required under subsection (a) for the applicable listed drug:

(A) A Medication Guide or patient package insert, if required under subsection (e) for the applicable listed drug.

(B) A packaging or disposal requirement, if required under subsection (e)(4) for the applicable listed drug.

(C)(i) Elements to assure safe use, if required under subsection (f) for the listed drug, which, subject to clause (ii), for a drug that is the subject of an application under section 355(j) of this title may use—

(I) a single, shared system with the listed drug under subsection (f); or

(II) a different, comparable aspect of the elements to assure safe use under subsection (f).

(ii) The Secretary may require a drug that is the subject of an application under section 355(j) of this title and the listed drug to use a single, shared system under subsection (f), if the Secretary determines that no different, comparable aspect of the elements to assure safe use could satisfy the requirements of subsection (f).

(2) Action by Secretary

For an applicable listed drug for which a drug is approved under section 355(j) of this title, the Secretary—

(A) shall undertake any communication plan to health care providers required under subsection (e)(3) for the applicable listed drug;

(B) shall permit packaging systems and safe disposal packaging or safe disposal systems that are different from those required for the applicable listed drug under subsection (e)(4); and

(C) shall inform the responsible person for the drug that is so approved if the risk evaluation and mitigation strategy for the applicable listed drug is modified.

(3) Shared REMS

If the Secretary approves, in accordance with paragraph (1)(C)(i)(II), a different, comparable aspect of the elements to assure safe use under subsection (f) for a drug that is the subject of an abbreviated new drug application under section 355(j) of this title, the Secretary may require that such different comparable aspect of the elements to assure safe use can be used with respect to any other drug that is the subject of an application under section 355(j) or 355(b) of this title that references the same listed drug.

(j) Drug Safety Oversight Board

(1) In general

There is established a Drug Safety Oversight Board.

(2) Composition; meetings

The Drug Safety Oversight Board shall—

(A) be composed of scientists and health care practitioners appointed by the Secretary, each of whom is an employee of the Federal Government;

(B) include representatives from offices throughout the Food and Drug Administration, including the offices responsible for postapproval safety of drugs;

(C) include at least 1 representative each from the National Institutes of Health and the Department of Health and Human Services (other than the Food and Drug Administration);

(D) include such representatives as the Secretary shall designate from other appropriate agencies that wish to provide representatives; and

(E) meet at least monthly to provide oversight and advice to the Secretary on the management of important drug safety issues.

(k) Waiver in public health emergencies

The Secretary may waive any requirement of this section with respect to a qualified countermeasure (as defined in section 247d–6a(a)(2) of title 42) to which a requirement under this section has been applied, if the Secretary determines that such waiver is required to mitigate the effects of, or reduce the severity of, the circumstances under which—

(1) a determination described in subparagraph (A), (B), or (C) of section 360bbb–3(b)(1) of this title has been made by the Secretary of Homeland Security, the Secretary of Defense, or the Secretary, respectively; or

(2) the identification of a material threat described in subparagraph (D) of section 360bbb–3(b)(1) of this title has been made pursuant to section 247d–6b of title 42.

(l) Provision of samples not a violation of strategy

The provision of samples of a covered product to an eligible product developer (as those terms are defined in section 355–2(a) of this title) shall not be considered a violation of the requirements of any risk evaluation and mitigation strategy that may be in place under this section for such drug.

(m) Separate REMS

When used in this section, the term "different, comparable aspect of the elements to assure safe use" means a risk evaluation and mitigation strategy for a drug that is the subject of an application under section 355(j) of this title that uses different methods or operational means than the strategy required under subsection (a) for the applicable listed drug, or other application under section 355(j) of this title with the same such listed drug, but achieves the same level of safety as such strategy.

(June 25, 1938, ch. 675, §505–1, as added Pub. L. 110–85, title IX, §901(b), Sept. 27, 2007, 121 Stat. 926; amended Pub. L. 112–144, title XI, §1132(a), (b), July 9, 2012, 126 Stat. 1119, 1120; Pub. L. 113–5, title III, §302(c), Mar. 13, 2013, 127 Stat. 185; Pub. L. 114–255, div. A, title III, §§3075(c), 3101(a)(2)(C), Dec. 13, 2016, 130 Stat. 1139, 1153; Pub. L. 115–52, title VI, §606, Aug. 18, 2017, 131 Stat. 1049; Pub. L. 115–271, title III, §§3032(a)–(c), 3041(a), Oct. 24, 2018, 132 Stat. 3940–3942; Pub. L. 116–94, div. N, title I, §610(d), (f), Dec. 20, 2019, 133 Stat. 3135, 3136.)

Editorial Notes

References in Text

For the effective date of this section, referred to in subsec. (a)(2)(A), see Effective Date note below.

Section 101(c) of the Food and Drug Administration Amendments Act of 2007, referred to in subsec. (h)(3), (4)(C)(i), is section 101(c) of Pub. L. 110–85, which is set out as a note under section 379g of this title.

Amendments

2019—Subsec. (g)(4)(B)(iii). Pub. L. 116–94, §610(f)(1), added cl. (iii).

Subsec. (i)(1)(C). Pub. L. 116–94, §610(f)(2), added subpar. (C) and struck out former subpar. (C) which read as follows: "Elements to assure safe use, if required under subsection (f) for the listed drug. A drug that is the subject of an abbreviated new drug application and the listed drug shall use a single, shared system under subsection (f). The Secretary may waive the requirement under the preceding sentence for a drug that is the subject of an abbreviated new drug application, and permit the applicant to use a different, comparable aspect of the elements to assure safe use, if the Secretary determines that—

"(i) the burden of creating a single, shared system outweighs the benefit of a single, system, taking into consideration the impact on health care providers, patients, the applicant for the abbreviated new drug application, and the holder of the reference drug product; or

"(ii) an aspect of the elements to assure safe use for the applicable listed drug is claimed by a patent that has not expired or is a method or process that, as a trade secret, is entitled to protection, and the applicant for the abbreviated new drug application certifies that it has sought a license for use of an aspect of the elements to assure safe use for the applicable listed drug and that it was unable to obtain a license.

A certification under clause (ii) shall include a description of the efforts made by the applicant for the abbreviated new drug application to obtain a license. In a case described in clause (ii), the Secretary may seek to negotiate a voluntary agreement with the owner of the patent, method, or process for a license under which the applicant for such abbreviated new drug application may use an aspect of the elements to assure safe use, if required under subsection (f) for the applicable listed drug, that is claimed by a patent that has not expired or is a method or process that as a trade secret is entitled to protection."

Subsec. (i)(3). Pub. L. 116–94, §610(f)(3), added par. (3).

Subsec. (l). Pub. L. 116–94, §610(d), added subsec. (l).

Subsec. (m). Pub. L. 116–94, §610(f)(4), added subsec. (m).

2018—Subsec. (b)(1)(E). Pub. L. 115–271, §3041(a), substituted "of the drug, which may include reduced effectiveness under the conditions of use prescribed in the labeling of such drug, but which may not include reduced effectiveness that is in accordance with such labeling" for "of the drug".

Subsec. (e)(4). Pub. L. 115–271, §3032(a), added par. (4).

Subsec. (f)(2)(C)(iii). Pub. L. 115–271, §3032(b), added cl. (iii).

Subsec. (i)(1)(B), (C). Pub. L. 115–271, §3032(c)(1), added subpar. (B) and redesignated former subpar. (B) as (C).

Subsec. (i)(2)(B), (C). Pub. L. 115–271, §3032(c)(2), added subpar. (B) and redesignated former subpar. (B) as (C).

2017—Subsec. (e)(3)(B). Pub. L. 115–52, §606(1), struck out "; or" at end.

Subsec. (e)(3)(D). Pub. L. 115–52, §606(2), (3), added subpar. (D).

2016—Subsec. (f)(5). Pub. L. 114–255, §3075(c)(1), inserted "or other advisory committee" after "(or successor committee)" in introductory provisions.

Subsec. (f)(5)(B). Pub. L. 114–255, §3075(c)(2), substituted "periodically" for "at least annually," in introductory provisions.

Subsec. (h)(2)(A)(iii). Pub. L. 114–255, §3101(a)(2)(C)(i), substituted, in heading, "labeling" for "label" and in text, "approved safety labeling changes" for "approved safety label changes", "responsible person" for "sponsor", and "a safety labeling change" for "a safety label change".

Subsec. (h)(8). Pub. L. 114–255, §3101(a)(2)(C)(ii), struck out period after "(7)".

2013—Subsec. (f)(7). Pub. L. 113–5, §302(c)(1), struck out par. (7) which related to waiver of subsec. (f) requirements in public health emergencies.

Subsec. (k). Pub. L. 113–5, §302(c)(2), added subsec. (k).

2012—Subsec. (g)(1). Pub. L. 112–144, §1132(a)(1), struck out ", and propose a modification to," after "an assessment of".

Subsec. (g)(2). Pub. L. 112–144, §1132(a)(2)(A), in introductory provisions, struck out ", subject to paragraph (5)," after "shall" and ", and may propose a modification to," after "an assessment of".

Subsec. (g)(2)(C). Pub. L. 112–144, §1132(a)(2)(B), substituted "an assessment is needed to evaluate whether the approved strategy should be modified to—" and cls. (i) and (ii) for "new safety or effectiveness information indicates that—

"(i) an element under subsection (d) or (e) should be modified or included in the strategy; or

"(ii) an element under subsection (f) should be modified or included in the strategy; or".

Subsec. (g)(2)(D). Pub. L. 112–144, §1132(a)(2)(C), struck out subpar. (D) which read as follows: "within 15 days when ordered by the Secretary, in consultation with the offices described in subsection (c)(2), if the Secretary determines that there may be a cause for action by the Secretary under section 355(e) of this title."

Subsec. (g)(3). Pub. L. 112–144, §1132(a)(3), substituted "for a drug shall include, with respect to each goal included in the strategy, an assessment of the extent to which the approved strategy, including each element of the strategy, is meeting the goal or whether 1 or more such goals or such elements should be modified." for "for a drug shall include—" and struck out subpars. (A) to (C) which related to assessment of elements to assure safe use, postapproval studies, and postapproval clinical trials.

Subsec. (g)(4). Pub. L. 112–144, §1132(a)(4), amended par. (4) generally. Prior to amendment, text read as follows: "A modification (whether an enhancement or a reduction) to the approved risk evaluation and mitigation strategy for a drug may include the addition or modification of any element under subsection (d) or the addition, modification, or removal of any element under subsection (e) or (f), such as—

"(A) modifying the timetable for assessments of the strategy as provided in subsection (d)(3), including to eliminate assessments; or

"(B) adding, modifying, or removing an element to assure safe use under subsection (f)."

Subsec. (h). Pub. L. 112–144, §1132(b)(1), inserted "and modifications" after "review of assessments" in heading.

Subsec. (h)(1). Pub. L. 112–144, §1132(b)(2), inserted "and proposed modification to" after "under subsection (a) and each assessment of" and ", and, if necessary, promptly initiate discussions with the responsible person about such proposed strategy, assessment, or modification" after "subsection (g)".

Subsec. (h)(2). Pub. L. 112–144, §1132(b)(3), (4), redesignated par. (3) as (2) and struck out former par. (2). Prior to amendment, text of par. (2) read as follows: "The Secretary, in consultation with the offices described in subsection (c)(2), shall initiate discussions with the responsible person for purposes of this subsection to determine a strategy not later than 60 days after any such assessment is submitted or, in the case of an assessment submitted under subsection (g)(2)(D), not later than 30 days after such assessment is submitted."

Subsec. (h)(2)(A). Pub. L. 112–144, §1132(b)(5)(A), amended subpar. (A) generally. Prior to amendment, subpar. (A) related to Secretary's description of any required risk evaluation and mitigation strategy for a drug as part of the

action letter on the application or in an order.

Subsec. (h)(2)(C). Pub. L. 112–144, §1132(b)(5)(B), amended subpar. (C) generally. Prior to amendment, text read as follows: "Any action letter described in subparagraph (A)(i) or order described in subparagraph (A)(ii) shall be made publicly available."

Subsec. (h)(3), (4). Pub. L. 112–144, §1132(b)(4), redesignated pars. (4) and (5) as (3) and (4), respectively. Former par. (3) redesignated (2).

Subsec. (h)(4)(A)(i). Pub. L. 112–144, §1132(b)(6)(A), substituted "The responsible" for "Not earlier than 15 days, and not later than 35 days, after discussions under paragraph (2) have begun, the responsible" and inserted ", after the sponsor is required to make a submission under subsection (a)(2) or (g)," before "request in writing".

Subsec. (h)(4)(I). Pub. L. 112–144, §1132(b)(6)(B), substituted "if the Secretary has complied with the timing requirements of scheduling review by the Drug Safety Oversight Board, providing a written recommendation, and issuing an action letter under subparagraphs (B), (F), and (G), respectively." for "if the Secretary—" and struck out cls. (i) and (ii) which read as follows:

"(i) has initiated the discussions described under paragraph (2) not less than 60 days before such action deadline; and

"(ii) has complied with the timing requirements of scheduling review by the Drug Safety Oversight Board, providing a written recommendation, and issuing an action letter under subparagraphs (B), (F), and (G), respectively."

Subsec. (h)(5). Pub. L. 112–144, §1132(b)(4), (7), redesignated par. (6) as (5) and substituted "subparagraph (B) or (C)" for "any of subparagraphs (B) through (D)" in subpar. (A) and "paragraph (3) or (4)" for "paragraph (4) or (5)" in subpar. (C). Former par. (5) redesignated (4).

Subsec. (h)(6), (7). Pub. L. 112–144, §1132(b)(4), redesignated pars. (7) and (8) as (6) and (7), respectively. Former par. (6) redesignated (5).

Subsec. (h)(8), (9). Pub. L. 112–144, §1132(b)(4), (8), redesignated par. (9) as (8) and substituted "paragraphs (6) and (7)." for "paragraphs (7) and (8)". Former par. (8) redesignated (7).

Statutory Notes and Related Subsidiaries

Effective Date

Section effective 180 days after Sept. 27, 2007, see section 909 of Pub. L. 110–85, set out as an Effective Date of 2007 Amendment note under section 331 of this title.

Evidence-Based Opioid Analgesic Prescribing Guidelines and Report

Pub. L. 115–271, title III, §3002, Oct. 24, 2018, 132 Stat. 3934, provided that:

"(a) Guidelines.—The Commissioner of Food and Drugs shall develop evidence-based opioid analgesic prescribing guidelines for the indication-specific treatment of acute pain only for the relevant therapeutic areas where such guidelines do not exist.

"(b) Public Input.—In developing the guidelines under subsection (a), the Commissioner of Food and Drugs shall—

"(1) consult with stakeholders, which may include conducting a public meeting of medical professional societies (including any State-based societies), health care providers, State medical boards, medical specialties including pain medicine specialty societies, patient groups, pharmacists, academic or medical research entities, and other entities with experience in health care, as appropriate;

"(2) collaborate with the Director of the Centers for Disease Control and Prevention, as applicable and appropriate, and other Federal agencies with relevant expertise as appropriate; and

"(3) provide for a notice and comment period consistent with section 701(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 371(h)) for the submission of comments by the public.

"(c) Report.—Not later than 1 year after the date of enactment of this Act [Oct. 24, 2018], or, if earlier, at the time the guidelines under subsection (a) are finalized, the Commissioner of Food and Drugs shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate, and post on the public website of the Food and Drug Administration, a report on how the Food and Drug Administration will utilize the guidelines under subsection (a) to protect the public health and a description of the public health need with respect to each such indication-specific treatment guideline.

"(d) Updates.—The Commissioner of Food and Drugs shall periodically—

"(1) update the guidelines under subsection (a), informed by public input described in subsection (b); and

"(2) submit to the committees specified in subsection (c) and post on the public website of the Food and Drug Administration an updated report under such subsection.

"(e) Statement To Accompany Guidelines and Recommendations.—The Commissioner of Food and Drugs shall ensure that opioid analgesic prescribing guidelines and other recommendations developed under this section are accompanied by a clear statement that such guidelines or recommendations, as applicable—

"(1) are intended to help inform clinical decisionmaking by prescribers and patients; and

"(2) are not intended to be used for the purposes of restricting, limiting, delaying, or denying coverage for, or access to, a prescription issued for a legitimate medical purpose by an individual practitioner acting in the usual course of professional practice."

Prescriber Education

Pub. L. 114–198, title I, §106(b), July 22, 2016, 130 Stat. 703, provided that: "Not later than 1 year after the date of the enactment of this Act [July 22, 2016], the Secretary [of Health and Human Services], acting through the Commissioner of Food and Drugs, as part of the Food and Drug Administration's evaluation of the Extended-Release/Long-Acting Opioid Analgesics Risk Evaluation and Mitigation Strategy, and in consultation with relevant stakeholders, shall develop recommendations regarding education programs for prescribers of opioids pursuant to section 505–1 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355–1), including recommendations on—

"(1) which prescribers should participate in such programs; and

"(2) how often participation in such programs is necessary."

Guidance

Pub. L. 112–144, title XI, §1132(c), July 9, 2012, 126 Stat. 1122, provided that: "Not later than 1 year after the date of enactment of this Act [July 9, 2012], the Secretary of Health and Human Services shall issue guidance that, for purposes of section 505–1(h)(2)(A) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355–1(h)(2)(A)), describes the types of modifications to approved risk evaluation and mitigation strategies that shall be considered to be minor modifications of such strategies."

[1] *So in original. Probably should be followed by a semicolon.*

§355–2. Actions for delays of generic drugs and biosimilar biological products

(a) Definitions

In this section—

(1) the term "commercially reasonable, market-based terms" means—

(A) a nondiscriminatory price for the sale of the covered product at or below, but not greater than, the most recent wholesale acquisition cost for the drug, as defined in section 1395w–3a(c)(6)(B) of title 42;

(B) a schedule for delivery that results in the transfer of the covered product to the eligible product developer consistent with the timing under subsection (b)(2)(A)(iv); and

(C) no additional conditions are imposed on the sale of the covered product;

(2) the term "covered product"—

(A) means—

(i) any drug approved under subsection (c) or (j) of section 355 of this title or biological product licensed under subsection (a) or (k) of section 262 of title 42;

(ii) any combination of a drug or biological product described in clause (i); or

(iii) when reasonably necessary to support approval of an application under section 355 of this title, or section 262 of title 42, as applicable, or otherwise meet the requirements for approval under either such section, any product, including any device, that is marketed or intended for use with such a drug or biological product; and

(B) does not include any drug or biological product that appears on the drug shortage list in effect under section 356e of this title, unless—

(i) the drug or biological product has been on the drug shortage list in effect under such section 356e of this title continuously for more than 6 months; or

(ii) the Secretary determines that inclusion of the drug or biological product as a covered product is likely to contribute to alleviating or preventing a shortage.

(3) the term "device" has the meaning given the term in section 321 of this title;

(4) the term "eligible product developer" means a person that seeks to develop a product for approval pursuant to an application for approval under subsection (b)(2) or (j) of section 355 of this title or for licensing pursuant to an application under section 262(k) of title 42;

(5) the term "license holder" means the holder of an application approved under subsection (c) or (j) of section 355 of this title or the holder of a license under subsection (a) or (k) of section 262 of title 42 for a covered product;

(6) the term "REMS" means a risk evaluation and mitigation strategy under section 355–1 of this title;

(7) the term "REMS with ETASU" means a REMS that contains elements to assure safe use under section 355–1(f) of this title;

(8) the term "Secretary" means the Secretary of Health and Human Services;

(9) the term "single, shared system of elements to assure safe use" means a single, shared system of elements to assure safe use under section 355–1(f) of this title; and

(10) the term "sufficient quantities" means an amount of a covered product that the eligible product developer determines allows it to—

(A) conduct testing to support an application under—

(i) subsection (b)(2) or (j) of section 355 of this title; or

(ii) section 262(k) of title 42; and

(B) fulfill any regulatory requirements relating to approval of such an application.

(b) Civil action for failure to provide sufficient quantities of a covered product

(1) In general

An eligible product developer may bring a civil action against the license holder for a covered product seeking relief under this subsection in an appropriate district court of the United States alleging that the license holder has declined to provide sufficient quantities of the covered product to the eligible product developer on commercially reasonable, market-based terms.

(2) Elements

(A) In general

To prevail in a civil action brought under paragraph (1), an eligible product developer shall prove, by a preponderance of the evidence—

(i) that—

(I) the covered product is not subject to a REMS with ETASU; or

(II) if the covered product is subject to a REMS with ETASU—

(aa) the eligible product developer has obtained a covered product authorization from the Secretary in accordance with subparagraph (B); and

(bb) the eligible product developer has provided a copy of the covered product authorization to the license holder;

(ii) that, as of the date on which the civil action is filed, the eligible product developer has not obtained sufficient quantities of the covered product on commercially reasonable, market-based terms;

(iii) that the eligible product developer has submitted a written request to purchase sufficient quantities of the covered product to the license holder, and such request—

(I) was sent to a named corporate officer of the license holder;

(II) was made by certified or registered mail with return receipt requested;

(III) specified an individual as the point of contact for the license holder to direct communications related to the sale of the covered product to the eligible product developer and a means for electronic and written communications with that individual; and

(IV) specified an address to which the covered product was to be shipped upon reaching an agreement to transfer the covered product; and

(iv) that the license holder has not delivered to the eligible product developer sufficient quantities of the covered product on commercially reasonable, market-based terms—

(I) for a covered product that is not subject to a REMS with ETASU, by the date that is 31 days after the date on which the license holder received the request for the covered product; and

(II) for a covered product that is subject to a REMS with ETASU, by 31 days after the later of —

(aa) the date on which the license holder received the request for the covered product; or

(bb) the date on which the license holder received a copy of the covered product authorization issued by the Secretary in accordance with subparagraph (B).

(B) Authorization for covered product subject to a REMS with ETASU

(i) Request

An eligible product developer may submit to the Secretary a written request for the eligible product developer to be authorized to obtain sufficient quantities of an individual covered product subject to a REMS with ETASU.

(ii) Authorization

Not later than 120 days after the date on which a request under clause (i) is received, the Secretary shall, by written notice, authorize the eligible product developer to obtain sufficient quantities of an individual covered product subject to a REMS with ETASU for purposes of—

(I) development and testing that does not involve human clinical trials, if the eligible product developer has agreed to comply with any conditions the Secretary determines necessary; or

(II) development and testing that involves human clinical trials, if the eligible product developer has—

(aa)(AA) submitted protocols, informed consent documents, and informational materials for testing that include protections that provide safety protections comparable to those provided by the REMS for the covered product; or

(BB) otherwise satisfied the Secretary that such protections will be provided; and

(bb) met any other requirements the Secretary may establish.

(iii) Notice

A covered product authorization issued under this subparagraph shall state that the provision of the covered product by the license holder under the terms of the authorization will not be a violation of the REMS for the covered product.

(3) Affirmative defense

In a civil action brought under paragraph (1), it shall be an affirmative defense, on which the defendant has the burden of persuasion by a preponderance of the evidence—

(A) that, on the date on which the eligible product developer requested to purchase sufficient quantities of the covered product from the license holder—

(i) neither the license holder nor any of its agents, wholesalers, or distributors was engaged in the manufacturing or commercial marketing of the covered product; and

(ii) neither the license holder nor any of its agents, wholesalers, or distributors otherwise had access to inventory of the covered product to supply to the eligible product developer on commercially reasonable, market-based terms;

(B) that—

(i) the license holder sells the covered product through agents, distributors, or wholesalers;

(ii) the license holder has placed no restrictions, explicit or implicit, on its agents, distributors, or wholesalers to sell covered products to eligible product developers; and

(iii) the covered product can be purchased by the eligible product developer in sufficient quantities on commercially reasonable, market-based terms from the agents, distributors, or wholesalers of the license holder; or

(C) that the license holder made an offer to the individual specified pursuant to paragraph (2)(A)(iii)(III), by a means of communication (electronic, written, or both) specified pursuant to such paragraph, to sell sufficient quantities of the covered product to the eligible product developer at commercially reasonable market-based terms—

(i) for a covered product that is not subject to a REMS with ETASU, by the date that is 14 days after the date on which the license holder received the request for the covered product, and the eligible product developer did not accept such offer by the date that is 7 days after the date on which the eligible product developer received such offer from the license holder; or

(ii) for a covered product that is subject to a REMS with ETASU, by the date that is 20 days after the date on which the license holder received the request for the covered product, and the eligible product developer did not accept such offer by the date that is 10 days after the date on which the eligible product developer received such offer from the license holder.

(4) Remedies

(A) In general

If an eligible product developer prevails in a civil action brought under paragraph (1), the court shall—

(i) order the license holder to provide to the eligible product developer without delay sufficient quantities of the covered product on commercially reasonable, market-based terms;

(ii) award to the eligible product developer reasonable attorney's fees and costs of the civil action; and

(iii) award to the eligible product developer a monetary amount sufficient to deter the license holder from failing to provide eligible product developers with sufficient quantities of a covered product on commercially reasonable, market-based terms, if the court finds, by a preponderance of the evidence—

(I) that the license holder delayed providing sufficient quantities of the covered product to the eligible product developer without a legitimate business justification; or

(II) that the license holder failed to comply with an order issued under clause (i).

(B) Maximum monetary amount

A monetary amount awarded under subparagraph (A)(iii) shall not be greater than the revenue that the license holder earned on the covered product during the period—

(i) beginning on—

(I) for a covered product that is not subject to a REMS with ETASU, the date that is 31 days after the date on which the license holder received the request; or

(II) for a covered product that is subject to a REMS with ETASU, the date that is 31 days after the later of—

(aa) the date on which the license holder received the request; or

(bb) the date on which the license holder received a copy of the covered product authorization issued by the Secretary in accordance with paragraph (2)(B); and

(ii) ending on the date on which the eligible product developer received sufficient quantities of the covered product.

(C) Avoidance of delay

The court may issue an order under subparagraph (A)(i) before conducting further proceedings that may be necessary to determine whether the eligible product developer is entitled to an award under clause (ii) or (iii) of subparagraph (A), or the amount of any such award.

(c) Limitation of liability

A license holder for a covered product shall not be liable for any claim under Federal, State, or local law arising out of the failure of an eligible product developer to follow adequate safeguards to assure safe use of the covered product during development or testing activities described in this section, including transportation, handling, use, or disposal of the covered product by the eligible product developer.

(d) Omitted

(e) Rule of construction

(1) Definition

In this subsection, the term "antitrust laws"—

(A) has the meaning given the term in subsection (a) of section 12 of title 15; and

(B) includes section 45 of title 15 to the extent that such section applies to unfair methods of competition.

(2) Antitrust laws

Nothing in this section shall be construed to limit the operation of any provision of the antitrust laws.

(f) Omitted

(g) Rule of construction

Nothing in this section, the amendments made by this section, or in section 355–1 of this title, shall be construed as—

(1) prohibiting a license holder from providing an eligible product developer access to a covered product in the absence of an authorization under this section; or

(2) in any way negating the applicability of a REMS with ETASU, as otherwise required under such section 355–1 of this title, with respect to such covered product.

(Pub. L. 116–94, div. N, title I, §610, Dec. 20, 2019, 133 Stat. 3130.)

Editorial Notes

Codification

Section was enacted as part of the Further Consolidated Appropriations Act, 2020, and not as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

Section is comprised of section 610 of Pub. L. 116–94. Subsecs. (d) and (f) of section 610 of Pub. L. 116–94 amended section 355–1 of this title.

§355a. Pediatric studies of drugs

(a) Definitions

As used in this section, the term "pediatric studies" or "studies" means at least one clinical investigation (that, at the Secretary's discretion, may include pharmacokinetic studies) in pediatric age groups (including neonates in appropriate cases) in which a drug is anticipated to be used, and, at the discretion of the Secretary, may include preclinical studies.

(b) Market exclusivity for new drugs

(1) In general

Except as provided in paragraph (2), if, prior to approval of an application that is submitted under section 355(b)(1) of this title, the Secretary determines that information relating to the use of a new drug in the pediatric population may produce health benefits in that population, the Secretary makes a written request for pediatric studies (which shall include a timeframe for completing such studies), the applicant agrees to the request, such studies are completed using appropriate formulations for each age group for which the study is requested within any such timeframe, and the reports thereof are submitted and accepted in accordance with subsection (d)(4)—

(A)(i)(I) the period referred to in subsection (c)(3)(E)(ii) of section 355 of this title, and in subsection (j)(5)(F)(ii) of such section, is deemed to be five years and six months rather than five

years, and the references in subsections (c)(3)(E)(ii) and (j)(5)(F)(ii) of such section to four years, to forty-eight months, and to seven and one-half years are deemed to be four and one-half years, fifty-four months, and eight years, respectively; or

(II) the period referred to in clauses (iii) and (iv) of subsection (c)(3)(E) of such section, and in clauses (iii) and (iv) of subsection (j)(5)(F) of such section, is deemed to be three years and six months rather than three years; and

(ii) if the drug is designated under section 360bb of this title for a rare disease or condition, the period referred to in section 360cc(a) of this title is deemed to be seven years and six months rather than seven years; and

(B)(i) if the drug is the subject of—

(I) a listed patent for which a certification has been submitted under subsection (b)(2)(A)(ii) or (j)(2)(A)(vii)(II) of section 355 of this title and for which pediatric studies were submitted prior to the expiration of the patent (including any patent extensions); or

(II) a listed patent for which a certification has been submitted under subsections (b)(2)(A)(iii) or (j)(2)(A)(vii)(III) of section 355 of this title,

the period during which an application may not be approved under section 355(c)(3) of this title or section 355(j)(5)(B) of this title shall be extended by a period of six months after the date the patent expires (including any patent extensions); or

(ii) if the drug is the subject of a listed patent for which a certification has been submitted under subsection (b)(2)(A)(iv) or (j)(2)(A)(vii)(IV) of section 355 of this title, and in the patent infringement litigation resulting from the certification the court determines that the patent is valid and would be infringed, the period during which an application may not be approved under section 355(c)(3) of this title or section 355(j)(5)(B) of this title shall be extended by a period of six months after the date the patent expires (including any patent extensions).

(2) Exception

The Secretary shall not extend the period referred to in paragraph (1)(A) or (1)(B) if the determination made under subsection (d)(4) is made later than 9 months prior to the expiration of such period.

(c) Market exclusivity for already-marketed drugs

(1) In general

Except as provided in paragraph (2), if the Secretary determines that information relating to the use of an approved drug in the pediatric population may produce health benefits in that population and makes a written request to the holder of an approved application under section 355(b)(1) of this title for pediatric studies (which shall include a timeframe for completing such studies), the holder agrees to the request, such studies are completed using appropriate formulations for each age group for which the study is requested within any such timeframe, and the reports thereof are submitted and accepted in accordance with subsection (d)(4)—

(A)(i)(I) the period referred to in subsection (c)(3)(E)(ii) of section 355 of this title, and in subsection (j)(5)(F)(ii) of such section, is deemed to be five years and six months rather than five years, and the references in subsections (c)(3)(E)(ii) and (j)(5)(F)(ii) of such section to four years, to forty-eight months, and to seven and one-half years are deemed to be four and one-half years, fifty-four months, and eight years, respectiv ely; or

(II) the period referred to in clauses (iii) and (iv) of subsection (c)(3)(E) of such section, and in clauses (iii) and (iv) of subsection (j)(5)(F) of such section, is deemed to be three years and six months rather than three years; and

(ii) if the drug is designated under section 360bb of this title for a rare disease or condition, the period referred to in section 360cc(a) of this title is deemed to be seven years and six months rather than seven years; and

(B)(i) if the drug is the subject of—

(I) a listed patent for which a certification has been submitted under subsection (b)(2)(A)(ii) or (j)(2)(A)(vii)(II) of section 355 of this title and for which pediatric studies were submitted prior to

the expiration of the patent (including any patent extensions); or

(II) a listed patent for which a certification has been submitted under subsection (b)(2)(A)(iii) or (j)(2)(A)(vii)(III) of section 355 of this title,

the period during which an application may not be approved under section 355(c)(3) of this title or section 355(j)(5)(B)(ii) of this title shall be extended by a period of six months after the date the patent expires (including any patent extensions); or

(ii) if the drug is the subject of a listed patent for which a certification has been submitted under subsection (b)(2)(A)(iv) or (j)(2)(A)(vii)(IV) of section 355 of this title, and in the patent infringement litigation resulting from the certification the court determines that the patent is valid and would be infringed, the period during which an application may not be approved under section 355(c)(3) of this title or section 355(j)(5)(B) of this title shall be extended by a period of six months after the date the patent expires (including any patent extensions).

(2) Exception

The Secretary shall not extend the period referred to in paragraph (1)(A) or (1)(B) if the determination made under subsection (d)(4) is made later than 9 months prior to the expiration of such period.

(d) Conduct of pediatric studies

(1) Request for studies

(A) In general

The Secretary may, after consultation with the sponsor of an application for an investigational new drug under section 355(i) of this title, the sponsor of an application for a new drug under section 355(b)(1) of this title, or the holder of an approved application for a drug under section 355(b)(1) of this title, issue to the sponsor or holder a written request for the conduct of pediatric studies for such drug. In issuing such request, the Secretary shall take into account adequate representation of children of ethnic and racial minorities. Such request to conduct pediatric studies shall be in writing and shall include a timeframe for such studies and a request to the sponsor or holder to propose pediatric labeling resulting from such studies. If a request under this subparagraph does not request studies in neonates, such request shall include a statement describing the rationale for not requesting studies in neonates.

(B) Single written request

A single written request—

(i) may relate to more than one use of a drug; and

(ii) may include uses that are both approved and unapproved.

(2) Written request for pediatric studies

(A) Request and response

(i) In general

If the Secretary makes a written request for pediatric studies (including neonates, as appropriate) under subsection (b) or (c), the applicant or holder, not later than 180 days after receiving the written request, shall respond to the Secretary as to the intention of the applicant or holder to act on the request by—

(I) indicating when the pediatric studies will be initiated, if the applicant or holder agrees to the request; or

(II) indicating that the applicant or holder does not agree to the request and stating the reasons for declining the request.

(ii) Disagree with request

If, on or after September 27, 2007, the applicant or holder does not agree to the request on the grounds that it is not possible to develop the appropriate pediatric formulation, the applicant or holder shall submit to the Secretary the reasons such pediatric formulation cannot be developed.

(B) Adverse event reports

An applicant or holder that, on or after September 27, 2007, agrees to the request for such studies shall provide the Secretary, at the same time as the submission of the reports of such studies, with all postmarket adverse event reports regarding the drug that is the subject of such studies and are available prior to submission of such reports.

(3) Action on submissions

The Secretary shall review and act upon a submission by a sponsor or holder of a proposed pediatric study request or a proposed amendment to a written request for pediatric studies within 120 calendar days of the submission.

(4) Meeting the studies requirement

Not later than 180 days after the submission of the reports of the studies, the Secretary shall accept or reject such reports and so notify the sponsor or holder. The Secretary's only responsibility in accepting or rejecting the reports shall be to determine, within the 180-day period, whether the studies fairly respond to the written request, have been conducted in accordance with commonly accepted scientific principles and protocols, and have been reported in accordance with the requirements of the Secretary for filing.

(5) Effect of subsection

Nothing in this subsection alters or amends section 331(j) of this title or section 552 of title 5 or section 1905 of title 18.

(6) Consultation

With respect to a drug that is a qualified countermeasure (as defined in section 247d–6a of title 42), a security countermeasure (as defined in section 247d–6b of title 42), or a qualified pandemic or epidemic product (as defined in section 247d–6d of title 42), the Secretary shall solicit input from the Assistant Secretary for Preparedness and Response regarding the need for and, from the Director of the Biomedical Advanced Research and Development Authority regarding the conduct of, pediatric studies under this section.

(e) Notice of determinations on studies requirement

(1) In general

The Secretary shall publish a notice of any determination, made on or after September 27, 2007, that the requirements of subsection (d) have been met and that submissions and approvals under subsection (b)(2) or (j) of section 355 of this title for a drug will be subject to the provisions of this section. Such notice shall be published not later than 30 days after the date of the Secretary's determination regarding market exclusivity and shall include a copy of the written request made under subsection (b) or (c).

(2) Identification of certain drugs

The Secretary shall publish a notice identifying any drug for which, on or after September 27, 2007, a pediatric formulation was developed, studied, and found to be safe and effective in the pediatric population (or specified subpopulation) if the pediatric formulation for such drug is not introduced onto the market within one year after the date that the Secretary publishes the notice described in paragraph (1). Such notice identifying such drug shall be published not later than 30 days after the date of the expiration of such one year period.

(f) Internal review of written requests and pediatric studies

(1) Internal review

The Secretary shall utilize the internal review committee established under section 355d of this title to review all written requests issued on or after September 27, 2007, in accordance with paragraph (2).

(2) Review of written requests

The committee referred to in paragraph (1) shall review all written requests issued pursuant to this section prior to being issued.

(3) Review of pediatric studies

The committee referred to in paragraph (1) may review studies conducted pursuant to this section to make a recommendation to the Secretary whether to accept or reject such reports under subsection (d)(4).

(4) Activity by committee

The committee referred to in paragraph (1) may operate using appropriate members of such committee and need not convene all members of the committee.

(5) Documentation of committee action

For each drug, the committee referred to in paragraph (1) shall document, for each activity described in paragraph (2) or (3), which members of the committee participated in such activity.

(6) Tracking pediatric studies and labeling changes

The Secretary, in consultation with the committee referred to in paragraph (1), shall track and make available to the public, in an easily accessible manner, including through posting on the Web site of the Food and Drug Administration—

(A) the number of studies conducted under this section and under section 284m of title 42;

(B) the specific drugs and drug uses, including labeled and off-labeled indications, studied under such sections;

(C) the types of studies conducted under such sections, including trial design, the number of pediatric patients studied, and the number of centers and countries involved;

(D) the number of pediatric formulations developed and the number of pediatric formulations not developed and the reasons such formulations were not developed;

(E) the labeling changes made as a result of studies conducted under such sections;

(F) an annual summary of labeling changes made as a result of studies conducted under such sections for distribution pursuant to subsection (k)(2); and

(G) information regarding reports submitted on or after September 27, 2007.

(7) Informing internal review committee

The Secretary shall provide to the committee referred to in paragraph (1) any response issued to an applicant or holder with respect to a proposed pediatric study request.

(g) Limitations

Notwithstanding subsection (c)(2), a drug to which the six-month period under subsection (b) or (c) has already been applied—

(1) may receive an additional six-month period under subsection (c)(1)(A)(i)(II) for a supplemental application if all other requirements under this section are satisfied, except that such drug may not receive any additional such period under subsection (c)(1)(B); and

(2) may not receive any additional such period under subsection (c)(1)(A)(ii).

(h) Relationship to pediatric research requirements

Exclusivity under this section shall only be granted for the completion of a study or studies that are the subject of a written request and for which reports are submitted and accepted in accordance with subsection (d)(4). Written requests under this section may consist of a study or studies required under section 355c of this title.

(i) Labeling changes

(1) Priority status for pediatric applications and supplements

Any application or supplement to an application under section 355 of this title proposing a labeling change as a result of any pediatric study conducted pursuant to this section—

(A) shall be considered to be a priority application or supplement; and

(B) shall be subject to the performance goals established by the Commissioner for priority drugs.

(2) Dispute resolution

(A) Request for labeling change and failure to agree

If, on or after September 27, 2007, the Commissioner determines that the sponsor and the Commissioner have been unable to reach agreement on appropriate changes to the labeling for the

drug that is the subject of the application, not later than 180 days after the date of submission of the application—

(i) the Commissioner shall request that the sponsor of the application make any labeling change that the Commissioner determines to be appropriate; and

(ii) if the sponsor of the application does not agree within 30 days after the Commissioner's request to make a labeling change requested by the Commissioner, the Commissioner shall refer the matter to the Pediatric Advisory Committee.

(B) Action by the Pediatric Advisory Committee

Not later than 90 days after receiving a referral under subparagraph (A)(ii), the Pediatric Advisory Committee shall—

(i) review the pediatric study reports; and

(ii) make a recommendation to the Commissioner concerning appropriate labeling changes, if any.

(C) Consideration of recommendations

The Commissioner shall consider the recommendations of the Pediatric Advisory Committee and, if appropriate, not later than 30 days after receiving the recommendation, make a request to the sponsor of the application to make any labeling change that the Commissioner determines to be appropriate.

(D) Misbranding

If the sponsor of the application, within 30 days after receiving a request under subparagraph (C), does not agree to make a labeling change requested by the Commissioner, the Commissioner may deem the drug that is the subject of the application to be misbranded.

(E) No effect on authority

Nothing in this subsection limits the authority of the United States to bring an enforcement action under this chapter when a drug lacks appropriate pediatric labeling. Neither course of action (the Pediatric Advisory Committee process or an enforcement action referred to in the preceding sentence) shall preclude, delay, or serve as the basis to stay the other course of action.

(j) Other labeling changes

If, on or after September 27, 2007, the Secretary determines that a pediatric study conducted under this section does or does not demonstrate that the drug that is the subject of the study is safe and effective, including whether such study results are inconclusive, in pediatric populations or subpopulations, the Secretary shall order the labeling of such product to include information about the results of the study and a statement of the Secretary's determination.

(k) Dissemination of pediatric information

(1) In general

Not later than 210 days after the date of submission of a report on a pediatric study under this section, the Secretary shall make available to the public the medical, statistical, and clinical pharmacology reviews of pediatric studies conducted under subsection (b) or (c).

(2) Dissemination of information regarding labeling changes

Beginning on September 27, 2007, the Secretary shall include as a requirement of a written request that the sponsors of the studies that result in labeling changes that are reflected in the annual summary developed pursuant to subsection (f)(6)(F) distribute, at least annually (or more frequently if the Secretary determines that it would be beneficial to the public health), such information to physicians and other health care providers.

(3) Effect of subsection

Nothing in this subsection alters or amends section 331(j) of this title or section 552 of title 5 or section 1905 of title 18.

(l) Adverse event reporting

(1) Reporting in first 18-month period

Beginning on September 27, 2007, during the 18-month period beginning on the date a labeling change is approved pursuant to subsection (i), the Secretary shall ensure that all adverse event reports that have been received for such drug (regardless of when such report was received) are referred to the Office of Pediatric Therapeutics established under section 393a of this title. In considering the reports, the Director of such Office shall provide for the review of the reports by the Pediatric Advisory Committee, including obtaining any recommendations of such Committee regarding whether the Secretary should take action under this chapter in response to such reports.

(2) Reporting in subsequent periods

Following the 18-month period described in paragraph (1), the Secretary shall, as appropriate, refer to the Office of Pediatric Therapeutics all pediatric adverse event reports for a drug for which a pediatric study was conducted under this section. In considering such reports, the Director of such Office may provide for the review of such reports by the Pediatric Advisory Committee, including obtaining any recommendation of such Committee regarding whether the Secretary should take action in response to such reports.

(3) Preservation of authority

Nothing in this subsection shall prohibit the Office of Pediatric Therapeutics from providing for the review of adverse event reports by the Pediatric Advisory Committee prior to the 18-month period referred to in paragraph (1), if such review is necessary to ensure safe use of a drug in a pediatric population.

(4) Effect

The requirements of this subsection shall supplement, not supplant, other review of such adverse event reports by the Secretary.

(m) Clarification of interaction of market exclusivity under this section and market exclusivity awarded to an applicant for approval of a drug under section 355(j) of this title

If a 180-day period under section 355(j)(5)(B)(iv) of this title overlaps with a 6-month exclusivity period under this section, so that the applicant for approval of a drug under section 355(j) of this title entitled to the 180-day period under that section loses a portion of the 180-day period to which the applicant is entitled for the drug, the 180-day period shall be extended from—

(1) the date on which the 180-day period would have expired by the number of days of the overlap, if the 180-day period would, but for the application of this subsection, expire after the 6-month exclusivity period; or

(2) the date on which the 6-month exclusivity period expires, by the number of days of the overlap if the 180-day period would, but for the application of this subsection, expire during the six-month exclusivity period.

(n) Referral if pediatric studies not submitted

(1) In general

Beginning on September 27, 2007, if pediatric studies of a drug have not been submitted by the date specified in the written request issued or if the applicant or holder does not agree to the request under subsection (d) and if the Secretary, through the committee established under section 355d of this title, determines that there is a continuing need for information relating to the use of the drug in the pediatric population (including neonates, as appropriate), the Secretary shall carry out the following:

(A) For a drug for which a listed patent has not expired, or for which a period of exclusivity eligible for extension under subsection (b)(1) or (c)(1) of this section or under subsection (m)(2) or (m)(3) of section 262 of title 42 has not ended, make a determination regarding whether an assessment shall be required to be submitted under section 355c(b) of this title.

(B) For a drug that has no unexpired listed patents and for which no unexpired periods of exclusivity eligible for extension under subsection (b)(1) or (c)(1) of this section or under subsection (m)(2) or (m)(3) of section 262 of title 42 apply, the Secretary shall refer the drug for inclusion on the list established under section 284m of title 42 for the conduct of studies.

(C) For a drug that is a qualified countermeasure (as defined in section 247d–6a of title 42), a security countermeasure (as defined in section 247d–6b of title 42), or a qualified pandemic or epidemic product (as defined in section 247d–6d of title 42), in addition to any action with respect to such drug under subparagraph (A) or (B), the Secretary shall notify the Assistant Secretary for Preparedness and Response and the Director of the Biomedical Advanced Research and Development Authority of all pediatric studies in the written request issued by the Commissioner of Food and Drugs.

(2) Public notice

The Secretary shall give the public notice of a decision under paragraph (1)(A) not to require an assessment under section 355c of this title and the basis for such decision.

(3) Effect of subsection

Nothing in this subsection alters or amends section 331(j) of this title or section 552 of title 5 or section 1905 of title 18.

(o) Prompt approval of drugs when pediatric information is added to labeling

(1) General rule

A drug for which an application has been submitted or approved under subsection (b)(2) or (j) of section 355 of this title shall not be considered ineligible for approval under that section or misbranded under section 352 of this title on the basis that the labeling of the drug omits a pediatric indication or any other aspect of labeling pertaining to pediatric use when the omitted indication or other aspect is protected by patent, or by exclusivity under clause (iii) or (iv) of section 355(j)(5)(F) of this title, clause (iii) or (iv) of section 355(c)(3)(E) of this title, or section 360cc(a) of this title, or by an extension of such exclusivity under this section or section 355f of this title.

(2) Labeling

Notwithstanding clauses (iii) and (iv) of section 355(j)(5)(F) of this title, clauses (iii) and (iv) of section 355(c)(3)(E) of this title, or section 360cc of this title, the Secretary may require that the labeling of a drug approved pursuant to an application submitted under subsection (b)(2) or (j) of section 355 of this title that omits a pediatric indication or other aspect of labeling as described in paragraph (1) include—

(A) a statement that, because of marketing exclusivity for a manufacturer—

(i) the drug is not labeled for pediatric use; or

(ii) in the case of a drug for which there is an additional pediatric use not referred to in paragraph (1), the drug is not labeled for the pediatric use under paragraph (1); and

(B) a statement of any appropriate pediatric contraindications, warnings, precautions, or other information that the Secretary considers necessary to assure safe use.

(3) Preservation of pediatric exclusivity and extensions

This subsection does not affect—

(A) the availability or scope of exclusivity under—

(i) this section;

(ii) section 355 of this title for pediatric formulations; or

(iii) section 360cc of this title;

(B) the availability or scope of an extension to any such exclusivity, including an extension under this section or section 355f of this title;

(C) the question of the eligibility for approval under section 355 of this title of any application described in subsection (b)(2) or (j) of such section that omits any other aspect of labeling protected by exclusivity under—

(i) clause (iii) or (iv) of section 355(j)(5)(F) of this title;

(ii) clause (iii) or (iv) of section 355(c)(3)(E) of this title; or

(iii) section 360cc(a) of this title; or

(D) except as expressly provided in paragraphs (1) and (2), the operation of section 355 of this title or section 360cc of this title.

(June 25, 1938, ch. 675, §505A, as added Pub. L. 105–115, title I, §111, Nov. 21, 1997, 111 Stat. 2305; amended Pub. L. 107–109, §§2, 4, 5(b)(2), 7–11(a), 18(a), 19, Jan. 4, 2002, 115 Stat. 1408, 1411, 1413-1415, 1423, 1424; Pub. L. 108–155, §§2(b)(2), 3(a), (b)(1), Dec. 3, 2003, 117 Stat. 1941; Pub. L. 108–173, title XI, §1104, Dec. 8, 2003, 117 Stat. 2461; Pub. L. 110–85, title V, §502(a)(1), Sept. 27, 2007, 121 Stat. 876; Pub. L. 111–148, title VII, §7002(g)(2)(B), Mar. 23, 2010, 124 Stat. 820; Pub. L. 112–144, title V, §§501(a), 502(a)(1), (b), 509(a), July 9, 2012, 126 Stat. 1039, 1040, 1047; Pub. L. 113–5, title III, §307(a), Mar. 13, 2013, 127 Stat. 191; Pub. L. 114–255, div. A, title III, §3102(2), Dec. 13, 2016, 130 Stat. 1156; Pub. L. 115–52, title V, §505(a)–(b)(2)(A), title VI, §608, Aug. 18, 2017, 131 Stat. 1046, 1050; Pub. L. 117–9, §1(b)(2), Apr. 23, 2021, 135 Stat. 258.)

Editorial Notes

Amendments

2021—Subsec. (c)(1)(A)(i)(II). Pub. L. 117–9 substituted "(c)(3)(E)" for "(c)(3)(D)".

2017—Subsecs. (b), (c). Pub. L. 115–52, §505(b)(2)(A), substituted "subsection (d)(4)" for "subsection (d)(3)" in introductory provisions of par. (1) and in par. (2).

Subsec. (d)(3) to (6). Pub. L. 115–52, §505(b)(1), added par. (3) and redesignated former pars. (3) to (5) as (4) to (6), respectively.

Subsec. (f)(3). Pub. L. 115–52, §505(b)(2)(A), substituted "subsection (d)(4)" for "subsection (d)(3)".

Subsec. (f)(7). Pub. L. 115–52, §505(a), added par. (7).

Subsec. (h). Pub. L. 115–52, §505(b)(2)(A), substituted "subsection (d)(4)" for "subsection (d)(3)".

Subsec. (o). Pub. L. 115–52, §608(1), struck out "under section 355(j)" after "approval of drugs" in heading.

Subsec. (o)(1). Pub. L. 115–52, §608(2), substituted "under subsection (b)(2) or (j) of section 355 of this title" for "under section 355(j) of this title" and ", or by exclusivity under clause (iii) or (iv) of section 355(j)(5)(F) of this title, clause (iii) or (iv) of section 355(c)(3)(E) of this title, or section 360cc(a) of this title, or by an extension of such exclusivity under this section or section 355f of this title" for "or by exclusivity under clause (iii) or (iv) of section 355(j)(5)(F) of this title".

Subsec. (o)(2). Pub. L. 115–52, §608(3), in introductory provisions, inserted "clauses (iii) and (iv) of section 355(c)(3)(E) of this title, or section 360cc of this title," after "section 355(j)(5)(F) of this title," and substituted "drug approved pursuant to an application submitted under subsection (b)(2) or (j) of section 355 of this title" for "drug approved under section 355(j) of this title".

Subsec. (o)(3). Pub. L. 115–52, §608(4), amended par. (3) generally. Prior to amendment, text read as follows: "This subsection does not affect—

"(A) the availability or scope of exclusivity under this section;

"(B) the availability or scope of exclusivity under section 355 of this title for pediatric formulations;

"(C) the question of the eligibility for approval of any application under section 355(j) of this title that omits any other conditions of approval entitled to exclusivity under clause (iii) or (iv) of section 355(j)(5)(F) of this title; or

"(D) except as expressly provided in paragraphs (1) and (2), the operation of section 355 of this title."

2016—Subsec. (p). Pub. L. 114–255 struck out subsec. (p) which related to Institute of Medicine study.

2013—Subsec. (d)(5). Pub. L. 113–5, §307(a)(1), added par. (5).

Subsec. (n)(1)(C). Pub. L. 113–5, §307(a)(2), added subpar. (C).

2012—Subsec. (d)(1)(A). Pub. L. 112–144, §502(b), inserted at end "If a request under this subparagraph does not request studies in neonates, such request shall include a statement describing the rationale for not requesting studies in neonates."

Subsec. (h). Pub. L. 112–144, §502(a)(1), amended subsec. (h) generally. Prior to amendment, text read as follows: "Notwithstanding any other provision of law, if any pediatric study is required by a provision of law (including a regulation) other than this section and such study meets the completeness, timeliness, and other requirements of this section, such study shall be deemed to satisfy the requirement for market exclusivity pursuant to this section."

Subsec. (k)(2). Pub. L. 112–144, §509(a)(1), substituted "subsection (f)(6)(F)" for "subsection (f)(3)(F)".

Subsec. (l)(1). Pub. L. 112–144, §509(a)(2)(A), substituted "first 18-month period" for "year one" in heading and "18-month" for "one-year" in text.

Subsec. (l)(2). Pub. L. 112–144, §509(a)(2)(B), substituted "periods" for "years" in heading and "18-month period" for "one-year period" in text.

Subsec. (l)(3), (4). Pub. L. 112–144, §509(a)(2)(C), (D), added par. (3) and redesignated former par. (3) as (4).

Subsec. (n). Pub. L. 112–144, §509(a)(3)(A), substituted "submitted" for "completed" in heading.

Subsec. (n)(1). Pub. L. 112–144, §509(a)(3)(B)(i), substituted "have not been submitted by the date specified in the written request issued or if the applicant or holder does not agree to the request" for "have not been completed" in introductory provisions.

Subsec. (n)(1)(A). Pub. L. 112–144, §509(a)(3)(B)(ii), inserted ", or for which a period of exclusivity eligible for extension under subsection (b)(1) or (c)(1) of this section or under subsection (m)(2) or (m)(3) of section 262 of title 42 has not ended" after "expired" and struck out at end "Prior to making such a determination, the Secretary may not take more than 30 days to certify whether the Foundation for the National Institutes of Health has sufficient funding at the time of such certification to initiate and fund all of the studies in the written request in their entirety within the timeframes specified within the written request. Only if the Secretary makes such certification in the affirmative, the Secretary shall refer all pediatric studies in the written request to the Foundation for the National Institutes of Health for the conduct of such studies, and such Foundation shall fund such studies. If no certification has been made at the end of the 30-day period, or if the Secretary certifies that funds are not sufficient to initiate and fund all the studies in their entirety, the Secretary shall consider whether assessments shall be required under section 355c(b) of this title for such drug."

Subsec. (n)(1)(B). Pub. L. 112–144, §509(a)(3)(B)(iii), substituted "no unexpired listed patents and for which no unexpired periods of exclusivity eligible for extension under subsection (b)(1) or (c)(1) of this section or under subsection (m)(2) or (m)(3) of section 262 of title 42 apply," for "no listed patents or has 1 or more listed patents that have expired,".

Subsec. (o)(2)(B). Pub. L. 112–144, §509(a)(4), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: "a statement of any appropriate pediatric contraindications, warnings, or precautions that the Secretary considers necessary."

Subsec. (q). Pub. L. 112–144, §501(a), struck out subsec. (q). Text read as follows: "A drug may not receive any 6-month period under subsection (b) or (c) unless—

"(1) on or before October 1, 2012, the Secretary makes a written request for pediatric studies of the drug;

"(2) on or before October 1, 2012, an application for the drug is accepted for filing under section 355(b) of this title; and

"(3) all requirements of this section are met."

2010—Subsec. (p)(4) to (6). Pub. L. 111–148 added pars. (4) to (6) and struck out former pars. (4) and (5) which read as follows:

"(4) review and assess the pediatric studies of biological products as required under subsections (a) and (b) of section 355c of this title; and

"(5) make recommendations regarding appropriate incentives for encouraging pediatric studies of biologics."

2007—Pub. L. 110–85 amended section generally. Prior to amendment, text consisted of subsecs. (a) to (n) relating to pediatric studies of drugs, including market exclusivity, conduct of pediatric studies, delay of effective date for certain applications, notice of determinations on studies requirement, limitations, research requirements, labeling supplements, dissemination of information, prompt approval of drugs, report to Congress not later than Jan. 1, 2001, and sunset provisions.

2003—Subsec. (b)(1)(A)(i). Pub. L. 108–173, §1104(1), substituted "(j)(5)(F)(ii)" for "(j)(5)(D)(ii)" in two places.

Subsec. (b)(1)(A)(ii). Pub. L. 108–173, §1104(2), substituted "(j)(5)(F)" for "(j)(5)(D)".

Subsec. (b)(2). Pub. L. 108–155, §3(a), substituted "355(j)(5)(B)" for "355(j)(4)(B)" in two places.

Subsec. (c)(1)(A)(i). Pub. L. 108–173, §1104(1), substituted "(j)(5)(F)(ii)" for "(j)(5)(D)(ii)" in two places.

Subsec. (c)(1)(A)(ii). Pub. L. 108–173, §1104(2), substituted "(j)(5)(F)" for "(j)(5)(D)".

Subsec. (c)(2). Pub. L. 108–155, §3(a), substituted "355(j)(5)(B)" for "355(j)(4)(B)" in two places.

Subsec. (e). Pub. L. 108–173, §1104(3), substituted "355(j)(5)(F)" for "355(j)(5)(D)".

Subsec. (h). Pub. L. 108–155, §2(b)(2), substituted "pediatric research requirements" for "regulations" in heading and "by a provision of law (including a regulation) other than this section" for "pursuant to regulations promulgated by the Secretary" in text.

Subsec. (i)(2). Pub. L. 108–155, §3(b)(1), struck out "Advisory Subcommittee of the Anti-Infective Drugs" before "Advisory Committee" wherever appearing.

Subsec. (l). Pub. L. 108–173, §1104(3), substituted "355(j)(5)(F)" for "355(j)(5)(D)" wherever appearing.

2002—Subsec. (a). Pub. L. 107–109, §19(2), (3), redesignated subsec. (g) as (a). Former subsec. (a) redesignated (b).

Subsec. (a)(1)(A). Pub. L. 107–109, §19(1)(A), (B), substituted "(j)(5)(D)(ii)" for "(j)(4)(D)(ii)" in two places in cl. (i) and "(j)(5)(D)" for "(j)(4)(D)" in cl. (ii).

Subsec. (b). Pub. L. 107–109, §19(2), (3), redesignated subsec. (a) as (b).

Pub. L. 107–109, §2(1), struck out heading and text of subsec. (b). Text read as follows: "Not later than 180 days after November 21, 1997, the Secretary, after consultation with experts in pediatric research shall develop, prioritize, and publish an initial list of approved drugs for which additional pediatric information may produce health benefits in the pediatric population. The Secretary shall annually update the list."

Subsec. (c). Pub. L. 107–109, §2(2), in introductory provisions, inserted "determines that information relating to the use of an approved drug in the pediatric population may produce health benefits in that population and" after "the Secretary" and struck out "concerning a drug identified in the list described in subsection (b) of this section" after "such studies)".

Subsec. (c)(1)(A). Pub. L. 107–109, §19(1)(A), (B), substituted "(j)(5)(D)(ii)" for "(j)(4)(D)(ii)" in two places in cl. (i) and "(j)(5)(D)" for "(j)(4)(D)" in cl. (ii).

Subsec. (d)(1). Pub. L. 107–109, §19(4), substituted "subsection (b) or (c)" for "subsection (a) or (c)" in introductory provisions.

Subsec. (d)(2). Pub. L. 107–109, §§18(a), 19(4), substituted "subsection (b) or (c)" for "subsection (a) or (c)" and inserted "In reaching an agreement regarding written protocols, the Secretary shall take into account adequate representation of children of ethnic and racial minorities." after first sentence.

Subsec. (d)(3). Pub. L. 107–109, §19(4), substituted "subsection (b) or (c)" for "subsection (a) or (c)".

Subsec. (d)(4). Pub. L. 107–109, §4, added par. (4).

Subsec. (e). Pub. L. 107–109, §19(1)(C), (4), substituted "section 355(j)(5)(D)" for "section 355(j)(4)(D)" and "subsection (b) or (c)" for "subsection (a) or (c)".

Subsec. (g). Pub. L. 107–109, §19(2), (3), (5), redesignated subsec. (h) as (g) and substituted "subsection (b) or (c)" for "subsection (a) or (b)" in introductory provisions. Former subsec. (g) redesignated (a).

Pub. L. 107–109, §7, inserted "(including neonates in appropriate cases)" after "pediatric age groups".

Subsec. (h). Pub. L. 107–109, §19(2), (3), redesignated subsec. (i) as (h). Former subsec. (h) redesignated (g).

Subsec. (i). Pub. L. 107–109, §19(2), (3), redesignated subsec. (l) as (i). Former subsec. (i) redesignated (h).

Subsec. (j). Pub. L. 107–109, §19(2), (3), redesignated subsec. (m) as (j). Former subsec. (j) redesignated (n).

Pub. L. 107–109, §8, added subsec. (j) and struck out heading and text of former subsec. (j). Text read as follows: "A drug may not receive any six-month period under subsection (a) or (c) of this section unless the application for the drug under section 355(b)(1) of this title is submitted on or before January 1, 2002. After January 1, 2002, a drug shall receive a six-month period under subsection (c) of this section if—

"(1) the drug was in commercial distribution as of November 21, 1997;

"(2) the drug was included by the Secretary on the list under subsection (b) of this section as of January 1, 2002;

"(3) the Secretary determines that there is a continuing need for information relating to the use of the drug in the pediatric population and that the drug may provide health benefits in that population; and

"(4) all requirements of this section are met."

Subsec. (k). Pub. L. 107–109, §19(2), (3), redesignated subsec. (n) as (k). Former subsec. (k) redesignated (m).

Subsec. (l). Pub. L. 107–109, §19(2), (3), redesignated subsec. (o) as (l). Former subsec. (l) redesignated (i).

Pub. L. 107–109, §5(b)(2), added subsec. (l).

Subsec. (m). Pub. L. 107–109, §19(2), (3), redesignated subsec. (k) as (m). Former subsec. (m) redesignated (j).

Pub. L. 107–109, §9, added subsec. (m).

Subsec. (n). Pub. L. 107–109, §19(4), which directed substitution of "subsection (b) or (c)" for "subsection (a) or (c)" in subsec. (m), was executed by making the substitution in introductory provisions of subsec. (n), to reflect the probable intent of Congress.

Pub. L. 107–109, §19(2), (3), redesignated subsec. (j) as (n). Former subsec. (n) redesignated (k).

Pub. L. 107–109, §10, added subsec. (n).

Subsec. (o). Pub. L. 107–109, §19(2), (3), redesignated subsec. (o) as (l).

Pub. L. 107–109, §11(a), added subsec. (o).

Statutory Notes and Related Subsidiaries

Effective Date of 2012 Amendment

Pub. L. 112–144, title V, §509(g), July 9, 2012, 126 Stat. 1050, provided that:

"(1) APPLICATION.—Notwithstanding any provision of section 505A and 505B of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355a, 355c) stating that a provision applies beginning on the date of the enactment of the Best Pharmaceuticals for Children Act of 2007 [Sept. 27, 2007] or the date of the enactment of the Pediatric Research Equity Act of 2007 [Sept. 27, 2007], any amendment made by this Act to such a provision applies beginning on the date of the enactment of this Act [July 9, 2012].

"(2) TRANSITIONAL RULE FOR ADVERSE EVENT REPORTING.—With respect to a drug for which a labeling change described under section 505A(l)(1) or 505B(i)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355a(l)(1); 355c(i)(1)) is approved or made, respectively, during the one-year period that ends on the day before the date of enactment of this Act [July 9, 2012], the Secretary [of Health and Human Services] shall apply section 505A(l) and section 505B(i), as applicable, to such drug, as such sections were in effect on such day."

EFFECTIVE DATE OF 2007 AMENDMENT

Pub. L. 110–85, title V, §502(a)(2), Sept. 27, 2007, 121 Stat. 885, provided that:

"(A) IN GENERAL.—The amendment made by this subsection [amending this section] shall apply to written requests under section 505A of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355a) issued on or after the date of the enactment of this Act [Sept. 27, 2007].

"(B) CERTAIN WRITTEN REQUESTS.—A written request issued under section 505A of the Federal Food, Drug, and Cosmetic Act, as in effect on the day before the date of the enactment of this Act, which has been accepted and for which no determination under subsection (d)(2) of such section has been made before such date of enactment, shall be subject to such section 505A, except that such written requests shall be subject to subsections (d)(2)(A)(ii), (e)(1) and (2), (f), (i)(2)(A), (j), (k)(1), (l)(1), and (n) of section 505A of the Federal Food, Drug, and Cosmetic Act, as in effect on or after the date of the enactment of this Act."

EFFECTIVE DATE OF 2003 AMENDMENT

Amendment by Pub. L. 108–155 effective Dec. 3, 2003, except as otherwise provided, see section 4 of Pub. L. 108–155, set out as an Effective Date note under section 355c of this title.

EFFECTIVE DATE OF 2002 AMENDMENT

Pub. L. 107–109, §11(b), Jan. 4, 2002, 115 Stat. 1416, provided that: "The amendment made by subsection (a) [amending this section] takes effect on the date of enactment of this Act [Jan. 4, 2002], including with respect to applications under section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)) that are approved or pending on that date."

CONSTRUCTION OF 2007 AMENDMENTS ON PEDIATRIC STUDIES

Pub. L. 110–85, title IX, §901(e), Sept. 27, 2007, 121 Stat. 942, provided that: "This title [enacting sections 353c, 355–1, 355e, 360a, and 360bbb–6 of this title, amending sections 331, 333, 334, 352, 355, and 381 of this title and section 262 of Title 42, The Public Health and Welfare, and enacting provisions set out as notes under sections 331, 352, and 355 of this title] and the amendments made by this title may not be construed as affecting the authority of the Secretary of Health and Human Services to request pediatric studies under section 505A of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355a] or to require such studies under section 505B of such Act [21 U.S.C. 355c]."

PLAN FOR EARLIER SUBMISSION OF PEDIATRIC STUDIES

Pub. L. 115–52, title V, §505(c), Aug. 18, 2017, 131 Stat. 1046, provided that: "The Secretary of Health and Human Services, acting through the internal review committee established under section 505C of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355d) shall, not later than one year after the date of enactment of this Act [Aug. 18, 2017], develop and implement a plan to achieve, when appropriate, earlier submission of pediatric studies under section 505A of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355a) or section 351(m) of the Public Health Service Act (42 U.S.C. 262(m)). Such plan shall include recommendations to achieve—

"(1) earlier discussion of proposed pediatric study requests and written requests with sponsors, and if appropriate, discussion of such requests at the meeting required under section 505B(e)(2)(C) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355c(e)(2)(C)), as amended by section 503(a);

"(2) earlier issuance of written requests for a pediatric study under such section 505A, including for investigational new drugs prior to the submission of an application under section 505(b)(1) of such Act (21 U.S.C. 355(b)(1)); and

"(3) shorter timelines, when appropriate, for the completion of studies pursuant to a written request under such section 505A or such section 351(m)."

Draft Guidance for Neonatal Studies

Pub. L. 115–52, title V, §505(d)(2), Aug. 18, 2017, 131 Stat. 1047, provided that: "Not later than 2 years after the date of enactment of this Act [Aug. 18, 2017], the Secretary shall issue draft guidance on clinical pharmacology considerations for neonatal studies for drugs and biological products."

Communication With Pediatric Review Committee

Pub. L. 112–144, title V, §503, July 9, 2012, 126 Stat. 1040, provided that: "Not later than 1 year after the date of enactment of this Act [July 9, 2012], the Secretary of Health and Human Services (referred to in this title [see Tables for classification] as the 'Secretary') shall issue internal standard operating procedures that provide for the review by the internal review committee established under section 505C of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355d) of any significant modifications to initial pediatric study plans, agreed initial pediatric study plans, and written requests under sections 505A and 505B of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355a, 355c). Such internal standard operating procedures shall be made publicly available on the Internet Web site of the Food and Drug Administration."

Access to Data

Pub. L. 112–144, title V, §504, July 9, 2012, 126 Stat. 1040, provided that: "Not later than 3 years after the date of enactment of this Act [July 9, 2012], the Secretary [of Health and Human Services] shall make available to the public, including through posting on the Internet Web site of the Food and Drug Administration, the medical, statistical, and clinical pharmacology reviews of, and corresponding written requests issued to an applicant, sponsor, or holder for, pediatric studies submitted between January 4, 2002, and September 27, 2007, under subsection (b) or (c) of section 505A of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355a) for which 6 months of market exclusivity was granted and that resulted in a labeling change. The Secretary shall make public the information described in the preceding sentence in a manner consistent with how the Secretary releases information under section 505A(k) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355a(k))."

Report on Pediatric Exclusivity Program

Pub. L. 107–109, §16, Jan. 4, 2002, 115 Stat. 1421, as amended by Pub. L. 108–155, §3(b)(4), Dec. 3, 2003, 117 Stat. 1942, required the Comptroller General, not later than Oct. 1, 2006, and in consultation with the Secretary of Health and Human Services, to submit to Congress a report on specified issues concerning the effectiveness of the pediatric exclusivity program.

Study by General Accounting Office

Pub. L. 107–109, §18(b), Jan. 4, 2002, 115 Stat. 1423, required the Comptroller General, not later than Jan. 10, 2003, to conduct a study relating to the representation of children of ethnic and racial minorities in studies under section 355a of this title and to submit a report to Congress describing the findings of the study.

§355b. Adverse-event reporting

(a) Toll-free number in labeling

Not later than one year after January 4, 2002, the Secretary of Health and Human Services shall promulgate a final rule requiring that the labeling of each drug for which an application is approved under section 505 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355] (regardless of the date on which approved) include the toll-free number maintained by the Secretary for the purpose of receiving reports of adverse events regarding drugs and a statement that such number is to be used for reporting purposes only, not to receive medical advice. With respect to the final rule:

(1) The rule shall provide for the implementation of such labeling requirement in a manner that the Secretary considers to be most likely to reach the broadest consumer audience.

(2) In promulgating the rule, the Secretary shall seek to minimize the cost of the rule on the pharmacy profession.

(3) The rule shall take effect not later than 60 days after the date on which the rule is promulgated.

(b) Drugs with pediatric market exclusivity

(1) In general

During the one year beginning on the date on which a drug receives a period of market exclusivity under 505A [1] of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355a], any report of an adverse event regarding the drug that the Secretary of Health and Human Services receives shall be referred to the Office of Pediatric Therapeutics established under section 393a of this title. In considering the report, the Director of such Office shall provide for the review of the report by the Pediatric Advisory Committee, including obtaining any recommendations of such subcommittee [2] regarding whether the Secretary should take action under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.] in response to the report.

(2) Rule of construction

Paragraph (1) may not be construed as restricting the authority of the Secretary of Health and Human Services to continue carrying out the activities described in such paragraph regarding a drug after the one-year period described in such paragraph regarding the drug has expired.

(Pub. L. 107–109, §17, Jan. 4, 2002, 115 Stat. 1422; Pub. L. 108–155, §3(b)(5), Dec. 3, 2003, 117 Stat. 1942.)

Editorial Notes

References in Text

The Federal Food, Drug, and Cosmetic Act, referred to in subsec. (b)(1), is act June 25, 1938, ch. 675, 52 Stat. 1040, as amended, which is classified generally to this chapter. For complete classification of this Act to the Code, see section 301 of this title and Tables.

Codification

Section was enacted as part of the Best Pharmaceuticals for Children Act, and not as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

Amendments

2003—Subsec. (b)(1). Pub. L. 108–155 struck out "Advisory Subcommittee of the Anti-Infective Drugs" before "Advisory Committee".

Statutory Notes and Related Subsidiaries

Effective Date of 2003 Amendment

Amendment by Pub. L. 108–155 effective Dec. 3, 2003, except as otherwise provided, see section 4 of Pub. L. 108–155, set out as an Effective Date note under section 355c of this title.

[1] *So in original. Probably should be preceded by "section".*

[2] *So in original. Probably should be "Committee".*

§355c. Research into pediatric uses for drugs and biological products

(a) New drugs and biological products

(1) In general

(A) General requirements

Except with respect to an application for which subparagraph (B) applies, a person that submits, on or after September 27, 2007, an application (or supplement to an application) for a drug—

(i) under section 355 of this title for a new active ingredient, new indication, new dosage form, new dosing regimen, or new route of administration; or

(ii) under section 262 of title 42 for a new active ingredient, new indication, new dosage form, new dosing regimen, or new route of administration,

shall submit with the application the assessments described in paragraph (2).

(B) Certain molecularly targeted cancer indications

A person that submits, on or after the date that is 3 years after August 18, 2017, an original application for a new active ingredient under section 355 of this title or section 262 of title 42, shall submit with the application reports on the investigation described in paragraph (3) if the drug or biological product that is the subject of the application is—

(i) intended for the treatment of an adult cancer; and

(ii) directed at a molecular target that the Secretary determines to be substantially relevant to the growth or progression of a pediatric cancer.

(2) Assessments

(A) In general

The assessments referred to in paragraph (1)(A) shall contain data, gathered using appropriate formulations for each age group for which the assessment is required, that are adequate—

(i) to assess the safety and effectiveness of the drug or the biological product for the claimed indications in all relevant pediatric subpopulations; and

(ii) to support dosing and administration for each pediatric subpopulation for which the drug or the biological product is safe and effective.

(B) Similar course of disease or similar effect of drug or biological product

(i) In general

If the course of the disease and the effects of the drug are sufficiently similar in adults and pediatric patients, the Secretary may conclude that pediatric effectiveness can be extrapolated from adequate and well-controlled studies in adults, usually supplemented with other information obtained in pediatric patients, such as pharmacokinetic studies.

(ii) Extrapolation between age groups

A study may not be needed in each pediatric age group if data from one age group can be extrapolated to another age group.

(iii) Information on extrapolation

A brief documentation of the scientific data supporting the conclusion under clauses (i) and (ii) shall be included in any pertinent reviews for the application under section 355 of this title or section 262 of title 42.

(3) Molecularly targeted pediatric cancer investigation

(A) In general

With respect to a drug or biological product described in paragraph (1)(B), the investigation described in this paragraph is a molecularly targeted pediatric cancer investigation, which shall be designed to yield clinically meaningful pediatric study data, gathered using appropriate formulations for each age group for which the study is required, regarding dosing, safety, and preliminary efficacy to inform potential pediatric labeling.

(B) Extrapolation of data

Paragraph (2)(B) shall apply to investigations described in this paragraph to the same extent and in the same manner as paragraph (2)(B) applies with respect to the assessments required under paragraph (1)(A).

(C) Deferrals and waivers

Deferrals and waivers under paragraphs (4) and (5) shall apply to investigations described in this paragraph to the same extent and in the same manner as such deferrals and waivers apply with respect to the assessments under paragraph (2)(B).

(4) Deferral

(A) In general

On the initiative of the Secretary or at the request of the applicant, the Secretary may defer submission of some or all assessments required under paragraph (1)(A) or reports on the investigation required under paragraph (1)(B) until a specified date after approval of the drug or issuance of the license for a biological product if—

(i) the Secretary finds that—

(I) the drug or biological product is ready for approval for use in adults before pediatric studies are complete;

(II) pediatric studies should be delayed until additional safety or effectiveness data have been collected; or

(III) there is another appropriate reason for deferral; and

(ii) the applicant submits to the Secretary—

(I) certification of the grounds for deferring the assessments or reports on the investigation;

(II) a pediatric study plan as described in subsection (e);

(III) evidence that the studies are being conducted or will be conducted with due diligence and at the earliest possible time; and

(IV) a timeline for the completion of such studies.

(B) Deferral extension

(i) In general

On the initiative of the Secretary or at the request of the applicant, the Secretary may grant an extension of a deferral approved under subparagraph (A) for submission of some or all assessments required under paragraph (1)(A) or reports on the investigation required under paragraph (1)(B) if—

(I) the Secretary determines that the conditions described in subclause (II) or (III) of subparagraph (A)(i) continue to be met; and

(II) the applicant submits a new timeline under subparagraph (A)(ii)(IV) and any significant updates to the information required under subparagraph (A)(ii).

(ii) Timing and information

If the deferral extension under this subparagraph is requested by the applicant, the applicant shall submit the deferral extension request containing the information described in this subparagraph not less than 90 days prior to the date that the deferral would expire. The Secretary shall respond to such request not later than 45 days after the receipt of such letter. If the Secretary grants such an extension, the specified date shall be the extended date. The sponsor of the required assessment under paragraph (1)(A) or reports on the investigation under paragraph (1)(B) shall not be issued a letter described in subsection (d) unless the specified or extended date of submission for such required studies has passed or if the request for an extension is pending. For a deferral that has expired prior to July 9, 2012, or that will expire prior to 270 days after July 9, 2012, a deferral extension shall be requested by an applicant not later than 180 days after July 9, 2012. The Secretary shall respond to any such request as soon as practicable, but not later than 1 year after July 9, 2012. Nothing in this clause shall prevent the Secretary from updating the status of a study or studies publicly if components of such study or studies are late or delayed.

(C) Annual review

(i) In general

On an annual basis following the approval of a deferral under subparagraph (A), the applicant shall submit to the Secretary the following information:

(I) Information detailing the progress made in conducting pediatric studies.

(II) If no progress has been made in conducting such studies, evidence and documentation that such studies will be conducted with due diligence and at the earliest possible time.

(III) Projected completion date for pediatric studies.

(IV) The reason or reasons why a deferral or deferral extension continues to be necessary.

(ii) Public availability

Not later than 90 days after the submission to the Secretary of the information submitted through the annual review under clause (i), the Secretary shall make available to the public in an easily accessible manner, including through the Internet Web site of the Food and Drug Administration—

(I) such information;

(II) the name of the applicant for the product subject to the assessment or investigation;

(III) the date on which the product was approved; and

(IV) the date of each deferral or deferral extension under this paragraph for the product.

(5) Waivers

(A) Full waiver

On the initiative of the Secretary or at the request of an applicant, the Secretary shall grant a full waiver, as appropriate, of the requirement to submit assessments or reports on the investigation for a drug or biological product under this subsection if the applicant certifies and the Secretary finds that —

(i) necessary studies are impossible or highly impracticable (because, for example, the number of patients is so small or the patients are geographically dispersed);

(ii) there is evidence strongly suggesting that the drug or biological product would be ineffective or unsafe in all pediatric age groups; or

(iii) the drug or biological product—

(I) does not represent a meaningful therapeutic benefit over existing therapies for pediatric patients; and

(II) is not likely to be used in a substantial number of pediatric patients.

(B) Partial waiver

On the initiative of the Secretary or at the request of an applicant, the Secretary shall grant a partial waiver, as appropriate, of the requirement to submit assessments or reports on the investigation for a drug or biological product under this subsection with respect to a specific pediatric age group if the applicant certifies and the Secretary finds that—

(i) necessary studies are impossible or highly impracticable (because, for example, the number of patients in that age group is so small or patients in that age group are geographically dispersed);

(ii) there is evidence strongly suggesting that the drug or biological product would be ineffective or unsafe in that age group;

(iii) the drug or biological product—

(I) does not represent a meaningful therapeutic benefit over existing therapies for pediatric patients in that age group; and

(II) is not likely to be used by a substantial number of pediatric patients in that age group; or

(iv) the applicant can demonstrate that reasonable attempts to produce a pediatric formulation necessary for that age group have failed.

(C) Pediatric formulation not possible

If a partial waiver is granted on the ground that it is not possible to develop a pediatric formulation, the waiver shall cover only the pediatric groups requiring that formulation. An applicant seeking such a partial waiver shall submit to the Secretary documentation detailing why a pediatric formulation cannot be developed and, if the waiver is granted, the applicant's submission shall promptly be made available to the public in an easily accessible manner, including through posting on the Web site of the Food and Drug Administration.

(D) Labeling requirement

If the Secretary grants a full or partial waiver because there is evidence that a drug or biological product would be ineffective or unsafe in pediatric populations, the information shall be included in the labeling for the drug or biological product.

(b) Marketed drugs and biological products

(1) In general

The Secretary may (by order in the form of a letter) require the sponsor or holder of an approved application for a drug under section 355 of this title or the holder of a license for a biological product under section 262 of title 42 to submit by a specified date the assessments described in subsection (a)(2), if the Secretary finds that—

(A)(i) the drug or biological product is used for a substantial number of pediatric patients for the labeled indications; and

(ii) adequate pediatric labeling could confer a benefit on pediatric patients;

(B) there is reason to believe that the drug or biological product would represent a meaningful therapeutic benefit over existing therapies for pediatric patients for 1 or more of the claimed indications; or

(C) the absence of adequate pediatric labeling could pose a risk to pediatric patients.

(2) Waivers

(A) Full waiver

At the request of an applicant, the Secretary shall grant a full waiver, as appropriate, of the requirement to submit assessments under this subsection if the applicant certifies and the Secretary finds that—

(i) necessary studies are impossible or highly impracticable (because, for example, the number of patients in that age group is so small or patients in that age group are geographically dispersed); or

(ii) there is evidence strongly suggesting that the drug or biological product would be ineffective or unsafe in all pediatric age groups.

(B) Partial waiver

At the request of an applicant, the Secretary shall grant a partial waiver, as appropriate, of the requirement to submit assessments under this subsection with respect to a specific pediatric age group if the applicant certifies and the Secretary finds that—

(i) necessary studies are impossible or highly impracticable (because, for example, the number of patients in that age group is so small or patients in that age group are geographically dispersed);

(ii) there is evidence strongly suggesting that the drug or biological product would be ineffective or unsafe in that age group;

(iii)(I) the drug or biological product—

(aa) does not represent a meaningful therapeutic benefit over existing therapies for pediatric patients in that age group; and

(bb) is not likely to be used in a substantial number of pediatric patients in that age group; and

(II) the absence of adequate labeling could not pose significant risks to pediatric patients; or

(iv) the applicant can demonstrate that reasonable attempts to produce a pediatric formulation necessary for that age group have failed.

(C) Pediatric formulation not possible

If a waiver is granted on the ground that it is not possible to develop a pediatric formulation, the waiver shall cover only the pediatric groups requiring that formulation. An applicant seeking either a full or partial waiver shall submit to the Secretary documentation detailing why a pediatric formulation cannot be developed and, if the waiver is granted, the applicant's submission shall promptly be made available to the public in an easily accessible manner, including through posting on the Web site of the Food and Drug Administration.

(D) Labeling requirement

If the Secretary grants a full or partial waiver because there is evidence that a drug or biological product would be ineffective or unsafe in pediatric populations, the information shall be included in the labeling for the drug or biological product.

(3) Effect of subsection

Nothing in this subsection alters or amends section 331(j) of this title or section 552 of title 5 or section 1905 of title 18.

(c) Meaningful therapeutic benefit

For the purposes of paragraph (4)(A)(iii)(I) and (4)(B)(iii)(I) of subsection (a) and paragraphs (1)(B) and (2)(B)(iii)(I)(aa) of subsection (b), a drug or biological product shall be considered to represent a meaningful therapeutic benefit over existing therapies if the Secretary determines that—

(1) if approved, the drug or biological product could represent an improvement in the treatment, diagnosis, or prevention of a disease, compared with marketed products adequately labeled for that use in the relevant pediatric population; or

(2) the drug or biological product is in a class of products or for an indication for which there is a need for additional options.

(d) Submission of assessments and reports on the investigation

If a person fails to submit a required assessment described in subsection (a)(2) or the investigation described in subsection (a)(3), fails to meet the applicable requirements in subsection (a)(4), or fails to submit a request for approval of a pediatric formulation described in subsection (a) or (b), in accordance with applicable provisions of subsections (a) and (b), the following shall apply:

(1) Beginning 270 days after July 9, 2012, the Secretary shall issue a non-compliance letter to such person informing them of such failure to submit or meet the requirements of the applicable subsection. Such letter shall require the person to respond in writing within 45 calendar days of issuance of such letter. Such response may include the person's request for a deferral extension if applicable. Such letter and the person's written response to such letter shall be made publicly available on the Internet Web site of the Food and Drug Administration 60 calendar days after issuance, with redactions for any trade secrets and confidential commercial information. If the Secretary determines that the letter was issued in error, the requirements of this paragraph shall not apply. The Secretary shall inform the Pediatric Advisory Committee of letters issued under this paragraph and responses to such letters.

(2) The drug or biological product that is the subject of an assessment described in subsection (a)(2) or the investigation described in subsection (a)(3), applicable requirements in subsection (a)(4), or request for approval of a pediatric formulation, may be considered misbranded solely because of that failure and subject to relevant enforcement action (except that the drug or biological product shall not be subject to action under section 333 of this title), but such failure shall not be the basis for a proceeding—

(A) to withdraw approval for a drug under section 355(e) of this title; or

(B) to revoke the license for a biological product under section 262 of title 42.

(e) Pediatric study plans

(1) In general

An applicant subject to subsection (a) shall submit to the Secretary an initial pediatric study plan prior to the submission of the assessments described under subsection (a)(2) or the investigation described in subsection (a)(3).

(2) Timing; content; meetings

(A) Timing

An applicant shall submit the initial pediatric study plan under paragraph (1)—

(i) before the date on which the applicant submits the assessments under subsection (a)(2) or the investigation described in subsection (a)(3); and

(ii) not later than—

(I) 60 calendar days after the date of the end-of-Phase 2 meeting (as such term is used in section 312.47 of title 21, Code of Federal Regulations, or successor regulations); or

(II) such other time as may be agreed upon between the Secretary and the applicant.

Nothing in this section shall preclude the Secretary from accepting the submission of an initial pediatric study plan earlier than the date otherwise applicable under this subparagraph.

(B) Content of initial pediatric study plan

The initial pediatric study plan shall include—

(i) an outline of the pediatric study or studies that the applicant plans to conduct (including, to the extent practicable study objectives and design, age groups, relevant endpoints, and statistical approach);

(ii) any request for a deferral, partial waiver, or waiver under this section, if applicable, along with any supporting information; and

(iii) other information specified in the regulations promulgated under paragraph (7).

(C) Meetings

The Secretary—

(i) shall meet with the applicant—

(I) if requested by the applicant with respect to a drug or biological product that is intended to treat a serious or life-threatening disease or condition, to discuss preparation of the initial pediatric study plan, not later than the end-of-Phase 1 meeting (as such term is used in section 312.82(b) of title 21, Code of Federal Regulations, or successor regulations) or within 30 calendar days of receipt of such request, whichever is later;

(II) to discuss the initial pediatric study plan as soon as practicable, but not later than 90 calendar days after the receipt of such plan under subparagraph (A); and

(III) to discuss the bases for the deferral under subsection (a)(4) or a full or partial waiver under subsection (a)(5);

(ii) may determine that a written response to the initial pediatric study plan is sufficient to communicate comments on the initial pediatric study plan, and that no meeting under clause (i)(II) is necessary; and

(iii) if the Secretary determines that no meeting under clause (i)(II) is necessary, shall so notify the applicant and provide written comments of the Secretary as soon as practicable, but not later than 90 calendar days after the receipt of the initial pediatric study plan.

(3) Agreed initial pediatric study plan

Not later than 90 calendar days following the meeting under paragraph (2)(C)(i)(II) or the receipt of a written response from the Secretary under paragraph (2)(C)(iii), the applicant shall document agreement on the initial pediatric study plan in a submission to the Secretary marked "Agreed Initial Pediatric Study Plan", and the Secretary shall confirm such agreement to the applicant in writing not later than 30 calendar days of receipt of such agreed initial pediatric study plan.

(4) Deferral and waiver

If the agreed initial pediatric study plan contains a request from the applicant for a deferral, partial waiver, or waiver under this section, the written confirmation under paragraph (3) shall include a recommendation from the Secretary as to whether such request meets the standards under paragraphs (3) or (4) of subsection (a).

(5) Amendments to the agreed initial pediatric study plan

At the initiative of the Secretary or the applicant, the agreed initial pediatric study plan may be amended at any time. The requirements of paragraph (2)(C) shall apply to any such proposed amendment in the same manner and to the same extent as such requirements apply to an initial pediatric study plan under paragraph (1). The requirements of paragraphs (3) and (4) shall apply to any agreement resulting from such proposed amendment in the same manner and to the same extent as such requirements apply to an agreed initial pediatric study plan.

(6) Internal committee

The Secretary shall consult the internal committee under section 355d of this title on the review of the initial pediatric study plan, agreed initial pediatric study plan, and any significant amendments to such plans.

(7) Required rulemaking

Not later than 1 year after July 9, 2012, the Secretary shall promulgate proposed regulations and issue guidance to implement the provisions of this subsection.

(f) Review of pediatric study plans, assessments, deferrals, deferral extensions, and waivers

(1) Review

Beginning not later than 30 days after September 27, 2007, the Secretary shall utilize the internal committee established under section 355d of this title to provide consultation to reviewing divisions on initial pediatric study plans, agreed initial pediatric study plans, and any significant amendments to such plans, and assessments prior to approval of an application or supplement for which a pediatric assessment is required under this section and all deferral, deferral extension, and waiver requests granted pursuant to this section.

(2) Activity by committee

The committee referred to in paragraph (1) may operate using appropriate members of such committee and need not convene all members of the committee.

(3) Documentation of committee action

For each drug or biological product, the committee referred to in paragraph (1) shall document, for each activity described in paragraph (4) or (5), which members of the committee participated in such activity.

(4) Review of pediatric study plans, assessments, deferrals, deferral extensions, and waivers

Consultation on initial pediatric study plans, agreed initial pediatric study plans, and assessments by the committee referred to in paragraph (1) pursuant to this section shall occur prior to approval of an application or supplement for which a pediatric assessment is required under this section. The committee shall review all requests for deferrals, deferral extensions, and waivers from the requirement to submit a pediatric assessment granted under this section and shall provide recommendations as needed to reviewing divisions, including with respect to whether such a supplement, when submitted, shall be considered for priority review.

(5) Retrospective review of pediatric assessments, deferrals, and waivers

Not later than 1 year after September 27, 2007, the committee referred to in paragraph (1) shall conduct a retrospective review and analysis of a representative sample of assessments submitted and deferrals and waivers approved under this section since December 3, 2003. Such review shall include an analysis of the quality and consistency of pediatric information in pediatric assessments and the appropriateness of waivers and deferrals granted. Based on such review, the Secretary shall issue recommendations to the review divisions for improvements and initiate guidance to industry related to the scope of pediatric studies required under this section.

(6) Tracking of assessments and labeling changes

The Secretary, in consultation with the committee referred to in paragraph (1), shall track and make available to the public in an easily accessible manner, including through posting on the Web site of the Food and Drug Administration—

(A) the number of assessments conducted under this section;

(B) the specific drugs and biological products and their uses assessed under this section;

(C) the types of assessments conducted under this section, including trial design, the number of pediatric patients studied, and the number of centers and countries involved;

(D) aggregated on an annual basis—

(i) the total number of deferrals and deferral extensions requested and granted under this section and, if granted, the reasons for each such deferral or deferral extension;

(ii) the timeline for completion of the assessments;

(iii) the number of assessments completed and pending; and

(iv) the number of postmarket non-compliance letters issued pursuant to subsection (d), and the recipients of such letters;

(E) the number of waivers requested and granted under this section and, if granted, the reasons for the waivers;

(F) the number of pediatric formulations developed and the number of pediatric formulations not developed and the reasons any such formulation was not developed;

(G) the labeling changes made as a result of assessments conducted under this section;

(H) an annual summary of labeling changes made as a result of assessments conducted under this section for distribution pursuant to subsection (h)(2);

(I) an annual summary of information submitted pursuant to subsection (a)(3)(B); and

(J) the number of times the committee referred to in paragraph (1) made a recommendation to the Secretary under paragraph (4) regarding priority review, the number of times the Secretary followed or did not follow such a recommendation, and, if not followed, the reasons why such a recommendation was not followed.

(g) Labeling changes

(1) Dispute resolution

(A) Request for labeling change and failure to agree

If, on or after September 27, 2007, the Commissioner determines that a sponsor and the Commissioner have been unable to reach agreement on appropriate changes to the labeling for the drug that is the subject of the application or supplement, not later than 180 days after the date of the submission of the application or supplement that receives a priority review or 330 days after the date of the submission of an application or supplement that receives a standard review—

(i) the Commissioner shall request that the sponsor of the application make any labeling change that the Commissioner determines to be appropriate; and

(ii) if the sponsor does not agree within 30 days after the Commissioner's request to make a labeling change requested by the Commissioner, the Commissioner shall refer the matter to the Pediatric Advisory Committee.

(B) Action by the Pediatric Advisory Committee

Not later than 90 days after receiving a referral under subparagraph (A)(ii), the Pediatric Advisory Committee shall—

(i) review the pediatric study reports; and

(ii) make a recommendation to the Commissioner concerning appropriate labeling changes, if any.

(C) Consideration of recommendations

The Commissioner shall consider the recommendations of the Pediatric Advisory Committee and, if appropriate, not later than 30 days after receiving the recommendation, make a request to the sponsor of the application or supplement to make any labeling changes that the Commissioner determines to be appropriate.

(D) Misbranding

If the sponsor of the application or supplement, within 30 days after receiving a request under subparagraph (C), does not agree to make a labeling change requested by the Commissioner, the Commissioner may deem the drug that is the subject of the application or supplement to be misbranded.

(E) No effect on authority

Nothing in this subsection limits the authority of the United States to bring an enforcement action under this chapter when a drug lacks appropriate pediatric labeling. Neither course of action (the Pediatric Advisory Committee process or an enforcement action referred to in the preceding sentence) shall preclude, delay, or serve as the basis to stay the other course of action.

(2) Other labeling changes

If, on or after September 27, 2007, the Secretary makes a determination that a pediatric assessment conducted under this section does or does not demonstrate that the drug that is the subject of such assessment is safe and effective in pediatric populations or subpopulations, including whether such assessment results are inconclusive, the Secretary shall order the labeling of such product to include information about the results of the assessment and a statement of the Secretary's determination.

(h) Dissemination of pediatric information

(1) In general

Not later than 210 days after the date of submission of an application (or supplement to an application) that contains a pediatric assessment under this section, if the application (or supplement) receives a priority review, or not later than 330 days after the date of submission of an application (or supplement to an application) that contains a pediatric assessment under this section, if the application (or supplement) receives a standard review, the Secretary shall make available to the public in an easily accessible manner the medical, statistical, and clinical pharmacology reviews of such pediatric assessments, and shall post such assessments on the Web site of the Food and Drug Administration.

(2) Dissemination of information regarding labeling changes

Beginning on September 27, 2007, the Secretary shall require that the sponsors of the assessments that result in labeling changes that are reflected in the annual summary developed pursuant to subsection (f)(6)(H) distribute such information to physicians and other health care providers.

(3) Effect of subsection

Nothing in this subsection shall alter or amend section 331(j) of this title or section 552 of title 5 or section 1905 of title 18.

(i) Adverse event reporting

(1) Reporting in first 18-month period

Beginning on September 27, 2007, during the 18-month period beginning on the date a labeling change is made pursuant to subsection (g), the Secretary shall ensure that all adverse event reports that have been received for such drug (regardless of when such report was received) are referred to the Office of Pediatric Therapeutics. In considering such reports, the Director of such Office shall provide for the review of such reports by the Pediatric Advisory Committee, including obtaining any recommendations of such committee regarding whether the Secretary should take action under this chapter in response to such reports.

(2) Reporting in subsequent periods

Following the 18-month period described in paragraph (1), the Secretary shall, as appropriate, refer to the Office of Pediatric Therapeutics all pediatric adverse event reports for a drug for which a pediatric study was conducted under this section. In considering such reports, the Director of such Office may provide for the review of such reports by the Pediatric Advisory Committee, including obtaining any recommendation of such Committee regarding whether the Secretary should take action in response to such reports.

(3) Preservation of authority

Nothing in this subsection shall prohibit the Office of Pediatric Therapeutics from providing for the review of adverse event reports by the Pediatric Advisory Committee prior to the 18-month period referred to in paragraph (1), if such review is necessary to ensure safe use of a drug in a pediatric population.

(4) Effect

The requirements of this subsection shall supplement, not supplant, other review of such adverse event reports by the Secretary.

(j) Scope of authority

Nothing in this section provides to the Secretary any authority to require a pediatric assessment of any drug or biological product, or any assessment regarding other populations or uses of a drug or biological product, other than the pediatric assessments described in this section.

(k) Relation to orphan drugs

(1) In general; exemption for orphan indications

Unless the Secretary requires otherwise by regulation and except as provided in paragraph (2), this section does not apply to any drug or biological product for an indication for which orphan designation has been granted under section 360bb of this title.

(2) Applicability despite orphan designation of certain indications

This section shall apply with respect to a drug or biological product for which an indication has been granted orphan designation under 360bb [1] of this title if the investigation described in subsection (a)(3) applies to the drug or biological product as described in subsection (a)(1)(B).

(l) New active ingredient

(1) Non-interchangeable biosimilar biological product

A biological product that is biosimilar to a reference product under section 262 of title 42, and that the Secretary has not determined to meet the standards described in subsection (k)(4) of such section for interchangeability with the reference product, shall be considered to have a new active ingredient under this section.

(2) Interchangeable biosimilar biological product

A biological product that is interchangeable with a reference product under section 262 of title 42 shall not be considered to have a new active ingredient under this section.

(m) List of primary molecular targets

(1) In general

Within one year of August 18, 2017, the Secretary shall establish and update regularly, and shall publish on the internet website of the Food and Drug Administration—

(A) a list of molecular targets considered, on the basis of data the Secretary determines to be adequate, to be substantially relevant to the growth and progression of a pediatric cancer, and that may trigger the requirements under this section; and

(B) a list of molecular targets of new cancer drugs and biological products in development for which pediatric cancer study requirements under this section will be automatically waived.

(2) Consultation

In establishing the lists described in paragraph (1), the Secretary shall consult the National Cancer Institute, members of the internal committee under section 355d of this title, and the Pediatric Oncology Subcommittee of the Oncologic Drugs Advisory Committee, and shall take into account comments from the meeting under subsection (c).

(3) Rule of construction

Nothing in paragraph (1) shall be construed—

(A) to require the inclusion of a molecular target on the list published under such paragraph as a condition for triggering the requirements under subsection (a)(1)(B) with respect to a drug or biological product directed at such molecular target; or

(B) to authorize the disclosure of confidential commercial information, as prohibited under section 331(j) of this title or section 1905 of title 18.

(June 25, 1938, ch. 675, §505B, as added Pub. L. 108–155, §2(a), Dec. 3, 2003, 117 Stat. 1936; amended Pub. L. 110–85, title IV, §402(a), Sept. 27, 2007, 121 Stat. 866; Pub. L. 111–148, title VII, §7002(d)(2), Mar. 23, 2010, 124 Stat. 816; Pub. L. 112–144, title V, §§501(b), 505–506(b), 509(b), July 9, 2012, 126 Stat. 1040–1044, 1048; Pub. L. 114–255, div. A, title III, §§3101(a)(2)(D), 3102(3), Dec. 13, 2016, 130 Stat. 1153, 1156; Pub. L. 115–52, title V, §§503–504(b), 505(e), Aug. 18, 2017, 131 Stat. 1038–1041, 1047.)

Editorial Notes

Amendments

2017—Subsec. (a)(1). Pub. L. 115–52, §504(a)(1)(A), designated existing provisions as subpar. (A) and inserted heading, substituted "Except with respect to an application for which subparagraph (B) applies, a person" for "A person", redesignated former subpars. (A) and (B) as cls. (i) and (ii), respectively, of subpar. (A) and realigned margins, substituted "; or" for ", or" at end of subpar. (A)(i), and added subpar. (B).

Subsec. (a)(2)(A). Pub. L. 115–52, §504(a)(1)(B), substituted "paragraph (1)(A)" for "paragraph (1)" in introductory provisions.

Subsec. (a)(3). Pub. L. 115–52, §504(a)(1)(D), added par. (3). Former par. (3) redesignated (4).

Subsec. (a)(4). Pub. L. 115–52, §504(a)(1)(C), redesignated par. (3) as (4). Former par. (4) redesignated (5).

Subsec. (a)(4)(A). Pub. L. 115–52, §504(a)(1)(E)(i), substituted "assessments required under paragraph (1)(A) or reports on the investigation required under paragraph (1)(B)" for "assessments required under paragraph (1)" in introductory provisions.

Subsec. (a)(4)(A)(ii)(I). Pub. L. 115–52, §504(a)(1)(E)(ii), inserted "or reports on the investigation" after "assessments".

Subsec. (a)(4)(B)(i). Pub. L. 115–52, §504(a)(1)(E)(i), substituted "assessments required under paragraph (1)(A) or reports on the investigation required under paragraph (1)(B)" for "assessments required under paragraph (1)" in introductory provisions.

Subsec. (a)(4)(B)(ii). Pub. L. 115–52, §504(a)(1)(E)(iii), substituted "assessment under paragraph (1)(A) or reports on the investigation under paragraph (1)(B)" for "assessment under paragraph (1)".

Subsec. (a)(4)(C)(ii)(II). Pub. L. 115–52, §504(a)(1)(E)(iv), inserted "or investigation" after "assessment".

Subsec. (a)(5). Pub. L. 115–52, §504(a)(1)(C), redesignated par. (4) as (5).

Subsec. (a)(5)(A), (B). Pub. L. 115–52, §504(a)(1)(F), inserted "or reports on the investigation" after "assessments" in introductory provisions.

Subsec. (d). Pub. L. 115–52, §504(a)(2), inserted "and reports on the investigation" after "Submission of assessments" in heading and, in introductory provisions, inserted "or the investigation described in subsection (a)(3)" after "assessment described in subsection (a)(2)" and substituted "subsection (a)(4)" for "subsection (a)(3)".

Subsec. (d)(1). Pub. L. 115–52, §505(e), inserted at end "The Secretary shall inform the Pediatric Advisory Committee of letters issued under this paragraph and responses to such letters."

Subsec. (d)(2). Pub. L. 115–52, §504(a)(2)(A), (C), in introductory provisions, inserted "or the investigation described in subsection (a)(3)" after "assessment described in subsection (a)(2)" and substituted "subsection (a)(4)" for "subsection (a)(3)".

Subsec. (e)(1). Pub. L. 115–52, §504(a)(3)(A), inserted "or the investigation described in subsection (a)(3)" after "under subsection (a)(2)".

Subsec. (e)(2). Pub. L. 115–52, §503(b)(1), substituted "meetings" for "meeting" in heading.

Subsec. (e)(2)(A)(i). Pub. L. 115–52, §504(a)(3)(B), inserted "or the investigation described in subsection (a)(3)" after "under subsection (a)(2)".

Subsec. (e)(2)(C). Pub. L. 115–52, §503(b)(2), substituted "Meetings" for "Meeting" in heading.

Subsec. (e)(2)(C)(i). Pub. L. 115–52, §503(a), amended cl. (i) generally. Prior to amendment, cl. (i) read as follows: "shall meet with the applicant to discuss the initial pediatric study plan as soon as practicable, but not later than 90 calendar days after the receipt of such plan under subparagraph (A);".

Subsec. (e)(2)(C)(ii), (iii). Pub. L. 115–52, §503(b)(3), substituted "no meeting under clause (i)(II)" for "no meeting".

Subsec. (e)(3). Pub. L. 115–52, §503(b)(4), substituted "meeting under paragraph (2)(C)(i)(II)" for "meeting under paragraph (2)(C)(i)".

Subsec. (k). Pub. L. 115–52, §504(b), amended subsec. (k) generally. Prior to amendment, text read as follows: "Unless the Secretary requires otherwise by regulation, this section does not apply to any drug for an indication for which orphan designation has been granted under section 360bb of this title."

Subsec. (m). Pub. L. 115–52, §504(a)(4), added subsec. (m).

2016—Subsec. (e)(2)(A). Pub. L. 114–255, §3101(a)(2)(D)(i)(I)(aa), inserted "study" after "initial pediatric" in introductory and concluding provisions.

Subsec. (e)(2)(B). Pub. L. 114–255, §3101(a)(2)(D)(i)(I)(bb), substituted "Content of initial pediatric study plan" for "Content of initial plan" in heading.

Subsec. (e)(5). Pub. L. 114–255, §3101(a)(2)(D)(i)(II), inserted "agreed initial pediatric study" before "plan" in heading.

Subsec. (e)(6). Pub. L. 114–255, §3101(a)(2)(D)(i)(III), substituted "agreed initial pediatric study plan" for "agreed initial pediatric plan".

Subsec. (f)(1). Pub. L. 114–255, §3101(a)(2)(D)(ii), inserted "and any significant amendments to such plans," after "agreed initial pediatric study plans,".

Subsecs. (l), (m). Pub. L. 114–255, §3102(3), redesignated subsec. (m) as (l) and struck out former subsec. (l) which related to Institute of Medicine study.

2012—Subsec. (a)(1). Pub. L. 112–144, §509(b)(1)(A), inserted "for a drug" after "(or supplement to an application)" in introductory provisions.

Subsec. (a)(3)(A)(ii)(II). Pub. L. 112–144, §506(b)(1), amended subcl. (II) generally. Prior to amendment, subcl. (II) read as follows: "a description of the planned or ongoing studies;".

Subsec. (a)(3)(B), (C). Pub. L. 112–144, §505(a)(1)(A), (B), added subpar. (B) and redesignated former subpar. (B) as (C).

Subsec. (a)(3)(C)(i)(III), (IV). Pub. L. 112–144, §505(a)(1)(C)(i), added subcls. (III) and (IV).

Subsec. (a)(3)(C)(ii). Pub. L. 112–144, §505(a)(1)(C)(ii), amended cl. (ii) generally. Prior to amendment, text read as follows: "The information submitted through the annual review under clause (i) shall promptly be made available to the public in an easily accessible manner, including through the Web site of the Food and Drug Administration."

Subsec. (a)(4)(C). Pub. L. 112–144, §509(b)(1)(B), inserted "partial" after "If a" in first sentence and substituted "such a" for "either a full or" in second sentence.

Subsec. (b)(1). Pub. L. 112–144, §509(b)(2), substituted "The" for "After providing notice in the form of a letter (that, for a drug approved under section 355 of this title, references a declined written request under section 355a of this title for a labeled indication which written request is not referred under section 355a(n)(1)(A) of this title to the Foundation of the National Institutes of Health for the pediatric studies), the" in introductory provisions.

Subsec. (d). Pub. L. 112–144, §505(c)(1), amended subsec. (d) generally. Prior to amendment, subsec. (d) related to submission of assessments.

Subsec. (e). Pub. L. 112–144, §506(a), amended subsec. (e) generally. Prior to amendment, text read as follows: "Before and during the investigational process for a new drug or biological product, the Secretary shall meet at appropriate times with the sponsor of the new drug or biological product to discuss—

"(1) information that the sponsor submits on plans and timelines for pediatric studies; or

"(2) any planned request by the sponsor for waiver or deferral of pediatric studies."

Subsec. (f). Pub. L. 112–144, §506(b)(2)(A), substituted "pediatric study plans," for "pediatric plans," in heading.

Pub. L. 112–144, §505(a)(2)(A), inserted "deferral extensions," after "deferrals," in heading.

Subsec. (f)(1). Pub. L. 112–144, §506(b)(2)(B), substituted "initial pediatric study plans, agreed initial pediatric study plans," for "all pediatric plans".

Pub. L. 112–144, §505(a)(2)(B), inserted ", deferral extension," after "deferral".

Subsec. (f)(4). Pub. L. 112–144, §506(b)(2)(C), substituted "pediatric study plans," for "pediatric plans," in heading and "initial pediatric study plans, agreed initial pediatric study plans," for "pediatric plans" in text.

Pub. L. 112–144, §505(a)(2)(C), inserted "deferral extensions," after "deferrals," in heading and ", deferral extensions," after "deferrals" in text.

Subsec. (f)(6)(D). Pub. L. 112–144, §505(b), amended subpar. (D) generally. Prior to amendment, subpar. (D) read as follows: "the total number of deferrals requested and granted under this section and, if granted, the reasons for such deferrals, the timeline for completion, and the number completed and pending by the specified date, as outlined in subsection (a)(3);".

Subsec. (f)(6)(D)(iv). Pub. L. 112–144, §505(c)(2), added cl. (iv).

Subsec. (g)(1)(A). Pub. L. 112–144, §509(b)(3)(A), inserted "that receives a priority review or 330 days after the date of the submission of an application or supplement that receives a standard review" after "after the date of the submission of the application or supplement" in introductory provisions.

Subsec. (g)(2). Pub. L. 112–144, §509(b)(3)(B), substituted "the labeling of such product" for "the label of such product".

Subsec. (h)(1). Pub. L. 112–144, §509(b)(4), inserted "an application (or supplement to an application) that contains" after "date of submission of" and "if the application (or supplement) receives a priority review, or not later than 330 days after the date of submission of an application (or supplement to an application) that contains a pediatric assessment under this section, if the application (or supplement) receives a standard review," after "under this section,".

Subsec. (i)(1). Pub. L. 112–144, §509(b)(5)(A), substituted "first 18-month period" for "year one" in heading and "18-month" for "one-year" in text.

Subsec. (i)(2). Pub. L. 112–144, §509(b)(5)(B), substituted "periods" for "years" in heading and "18-month period" for "one-year period" in text.

Subsec. (i)(3), (4). Pub. L. 112–144, §509(b)(5)(C), (D), added par. (3) and redesignated former par. (3) as (4).

Subsecs. (m), (n). Pub. L. 112–144, §501(b), redesignated subsec. (n) as (m) and struck out former subsec. (m). Prior to amendment, text of subsec. (m) read as follows: "The authority under this section shall remain in effect so long as an application subject to this section may be accepted for filing by the Secretary on or before the date specified in section 355a(q) of this title."

2010—Subsec. (n). Pub. L. 111–148 added subsec. (n).

2007—Pub. L. 110–85 amended section generally. Prior to amendment, section related to required submission of assessments with an application for a new drug or new biological product and by order of the Secretary for certain marketed drugs and biological products used for pediatric patients, a definition of meaningful therapeutic benefit,

consequences of failure to submit required assessments, meetings of the Secretary and the sponsor of a new drug or biological product, a limitation of the scope of the Secretary's authority, application to orphan drugs, and integration with other pediatric studies.

Statutory Notes and Related Subsidiaries

Effective Date of 2012 Amendment

Pub. L. 112–144, title V, §506(c), July 9, 2012, 126 Stat. 1045, provided that:

"(1) In general.—Subject to paragraph (2), the amendments made by this section [amending this section] shall take effect 180 calendar days after the date of enactment of this Act [July 9, 2012], irrespective of whether the Secretary [of Health and Human Services] has promulgated final regulations to carry out such amendments.

"(2) Rule of construction.—Paragraph (1) shall not be construed to affect the deadline for promulgation of proposed regulations under section 505B(e)(7) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355c(e)(7)], as added by subsection (a) of this section."

Notwithstanding any provision of this section stating that a provision applies beginning on Sept. 27, 2007, any amendment made by Pub. L. 112–144 to such a provision applies beginning on July 9, 2012, subject to a transitional rule, see section 509(g) of Pub. L. 112–144, set out as a note under section 355a of this title.

Effective Date of 2007 Amendment

Pub. L. 110–85, title IV, §402(b), Sept. 27, 2007, 121 Stat. 875, provided that:

"(1) In general.—Notwithstanding subsection (h) of section 505B of the Federal Food, Drug and Cosmetic Act [21 U.S.C. 355c(h)], as in effect on the day before the date of the enactment of this Act [Sept. 27, 2007], a pending assessment, including a deferred assessment, required under such section 505B shall be deemed to have been required under section 505B of the Federal Food, Drug and Cosmetic Act as in effect on or after the date of the enactment of this Act.

"(2) Certain assessments and waiver requests.—An assessment pending on or after the date that is 1 year prior to the date of the enactment of this Act shall be subject to the tracking and disclosure requirements established under such section 505B, as in effect on or after such date of enactment, except that any such assessments submitted or waivers of such assessments requested before such date of enactment shall not be subject to subsections (a)(4)(C), (b)(2)(C), (f)(6)(F), and (h) of such section 505B."

Effective Date

Pub. L. 108–155, §4, Dec. 3, 2003, 117 Stat. 1942, provided that:

"(a) In General.—Subject to subsection (b), this Act [enacting this section, amending sections 355, 355a, and 355b of this title and sections 262 and 284m of Title 42, The Public Health and Welfare, enacting provisions set out as a note under section 301 of this title, and amending provisions set out as notes under section 355a of this title and section 284m of Title 42] and the amendments made by this Act take effect on the date of enactment of this Act [Dec. 3, 2003].

"(b) Applicability to New Drugs and Biological Products.—

"(1) In general.—Subsection (a) of section 505B of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355c(a)] (as added by section 2) shall apply to an application described in paragraph (1) of that subsection submitted to the Secretary of Health and Human Services on or after April 1, 1999.

"(2) Waivers and deferrals.—

"(A) Waiver or deferral granted.—If, with respect to an application submitted to the Secretary of Health and Human Services between April 1, 1999, and the date of enactment of this Act [Dec. 3, 2003], a waiver or deferral of pediatric assessments was granted under regulations of the Secretary then in effect, the waiver or deferral shall be a waiver or deferral under subsection (a) of section 505B of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355c(a)], except that any date specified in such a deferral shall be extended by the number of days that is equal to the number of days between October 17, 2002, and the date of enactment of this Act.

"(B) Waiver and deferral not granted.—If, with respect to an application submitted to the Secretary of Health and Human Services between April 1, 1999, and the date of enactment of this Act [Dec. 3, 2003], neither a waiver nor deferral of pediatric assessments was granted under regulations of the Secretary then in effect, the person that submitted the application shall be required to submit assessments under subsection (a)(2) of section 505B of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355c(a)(2)] on the date that is the later of—

"(i) the date that is 1 year after the date of enactment of this Act; or

"(ii) such date as the Secretary may specify under subsection (a)(3) of that section;

unless the Secretary grants a waiver under subsection (a)(4) of that section.

"(c) No Limitation of Authority.—Neither the lack of guidance or regulations to implement this Act or the amendments made by this Act nor the pendency of the process for issuing guidance or regulations shall limit the authority of the Secretary of Health and Human Services under, or defer any requirement under, this Act or those amendments."

Rule of Construction

Pub. L. 115–52, title V, §504(e), Aug. 18, 2017, 131 Stat. 1045, provided that: "Nothing in this section [amending this section and section 355c–1 of this title and enacting provisions set out as a note below], including the amendments made by this section, shall limit the authority of the Secretary of Health and Human Services to issue written requests under section 505A of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355a) or section 351(m) of the Public Health Service Act (42 U.S.C. 262(m)), or to negotiate or implement amendments to such requests proposed by the an [sic] applicant."

Meeting, Consultation, and Guidance

Pub. L. 115–52, title V, §504(c), Aug. 18, 2017, 131 Stat. 1041, provided that:

"(1) Meeting.—The Secretary of Health and Human Services (referred to in this subsection as the 'Secretary'), acting through the Commissioner of Food and Drugs and in collaboration with the Director of the National Cancer Institute, shall convene a public meeting not later than 1 year after the date of enactment of this Act [Aug. 18, 2017] to solicit feedback from physicians and researchers (including pediatric oncologists and rare disease specialists), patients, and other stakeholders to provide input on development of the guidance under paragraph (2) and the list under subsection (m) of section 505B of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355c), as added by subsection (a). The Secretary shall seek input at such meeting on—

"(A) the data necessary to determine that there is scientific evidence that a drug or biological product is directed at a molecular target that is considered to be substantially relevant to the growth or progression of a pediatric cancer;

"(B) the data necessary to determine that there is scientific evidence that a molecular target is considered to be substantially relevant to the growth or progression of a pediatric cancer;

"(C) the data needed to meet the requirement of conducting an investigation described in section 505B(a)(3) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355c(a)(3)], as amended by subsection (a);

"(D) considerations when developing the list under section 505B(m) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355c(m)] that contains molecular targets shared between different tumor types;

"(E) the process the Secretary shall utilize to update regularly a list of molecular targets that may trigger a pediatric study under section 505B of the Federal Food, Drug, and Cosmetic Act, as so amended, and how often such updates shall occur;

"(F) how to overcome the challenges related to pediatric cancer drug and biological product development, including issues related to the ethical, practical, and other barriers to conducting clinical trials in pediatric cancer with small patient populations;

"(G) scientific or operational challenges associated with performing an investigation described in section 505B(a)(1)(B) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355c(a)(1)(B)], including the effect on pediatric studies currently underway in a pediatric patient population, treatment of a pediatric patient population, and the ability to complete adult clinical trials;

"(H) the advantages and disadvantages of innovative clinical trial designs in addressing the development of cancer drugs or biological products directed at molecular targets in pediatric cancer patients;

"(I) the ways in which the Secretary can improve the current process outlined under sections 505A and 505B of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355a, 355c) to encourage additional research and development of pediatric cancer treatments;

"(J) the ways in which the Secretary might streamline and improve the written request process, including when studies contained in a request under such section 505A are not feasible due to the ethical, practical, or other barriers to conducting clinical trials in pediatric cancer populations;

"(K) how the Secretary will facilitate collaboration among pediatric networks, academic centers and experts in pediatric cancer to conduct an investigation described in such section 505B(a)(3);

"(L) how the Secretary may facilitate collaboration among sponsors of same-in-class drugs and biological products that would be subject to the requirements for an investigation under such section 505B based on shared molecular targets; and

"(M) the ways in which the Secretary will help to mitigate the risks, if any, of discouraging the research and development of orphan drugs when implementing such section 505B as amended.

"(2) GUIDANCE.—Not later than 2 years after the date of enactment of this Act [Aug. 18, 2017], the Secretary, acting through the Commissioner of Food and Drugs, shall issue final guidance on implementation of the amendments to section 505B of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355c) regarding molecularly targeted cancer drugs made by this section, including—

"(A) the scientific criteria, types of data, and regulatory considerations for determining whether a molecular target is substantially relevant to the growth or progression of a pediatric cancer and would trigger an investigation under section 505B of the Federal Food, Drug, and Cosmetic Act, as amended;

"(B) the process by which the Secretary will engage with sponsors to discuss determinations, investigation requirements, deferrals, waivers, and any other issues that need to be resolved to ensure that any required investigation based on a molecular target can be reasonably conducted;

"(C) the scientific or operational challenges for which the Secretary may issue deferrals or waivers for an investigation described in subsection (a)(3) of such section 505B, including adverse impacts on current pediatric studies underway in a pediatric patient population, studies involving drugs designated as orphan drugs, treatment of a pediatric patient population, or the ability to complete adult clinical trials;

"(D) how the Secretary and sponsors will facilitate collaboration among pediatric networks, academic centers, and experts in pediatric cancer to conduct an investigation described in subsection (a)(3) of such section 505B;

"(E) scientific and regulatory considerations for study designs, including the applicability of innovative clinical trial designs for pediatric cancer drug and biological product developments under sections 505A and 505B of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355a, 355c);

"(F) approaches to streamline and improve the amendment process, including when studies contained in a request under such section 505A are not feasible due to the ethical, practical, or other barriers to conducting clinical trials in pediatric cancer populations;

"(G) the process for submission of an initial pediatric study plan for the investigation described in section 505B(a)(3) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355c(a)(3)), including the process for a sponsor to meet and reach agreement with the Secretary on the initial pediatric study plan; and

"(H) considerations for implementation of such section 505B, as so amended, and waivers of the requirements of such section 505B with regard to molecular targets for which several drugs or biological products may be under investigation."

[1] *So in original. Probably should be preceded by "section".*

§355c–1. Report

(a) In general

Not later than four years after July 9, 2012, and every five years thereafter, the Secretary shall prepare and submit to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Energy and Commerce of the House of Representatives, and make publicly available, including through posting on the Internet Web site of the Food and Drug Administration, a report on the implementation of sections 355a and 355c of this title.

(b) Contents

Each report under subsection (a) shall include—

(1) an assessment of the effectiveness of sections 355a and 355c of this title in improving information about pediatric uses for approved drugs and biological products, including the number and type of labeling changes made since July 9, 2012, and the importance of such uses in the improvement of the health of children;

(2) the number of required studies under such section 355c of this title that have not met the initial deadline provided under such section 355c of this title, including—

(A) the number of deferrals and deferral extensions granted and the reasons such extensions were granted;

(B) the number of waivers and partial waivers granted; and

(C) the number of letters issued under subsection (d) of such section 355c of this title;

(3) an assessment of the timeliness and effectiveness of pediatric study planning since July 9, 2012, including the number of initial pediatric study plans not submitted in accordance with the requirements of subsection (e) of such section 355c of this title and any resulting rulemaking;

(4) the number of written requests issued, accepted, and declined under such section 355a of this title since July 9, 2012, and a listing of any important gaps in pediatric information as a result of such declined requests;

(5) a description and current status of referrals made under subsection (n) of such section 355a of this title;

(6) an assessment of the effectiveness of studying biological products in pediatric populations under such sections 355a and 355c of this title and section 284m of title 42;

(7)(A) the efforts made by the Secretary to increase the number of studies conducted in the neonatal population (including efforts made to encourage the conduct of appropriate studies in neonates by companies with products that have sufficient safety and other information to make the conduct of the studies ethical and safe); and

(B) the results of such efforts;

(8)(A) the number and importance of drugs and biological products for children with cancer that are being tested as a result of the programs under such sections 355a and 355c of this title and under section 284m of title 42; and

(B) any recommendations for modifications to such programs that would lead to new and better therapies for children with cancer, including a detailed rationale for each recommendation;

(9) any recommendations for modification to such programs that would improve pediatric drug research and increase pediatric labeling of drugs and biological products;

(10) an assessment of the successes of and limitations to studying drugs for rare diseases under such sections 355a and 355c of this title;

(11) an assessment of the impact of the amendments to such section 355c of this title made by the FDA Reauthorization Act of 2017 on pediatric research and labeling of drugs and biological products and pediatric labeling of molecularly targeted drugs and biological products for the treatment of cancer;

(12) an assessment of the efforts of the Secretary to implement the plan developed under section 505C–1 of the Federal Food, Drug, and Cosmetic Act,[1] regarding earlier submission of pediatric studies under sections 355a and 355c of this title and section 262(m) of title 42, including—

(A) the average length of time after the approval of an application under section 355(b)(1) of this title or section 262(a) of title 42 before studies conducted pursuant to such section 355a of this title, 355c of this title, or section 262(m) of title 42 are completed, submitted, and incorporated into labeling;

(B) the average length of time after the receipt of a proposed pediatric study request before the Secretary responds to such request;

(C) the average length of time after the submission of a proposed pediatric study request before the Secretary issues a written request for such studies;

(D) the number of written requests issued for each investigational new drug or biological product prior to the submission of an application under section 355(b)(1) of this title or section 262(a) of title 42; and

(E) the average number, and range of numbers, of amendments to written requests issued, and the time the Secretary requires to review and act on proposed amendments to written requests;

(13) a list of sponsors of applications or holders of approved applications who received exclusivity under such section 355a of this title or such section 262(m) of title 42 after receiving a letter issued under such section 355c(d)(1) of this title for any drug or biological product before the studies referred to in such letter were completed and submitted;

(14) a list of assessments and investigations required under such section 355c of this title;

(15) how many requests under such section 355a of this title for molecular targeted cancer drugs, as defined by subsection (a)(1)(B) of such section 355c of this title, approved prior to 3 years after August 18, 2017, have been issued by the Food and Drug Administration, and how many such requests have been completed; and

(16) the Secretary's assessment of the overall impact of the amendments made by section 504 of the FDA Reauthorization Act of 2017 on the conduct and effectiveness of pediatric cancer research and the orphan drug program, as well any subsequent recommendations.

(c) Stakeholder comment

At least 180 days prior to the submission of each report under subsection (a), the Secretary shall consult with representatives of patient groups (including pediatric patient groups), consumer groups, regulated industry, academia, and other interested parties to obtain any recommendations or information relevant to the report including suggestions for modifications that would improve pediatric drug research and pediatric labeling of drugs and biological products.

(Pub. L. 112–144, title V, §508, July 9, 2012, 126 Stat. 1045; Pub. L. 115–52, title V, §504(d), Aug. 18, 2017, 131 Stat. 1044.)

Editorial Notes

References in Text

The FDA Reauthorization Act of 2017, referred to in subsec. (b)(11), (16), is Pub. L. 115–52, Aug. 18, 2017, 131 Stat. 1005. Section 504 of the Act amended this section and section 355c of this title. For complete classification of this Act to the Code, see Short Title of 2017 Amendment note set out under section 301 of this title and Tables.

Section 505C–1 of the Federal Food, Drug, and Cosmetic Act, referred to in subsec. (b)(12), probably means section 505(c) of Pub. L. 115–52, the FDA Reauthorization Act of 2017, which is set out as a note under section 355a of this title. The Federal Food, Drug, and Cosmetic Act does not contain a section 505C–1, and section 505(c) of the FDA Reauthorization Act of 2017 relates to the development and implementation of a plan for earlier submission of pediatric studies under sections 355a and 355c of this title and section 262(m) of Title 42, The Public Health and Welfare.

Codification

Section was enacted as part of the Food and Drug Administration Safety and Innovation Act, and not as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

Amendments

2017—Subsec. (b)(11) to (16). Pub. L. 115–52 added pars. (11) to (16) and struck out former par. (11) which read as follows: "an assessment of the Secretary's efforts to address the suggestions and options described in any prior report issued by the Comptroller General, Institute of Medicine, or the Secretary, and any subsequent reports, including recommendations therein, regarding the topics addressed in the reports under this section, including with respect to—

"(A) improving public access to information from pediatric studies conducted under such sections 355a and 355c of this title; and

"(B) improving the timeliness of pediatric studies and pediatric study planning under such sections 355a and 355c of this title."

Statutory Notes and Related Subsidiaries

Rule of Construction

Nothing in amendment by Pub. L. 115–52 to limit the authority of the Secretary of Health and Human Services to issue written requests under section 355a of this title or section 262(m) of Title 42, The Public Health and Welfare, or to negotiate or implement amendments to such requests proposed by applicants, see section 504(e) of Pub. L. 115–52, set out as a note under section 355c of this title.

Definition of "Secretary"

The term "Secretary" as used in this section means the Secretary of Health and Human Services, see section 503 of Pub. L. 112–144, set out as a note under section 355a of this title.

[1] *See References in Text note below.*

§355d. Internal committee for review of pediatric plans, assessments, deferrals, deferral extensions, and waivers

The Secretary shall establish an internal committee within the Food and Drug Administration to carry out the activities as described in sections 355a(f) and 355c(f) of this title. Such internal committee shall include employees of the Food and Drug Administration, with expertise in pediatrics (including representation from the Office of Pediatric Therapeutics), biopharmacology, statistics, chemistry, legal issues, pediatric ethics, neonatology, and the appropriate expertise pertaining to the pediatric product under review, such as expertise in child and adolescent psychiatry or pediatric rare diseases, and other individuals designated by the Secretary.

(June 25, 1938, ch. 675, §505C, as added Pub. L. 110–85, title IV, §403, Sept. 27, 2007, 121 Stat. 875; amended Pub. L. 112–144, title V, §509(c), July 9, 2012, 126 Stat. 1049; Pub. L. 115–52, title V, §505(f), Aug. 18, 2017, 131 Stat. 1047.)

Editorial Notes

Amendments

2017—Pub. L. 115–52 inserted "or pediatric rare diseases" after "psychiatry".

2012—Pub. L. 112–144 inserted "deferral extensions," after "deferrals," in section catchline and "neonatology," after "pediatric ethics," in text.

§355e. Pharmaceutical security

(a) In general

The Secretary shall develop standards and identify and validate effective technologies for the purpose of securing the drug supply chain against counterfeit, diverted, subpotent, substandard, adulterated, misbranded, or expired drugs.

(b) Standards development

(1) In general

The Secretary shall, in consultation with the agencies specified in paragraph (4), manufacturers, distributors, pharmacies, and other supply chain stakeholders, prioritize and develop standards for the identification, validation, authentication, and tracking and tracing of prescription drugs.

(2) Standardized numeral identifier

Not later than 30 months after September 27, 2007, the Secretary shall develop a standardized numerical identifier (which, to the extent practicable, shall be harmonized with international consensus standards for such an identifier) to be applied to a prescription drug at the point of manufacturing and repackaging (in which case the numerical identifier shall be linked to the numerical identifier applied at the point of manufacturing) at the package or pallet level, sufficient to facilitate the identification, validation, authentication, and tracking and tracing of the prescription drug.

(3) Promising technologies

The standards developed under this subsection shall address promising technologies, which may include—

(A) radio frequency identification technology;
(B) nanotechnology;
(C) encryption technologies; and
(D) other track-and-trace or authentication technologies.

(4) Interagency collaboration

In carrying out this subsection, the Secretary shall consult with Federal health and security agencies, including—

(A) the Department of Justice;
(B) the Department of Homeland Security;
(C) the Department of Commerce; and
(D) other appropriate Federal and State agencies.

(c) Inspection and enforcement

(1) In general

The Secretary shall expand and enhance the resources and facilities of agency components of the Food and Drug Administration involved with regulatory and criminal enforcement of this chapter to secure the drug supply chain against counterfeit, diverted, subpotent, substandard, adulterated, misbranded, or expired drugs including biological products and active pharmaceutical ingredients from domestic and foreign sources.

(2) Activities

The Secretary shall undertake enhanced and joint enforcement activities with other Federal and State agencies, and establish regional capacities for the validation of prescription drugs and the inspection of the prescription drug supply chain.

(d) Definition

In this section, the term "prescription drug" means a drug subject to section 353(b)(1) of this title.

(June 25, 1938, ch. 675, §505D, as added Pub. L. 110–85, title IX, §913, Sept. 27, 2007, 121 Stat. 952.)

§355f. Extension of exclusivity period for new qualified infectious disease products

(a) Extension

If the Secretary approves an application pursuant to section 355 of this title for a drug that has been designated as a qualified infectious disease product under subsection (d), the 4- and 5-year periods described in subsections (c)(3)(E)(ii) and (j)(5)(F)(ii) of section 355 of this title, the 3-year periods described in clauses (iii) and (iv) of subsection (c)(3)(E) and clauses (iii) and (iv) of subsection (j)(5)(F) of section 355 of this title, or the 7-year period described in section 360cc of this title, as applicable, shall be extended by 5 years.

(b) Relation to pediatric exclusivity

Any extension under subsection (a) of a period shall be in addition to any extension of the period under section 355a of this title with respect to the drug.

(c) Limitations

Subsection (a) does not apply to the approval of—

(1) a supplement to an application under section 355(b) of this title for any qualified infectious disease product for which an extension described in subsection (a) is in effect or has expired;

(2) a subsequent application filed with respect to a product approved under section 355 of this title for a change that results in a new indication, route of administration, dosing schedule, dosage form, delivery system, delivery device, or strength; or

(3) a product that does not meet the definition of a qualified infectious disease product under subsection (g) based upon its approved uses.

(d) Designation

(1) In general

The manufacturer or sponsor of a drug may request the Secretary to designate a drug as a qualified infectious disease product at any time before the submission of an application under section 355(b) of this title for such drug. The Secretary shall, not later than 60 days after the submission of such a request, determine whether the drug is a qualified infectious disease product.

(2) Limitation

Except as provided in paragraph (3), a designation under this subsection shall not be withdrawn for any reason, including modifications to the list of qualifying pathogens under subsection (f)(2)(C).

(3) Revocation of designation

The Secretary may revoke a designation of a drug as a qualified infectious disease product if the Secretary finds that the request for such designation contained an untrue statement of material fact.

(e) Regulations

(1) In general

Not later than 2 years after July 9, 2012, the Secretary shall adopt final regulations implementing this section, including developing the list of qualifying pathogens described in subsection (f).

(2) Procedure

In promulgating a regulation implementing this section, the Secretary shall—

(A) issue a notice of proposed rulemaking that includes the proposed regulation;

(B) provide a period of not less than 60 days for comments on the proposed regulation; and

(C) publish the final regulation not less than 30 days before the effective date of the regulation.

(3) Restrictions

Notwithstanding any other provision of law, the Secretary shall promulgate regulations implementing this section only as described in paragraph (2), except that the Secretary may issue interim guidance for sponsors seeking designation under subsection (d) prior to the promulgation of such regulations.

(4) Designation prior to regulations

The Secretary shall designate drugs as qualified infectious disease products under subsection (d) prior to the promulgation of regulations under this subsection, if such drugs meet the definition of a qualified infectious disease product described in subsection (g).

(f) Qualifying pathogen

(1) Definition

In this section, the term "qualifying pathogen" means a pathogen identified and listed by the Secretary under paragraph (2) that has the potential to pose a serious threat to public health, such as—

(A) resistant gram positive pathogens, including methicillin-resistant Staphylococcus aureus, vancomycin-resistant Staphylococcus aureus, and vancomycin-resistant enterococcus;

(B) multi-drug resistant gram negative bacteria, including Acinetobacter, Klebsiella, Pseudomonas, and E. coli species;

(C) multi-drug resistant tuberculosis; and

(D) Clostridium difficile.

(2) List of qualifying pathogens

(A) In general

The Secretary shall establish and maintain a list of qualifying pathogens, and shall make public the methodology for developing such list.

(B) Considerations

In establishing and maintaining the list of pathogens described under this section, the Secretary shall—

(i) consider—

(I) the impact on the public health due to drug-resistant organisms in humans;

(II) the rate of growth of drug-resistant organisms in humans;

(III) the increase in resistance rates in humans; and

(IV) the morbidity and mortality in humans; and

(ii) consult with experts in infectious diseases and antibiotic resistance, including the Centers for Disease Control and Prevention, the Food and Drug Administration, medical professionals, and the clinical research community.

(C) Review

Every 5 years, or more often as needed, the Secretary shall review, provide modifications to, and publish the list of qualifying pathogens under subparagraph (A) and shall by regulation revise the list as necessary, in accordance with subsection (e).

(g) Qualified infectious disease product

The term "qualified infectious disease product" means an antibacterial or antifungal drug for human use intended to treat serious or life-threatening infections, including those caused by—

(1) an antibacterial or antifungal resistant pathogen, including novel or emerging infectious pathogens; or

(2) qualifying pathogens listed by the Secretary under subsection (f).

(June 25, 1938, ch. 675, §505E, as added Pub. L. 112–144, title VIII, §801(a), July 9, 2012, 126 Stat. 1077.)

Statutory Notes and Related Subsidiaries

Effective Date

Pub. L. 112–144, title VIII, §801(b), July 9, 2012, 126 Stat. 1079, provided that: "Section 505E of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355f], as added by subsection (a), applies only with respect to a drug that is first approved under section 505(c) of such Act (21 U.S.C. 355(c)) on or after the date of the enactment of this Act [July 9, 2012]."

§355g. Utilizing real world evidence

(a) In general

The Secretary shall establish a program to evaluate the potential use of real world evidence—

(1) to help to support the approval of a new indication for a drug approved under section 355(c) of this title; and

(2) to help to support or satisfy postapproval study requirements.

(b) Real world evidence defined

In this section, the term "real world evidence" means data regarding the usage, or the potential benefits or risks, of a drug derived from sources other than traditional clinical trials.

(c) Program framework

(1) In general

Not later than 2 years after December 13, 2016, the Secretary shall establish a draft framework for implementation of the program under this section.

(2) Contents of framework

The framework shall include information describing—

(A) the sources of real world evidence, including ongoing safety surveillance, observational studies, registries, claims, and patient-centered outcomes research activities;

(B) the gaps in data collection activities;

(C) the standards and methodologies for collection and analysis of real world evidence; and

(D) the priority areas, remaining challenges, and potential pilot opportunities that the program established under this section will address.

(3) Consultation

(A) In general

In developing the program framework under this subsection, the Secretary shall consult with regulated industry, academia, medical professional organizations, representatives of patient advocacy organizations, consumer organizations, disease research foundations, and other interested parties.

(B) Process

The consultation under subparagraph (A) may be carried out through approaches such as—

(i) a public-private partnership with the entities described in such subparagraph in which the Secretary may participate;

(ii) a contract, grant, or other arrangement, as the Secretary determines appropriate, with such a partnership or an independent research organization; or

(iii) public workshops with the entities described in such subparagraph.

(d) Program implementation

The Secretary shall, not later than 3 years after December 13, 2016, and in accordance with the framework established under subsection (c), implement the program to evaluate the potential use of real world evidence.

(e) Guidance for industry

The Secretary shall—

(1) utilize the program established under subsection (a), its activities, and any subsequent pilots or written reports, to inform a guidance for industry on—

(A) the circumstances under which sponsors of drugs and the Secretary may rely on real world evidence for the purposes described in paragraphs (1) and (2) of subsection (a); and

(B) the appropriate standards and methodologies for collection and analysis of real world evidence submitted for such purposes;

(2) not later than 5 years after December 13, 2016, issue draft guidance for industry as described in paragraph (1); and

(3) not later than 18 months after the close of the public comment period for the draft guidance described in paragraph (2), issue revised draft guidance or final guidance.

(f) Rule of construction

(1) In general

Subject to paragraph (2), nothing in this section prohibits the Secretary from using real world evidence for purposes not specified in this section, provided the Secretary determines that sufficient basis exists for any such nonspecified use.

(2) Standards of evidence and Secretary's authority

This section shall not be construed to alter—

(A) the standards of evidence under—

(i) subsection (c) or (d) of section 355 of this title, including the substantial evidence standard in such subsection (d); or

(ii) section 262(a) of title 42; or

(B) the Secretary's authority to require postapproval studies or clinical trials, or the standards of evidence under which studies or trials are evaluated.

(June 25, 1938, ch. 675, §505F, as added Pub. L. 114–255, div. A, title III, §3022, Dec. 13, 2016, 130 Stat. 1096; amended Pub. L. 115–52, title IX, §901(c), (d), Aug. 18, 2017, 131 Stat. 1076.)

Editorial Notes

Amendments

2017—Subsec. (b). Pub. L. 115–52, §901(c), substituted "traditional" for "randomized".
Subsec. (d). Pub. L. 115–52, §901(d), substituted "3 years" for "2 years".

§355h. Regulation of certain nonprescription drugs that are marketed without an approved drug application

(a) Nonprescription drugs marketed without an approved application

Nonprescription drugs marketed without an approved drug application under section 355 of this title, as of March 27, 2020, shall be treated in accordance with this subsection.

(1) Drugs subject to a final monograph; category I drugs subject to a tentative final monograph

A drug is deemed to be generally recognized as safe and effective under section 321(p)(1) of this title, not a new drug under section 321(p) of this title, and not subject to section 353(b)(1) of this title, if —

(A) the drug is—

(i) in conformity with the requirements for nonprescription use of a final monograph issued under part 330 of title 21, Code of Federal Regulations (except as provided in paragraph (2)), the general requirements for nonprescription drugs, and conditions or requirements under subsections (b), (c), and (k); and

(ii) except as permitted by an order issued under subsection (b) or, in the case of a minor change in the drug, in conformity with an order issued under subsection (c), in a dosage form that, immediately prior to March 27, 2020, has been used to a material extent and for a material time under section 321(p)(2) of this title; or

(B) the drug is—

(i) classified in category I for safety and effectiveness under a tentative final monograph that is the most recently applicable proposal or determination issued under part 330 of title 21, Code of Federal Regulations;

(ii) in conformity with the proposed requirements for nonprescription use of such tentative final monograph, any applicable subsequent determination by the Secretary, the general requirements for nonprescription drugs, and conditions or requirements under subsections (b), (c), and (k); and

(iii) except as permitted by an order issued under subsection (b) or, in the case of a minor change in the drug, in conformity with an order issued under subsection (c), in a dosage form that, immediately prior to March 27, 2020, has been used to a material extent and for a material time under section 321(p)(2) of this title.

(2) Treatment of sunscreen drugs

With respect to sunscreen drugs subject to this section, the applicable requirements in terms of conformity with a final monograph, for purposes of paragraph (1)(A)(i), shall be the requirements specified in part 352 of title 21, Code of Federal Regulations, as published on May 21, 1999, beginning on page 27687 of volume 64 of the Federal Register, except that the applicable requirements governing effectiveness and labeling shall be those specified in section 201.327 of title 21, Code of Federal Regulations.

(3) Category III drugs subject to a tentative final monograph; category I drugs subject to proposed monograph or advance notice of proposed rulemaking

A drug that is not described in paragraph (1), (2), or (4) is not required to be the subject of an application approved under section 355 of this title, and is not subject to section 353(b)(1) of this title, if —

(A) the drug is—

(i) classified in category III for safety or effectiveness in the preamble of a proposed rule establishing a tentative final monograph that is the most recently applicable proposal or determination for such drug issued under part 330 of title 21, Code of Federal Regulations;

(ii) in conformity with—

(I) the conditions of use, including indication and dosage strength, if any, described for such category III drug in such preamble or in an applicable subsequent proposed rule;

(II) the proposed requirements for drugs classified in such tentative final monograph in category I in the most recently proposed rule establishing requirements related to such tentative final monograph and in any final rule establishing requirements that are applicable to the drug; and

(III) the general requirements for nonprescription drugs and conditions or requirements under subsection (b) or (k); and

(iii) in a dosage form that, immediately prior to March 27, 2020, had been used to a material extent and for a material time under section 321(p)(2) of this title; or

(B) the drug is—

(i) classified in category I for safety and effectiveness under a proposed monograph or advance notice of proposed rulemaking that is the most recently applicable proposal or determination for such drug issued under part 330 of title 21, Code of Federal Regulations;

(ii) in conformity with the requirements for nonprescription use of such proposed monograph or advance notice of proposed rulemaking, any applicable subsequent determination by the Secretary, the general requirements for nonprescription drugs, and conditions or requirements under subsection (b) or (k); and

(iii) in a dosage form that, immediately prior to March 27, 2020, has been used to a material extent and for a material time under section 321(p)(2) of this title.

(4) Category II drugs deemed new drugs

A drug that is classified in category II for safety or effectiveness under a tentative final monograph or that is subject to a determination to be not generally recognized as safe and effective in a proposed rule that is the most recently applicable proposal issued under part 330 of title 21, Code of Federal Regulations, shall be deemed to be a new drug under section 321(p) of this title, misbranded under section 352(ee) of this title, and subject to the requirement for an approved new drug application under section 355 of this title beginning on the day that is 180 calendar days after March 27, 2020, unless, before such day, the Secretary determines that it is in the interest of public health to extend the period during which the drug may be marketed without such an approved new drug application.

(5) Drugs not GRASE deemed new drugs

A drug that the Secretary has determined not to be generally recognized as safe and effective under section 321(p)(1) of this title under a final determination issued under part 330 of title 21, Code of Federal Regulations, shall be deemed to be a new drug under section 321(p) of this title, misbranded under section 352(ee) of this title, and subject to the requirement for an approved new drug application under section 355 of this title.

(6) Other drugs deemed new drugs

Except as provided in subsection (m), a drug is deemed to be a new drug under section 321(p) of this title and misbranded under section 352(ee) of this title if the drug—

(A) is not subject to section 353(b)(1) of this title; and

(B) is not described in paragraph (1), (2), (3), (4), or (5), or subsection (b)(1)(B).

(b) Administrative orders

(1) In general

(A) Determination

The Secretary may, on the initiative of the Secretary or at the request of one or more requestors, issue an administrative order determining whether there are conditions under which a specific drug, a class of drugs, or a combination of drugs, is determined to be—

(i) not subject to section 353(b)(1) of this title; and

(ii) generally recognized as safe and effective under section 321(p)(1) of this title.

(B) Effect

A drug or combination of drugs shall be deemed to not require approval under section 355 of this title if such drug or combination of drugs—

(i) is determined by the Secretary to meet the conditions specified in clauses (i) and (ii) of subparagraph (A);

(ii) is marketed in conformity with an administrative order under this subsection;

(iii) meets the general requirements for nonprescription drugs; and

(iv) meets the requirements under subsections (c) and (k).

(C) Standard

The Secretary shall find that a drug is not generally recognized as safe and effective under section 321(p)(1) of this title if—

(i) the evidence shows that the drug is not generally recognized as safe and effective under section 321(p)(1) of this title; or

(ii) the evidence is inadequate to show that the drug is generally recognized as safe and effective under section 321(p)(1) of this title.

(2) Administrative orders initiated by the Secretary

(A) In general

In issuing an administrative order under paragraph (1) upon the Secretary's initiative, the Secretary shall—

(i) make reasonable efforts to notify informally, not later than 2 business days before the issuance of the proposed order, the sponsors of drugs who have a listing in effect under section 360(j) of this title for the drugs or combination of drugs that will be subject to the administrative order;

(ii) after any such reasonable efforts of notification—

(I) issue a proposed administrative order by publishing it on the website of the Food and Drug Administration and include in such order the reasons for the issuance of such order; and

(II) publish a notice of availability of such proposed order in the Federal Register;

(iii) except as provided in subparagraph (B), provide for a public comment period with respect to such proposed order of not less than 45 calendar days; and

(iv) if, after completion of the proceedings specified in clauses (i) through (iii), the Secretary determines that it is appropriate to issue a final administrative order—

(I) issue the final administrative order, together with a detailed statement of reasons, which order shall not take effect until the time for requesting judicial review under paragraph (3)(D)(ii) has expired;

(II) publish a notice of such final administrative order in the Federal Register;

(III) afford requestors of drugs that will be subject to such order the opportunity for formal dispute resolution up to the level of the Director of the Center for Drug Evaluation and Research, which initially must be requested within 45 calendar days of the issuance of the order, and, for subsequent levels of appeal, within 30 calendar days of the prior decision; and

(IV) except with respect to drugs described in paragraph (3)(B), upon completion of the formal dispute resolution procedure, inform the persons which sought such dispute resolution of their right to request a hearing.

(B) Exceptions

When issuing an administrative order under paragraph (1) on the Secretary's initiative proposing to determine that a drug described in subsection (a)(3) is not generally recognized as safe and effective under section 321(p)(1) of this title, the Secretary shall follow the procedures in subparagraph (A), except that—

(i) the proposed order shall include notice of—

(I) the general categories of data the Secretary has determined necessary to establish that the drug is generally recognized as safe and effective under section 321(p)(1) of this title; and

(II) the format for submissions by interested persons;

(ii) the Secretary shall provide for a public comment period of no less than 180 calendar days with respect to such proposed order, except when the Secretary determines, for good cause, that a shorter period is in the interest of public health; and

(iii) any person who submits data in such comment period shall include a certification that the person has submitted all evidence created, obtained, or received by that person that is both within the categories of data identified in the proposed order and relevant to a determination as to whether the drug is generally recognized as safe and effective under section 321(p)(1) of this title.

(3) Hearings; judicial review

(A) In general

Only a person who participated in each stage of formal dispute resolution under subclause (III) of paragraph (2)(A)(iv) of an administrative order with respect to a drug may request a hearing concerning a final administrative order issued under such paragraph with respect to such drug. If a hearing is sought, such person must submit a request for a hearing, which shall be based solely on information in the administrative record, to the Secretary not later than 30 calendar days after receiving notice of the final decision of the formal dispute resolution procedure.

(B) No hearing required with respect to orders relating to certain drugs

(i) In general

The Secretary shall not be required to provide notice and an opportunity for a hearing pursuant to paragraph (2)(A)(iv) if the final administrative order involved relates to a drug—

(I) that is described in subsection (a)(3)(A); and

(II) with respect to which no human or non-human data studies relevant to the safety or effectiveness of such drug have been submitted to the administrative record since the issuance of the most recent tentative final monograph relating to such drug.

(ii) Human data studies and non-human data defined

In this subparagraph:

(I) The term "human data studies" means clinical trials of safety or effectiveness (including actual use studies), pharmacokinetics studies, or bioavailability studies.

(II) The term "non-human data" means data from testing other than with human subjects which provides information concerning safety or effectiveness.

(C) Hearing procedures

(i) Denial of request for hearing

If the Secretary determines that information submitted in a request for a hearing under subparagraph (A) with respect to a final administrative order issued under paragraph (2)(A)(iv) does not identify the existence of a genuine and substantial question of material fact, the Secretary may deny such request. In making such a determination, the Secretary may consider only information and data that are based on relevant and reliable scientific principles and methodologies.

(ii) Single hearing for multiple related requests

If more than one request for a hearing is submitted with respect to the same administrative order under subparagraph (A), the Secretary may direct that a single hearing be conducted in which all persons whose hearing requests were granted may participate.

(iii) Presiding officer

The presiding officer of a hearing requested under subparagraph (A) shall—

(I) be designated by the Secretary;

(II) not be an employee of the Center for Drug Evaluation and Research; and

(III) not have been previously involved in the development of the administrative order involved or proceedings relating to that administrative order.

(iv) Rights of parties to hearing

The parties to a hearing requested under subparagraph (A) shall have the right to present testimony, including testimony of expert witnesses, and to cross-examine witnesses presented by other parties. Where appropriate, the presiding officer may require that cross-examination by parties representing substantially the same interests be consolidated to promote efficiency and avoid duplication.

(v) Final decision

(I) At the conclusion of a hearing requested under subparagraph (A), the presiding officer of the hearing shall issue a decision containing findings of fact and conclusions of law. The

decision of the presiding officer shall be final.

(II) The final decision may not take effect until the period under subparagraph (D)(ii) for submitting a request for judicial review of such decision expires.

(D) Judicial review of final administrative order

(i) In general

The procedures described in section 355(h) of this title shall apply with respect to judicial review of final administrative orders issued under this subsection in the same manner and to the same extent as such section applies to an order described in such section except that the judicial review shall be taken by filing in an appropriate district court of the United States in lieu of the appellate courts specified in such section.

(ii) Period to submit a request for judicial review

A person eligible to request a hearing under this paragraph and seeking judicial review of a final administrative order issued under this subsection shall file such request for judicial review not later than 60 calendar days after the latest of—

(I) the date on which notice of such order is published;

(II) the date on which a hearing with respect to such order is denied under subparagraph (B) or (C)(i);

(III) the date on which a final decision is made following a hearing under subparagraph (C)(v); or

(IV) if no hearing is requested, the date on which the time for requesting a hearing expires.

(4) Expedited procedure with respect to administrative orders initiated by the Secretary

(A) Imminent hazard to the public health

(i) In general

In the case of a determination by the Secretary that a drug, class of drugs, or combination of drugs subject to this section poses an imminent hazard to the public health, the Secretary, after first making reasonable efforts to notify, not later than 48 hours before issuance of such order under this subparagraph, sponsors who have a listing in effect under section 360(j) of this title for such drug or combination of drugs—

(I) may issue an interim final administrative order for such drug, class of drugs, or combination of drugs under paragraph (1), together with a detailed statement of the reasons for such order;

(II) shall publish in the Federal Register a notice of availability of any such order; and

(III) shall provide for a public comment period of at least 45 calendar days with respect to such interim final order.

(ii) Nondelegation

The Secretary may not delegate the authority to issue an interim final administrative order under this subparagraph.

(B) Safety labeling changes

(i) In general

In the case of a determination by the Secretary that a change in the labeling of a drug, class of drugs, or combination of drugs subject to this section is reasonably expected to mitigate a significant or unreasonable risk of a serious adverse event associated with use of the drug, the Secretary may—

(I) make reasonable efforts to notify informally, not later than 48 hours before the issuance of the interim final order, the sponsors of drugs who have a listing in effect under section 360(j) of this title for such drug or combination of drugs;

(II) after reasonable efforts of notification, issue an interim final administrative order in accordance with paragraph (1) to require such change, together with a detailed statement of the reasons for such order;

(III) publish in the Federal Register a notice of availability of such order; and

(IV) provide for a public comment period of at least 45 calendar days with respect to such interim final order.

(ii) Content of order

An interim final order issued under this subparagraph with respect to the labeling of a drug may provide for new warnings and other information required for safe use of the drug.

(C) Effective date

An order under subparagraph (A) or (B) shall take effect on a date specified by the Secretary.

(D) Final order

After the completion of the proceedings in subparagraph (A) or (B), the Secretary shall—

(i) issue a final order in accordance with paragraph (1);

(ii) publish a notice of availability of such final administrative order in the Federal Register; and

(iii) afford sponsors of such drugs that will be subject to such an order the opportunity for formal dispute resolution up to the level of the Director of the Center for Drug Evaluation and Research, which must initially be within 45 calendar days of the issuance of the order, and for subsequent levels of appeal, within 30 calendar days of the prior decision.

(E) Hearings

A sponsor of a drug subject to a final order issued under subparagraph (D) and that participated in each stage of formal dispute resolution under clause (iii) of such subparagraph may request a hearing on such order. The provisions of subparagraphs (A), (B), and (C) of paragraph (3), other than paragraph (3)(C)(v)(II), shall apply with respect to a hearing on such order in the same manner and to the same extent as such provisions apply with respect to a hearing on an administrative order issued under paragraph (2)(A)(iv).

(F) Timing

(i) Final order and hearing

The Secretary shall—

(I) not later than 6 months after the date on which the comment period closes under subparagraph (A) or (B), issue a final order in accordance with paragraph (1); and

(II) not later than 12 months after the date on which such final order is issued, complete any hearing under subparagraph (E).

(ii) Dispute resolution request

The Secretary shall specify in an interim final order issued under subparagraph (A) or (B) such shorter periods for requesting dispute resolution under subparagraph (D)(iii) as are necessary to meet the requirements of this subparagraph.

(G) Judicial review

A final order issued pursuant to subparagraph (F) shall be subject to judicial review in accordance with paragraph (3)(D).

(5) Administrative order initiated at the request of a requestor

(A) In general

In issuing an administrative order under paragraph (1) at the request of a requestor with respect to certain drugs, classes of drugs, or combinations of drugs—

(i) the Secretary shall, after receiving a request under this subparagraph, determine whether the request is sufficiently complete and formatted to permit a substantive review;

(ii) if the Secretary determines that the request is sufficiently complete and formatted to permit a substantive review, the Secretary shall—

(I) file the request; and

(II) initiate proceedings with respect to issuing an administrative order in accordance with paragraphs (2) and (3); and

(iii) except as provided in paragraph (6), if the Secretary determines that a request does not meet the requirements for filing or is not sufficiently complete and formatted to permit a substantive review, the requestor may demand that the request be filed over protest, and the Secretary shall initiate proceedings to review the request in accordance with paragraph (2)(A).

(B) Request to initiate proceedings

(i) In general

A requestor seeking an administrative order under paragraph (1) with respect to certain drugs, classes of drugs, or combinations of drugs, shall submit to the Secretary a request to initiate proceedings for such order in the form and manner as specified by the Secretary. Such requestor may submit a request under this subparagraph for the issuance of an administrative order—

(I) determining whether a drug is generally recognized as safe and effective under section 321(p)(1) of this title, exempt from section 353(b)(1) of this title, and not required to be the subject of an approved application under section 355 of this title; or

(II) determining whether a change to a condition of use of a drug is generally recognized as safe and effective under section 321(p)(1) of this title, exempt from section 353(b)(1) of this title, and not required to be the subject of an approved application under section 355 of this title, if, absent such a changed condition of use, such drug is—

(aa) generally recognized as safe and effective under section 321(p)(1) of this title in accordance with subsection (a)(1), (a)(2), or an order under this subsection; or

(bb) subject to subsection (a)(3), but only if such requestor initiates such request in conjunction with a request for the Secretary to determine whether such drug is generally recognized as safe and effective under section 321(p)(1) of this title, which is filed by the Secretary under subparagraph (A)(ii).

(ii) Exception

The Secretary is not required to complete review of a request for a change described in clause (i)(II) if the Secretary determines that there is an inadequate basis to find the drug is generally recognized as safe and effective under section 321(p)(1) of this title under paragraph (1) and issues a final order announcing that determination.

(iii) Withdrawal

The requestor may withdraw a request under this paragraph, according to the procedures set forth pursuant to subsection (d)(2)(B). Notwithstanding any other provision of this section, if such request is withdrawn, the Secretary may cease proceedings under this subparagraph.

(C) Exclusivity

(i) In general

A final administrative order issued in response to a request under this section shall have the effect of authorizing solely the order requestor (or the licensees, assignees, or successors in interest of such requestor with respect to the subject of such order), for a period of 18 months following the effective date of such final order and beginning on the date the requestor may lawfully market such drugs pursuant to the order, to market drugs—

(I) incorporating changes described in clause (ii); and

(II) subject to the limitations under clause (iv).

(ii) Changes described

A change described in this clause is a change subject to an order specified in clause (i), which—

(I) provides for a drug to contain an active ingredient (including any ester or salt of the active ingredient) not previously incorporated in a drug described in clause (iii); or

(II) provides for a change in the conditions of use of a drug, for which new human data studies conducted or sponsored by the requestor (or for which the requestor has an exclusive right of reference) were essential to the issuance of such order.

(iii) Drugs described

The drugs described in this clause are drugs—

(I) specified in subsection (a)(1), (a)(2), or (a)(3);
(II) subject to a final order issued under this section;
(III) subject to a final sunscreen order (as defined in section 360fff(2)(A) of this title); or
(IV) described in subsection (m)(1), other than drugs subject to an active enforcement action under subchapter III of this chapter.

(iv) Limitations on exclusivity

(I) In general

Only one 18-month period under this subparagraph shall be granted, under each order described in clause (i), with respect to changes (to the drug subject to such order) which are either—
(aa) changes described in clause (ii)(I), relating to active ingredients; or
(bb) changes described in clause (ii)(II), relating to conditions of use.

(II) No exclusivity allowed

No exclusivity shall apply to changes to a drug which are—
(aa) the subject of a Tier 2 OTC monograph order request (as defined in section 379j–71 of this title);
(bb) safety-related changes, as defined by the Secretary, or any other changes the Secretary considers necessary to assure safe use; or
(cc) changes related to methods of testing safety or efficacy.

(v) New human data studies defined

In this subparagraph, the term "new human data studies" means clinical trials of safety or effectiveness (including actual use studies), pharmacokinetics studies, or bioavailability studies, the results of which—
(I) have not been relied on by the Secretary to support—
(aa) a proposed or final determination that a drug described in subclause (I), (II), or (III) of clause (iii) is generally recognized as safe and effective under section 321(p)(1) of this title; or
(bb) approval of a drug that was approved under section 355 of this title; and

(II) do not duplicate the results of another study that was relied on by the Secretary to support—
(aa) a proposed or final determination that a drug described in subclause (I), (II), or (III) of clause (iii) is generally recognized as safe and effective under section 321(p)(1) of this title; or
(bb) approval of a drug that was approved under section 355 of this title.

(vi) Notification of drug not available for sale

A requestor that is granted exclusivity with respect to a drug under this subparagraph shall notify the Secretary in writing within 1 year of the issuance of the final administrative order if the drug that is the subject of such order will not be available for sale within 1 year of the date of issuance of such order. The requestor shall include with such notice the—
(I) identity of the drug by established name and by proprietary name, if any;
(II) strength of the drug;
(III) date on which the drug will be available for sale, if known; and
(IV) reason for not marketing the drug after issuance of the order.

(6) Information regarding safe nonprescription marketing and use as condition for filing a generally recognized as safe and effective request

(A) In general

In response to a request under this section that a drug described in subparagraph (B) be generally recognized as safe and effective, the Secretary—

(i) may file such request, if the request includes information specified under subparagraph (C) with respect to safe nonprescription marketing and use of such drug; or

(ii) if the request fails to include information specified under subparagraph (C), shall refuse to file such request and require that nonprescription marketing of the drug be pursuant to a new drug application as described in subparagraph (D).

(B) Drug described

A drug described in this subparagraph is a nonprescription drug which contains an active ingredient not previously incorporated in a drug—

(i) specified in subsection (a)(1), (a)(2), or (a)(3);

(ii) subject to a final order under this section; or

(iii) subject to a final sunscreen order (as defined in section 360fff(2)(A) of this title).

(C) Information demonstrating prima facie safe nonprescription marketing and use

Information specified in this subparagraph, with respect to a request described in subparagraph (A)(i), is—

(i) information sufficient for a prima facie demonstration that the drug subject to such request has a verifiable history of being marketed and safely used by consumers in the United States as a nonprescription drug under comparable conditions of use;

(ii) if the drug has not been previously marketed in the United States as a nonprescription drug, information sufficient for a prima facie demonstration that the drug was marketed and safely used under comparable conditions of marketing and use in a country listed in section 382(b)(1)(A) of this title or designated by the Secretary in accordance with section 382(b)(1)(B) of this title—

(I) for such period as needed to provide reasonable assurances concerning the safe nonprescription use of the drug; and

(II) during such time was subject to sufficient monitoring by a regulatory body considered acceptable by the Secretary for such monitoring purposes, including for adverse events associated with nonprescription use of the drug; or

(iii) if the Secretary determines that information described in clause (i) or (ii) is not needed to provide a prima facie demonstration that the drug can be safely marketed and used as a nonprescription drug, such other information the Secretary determines is sufficient for such purposes.

(D) Marketing pursuant to new drug application

In the case of a request described in subparagraph (A)(ii), the drug subject to such request may be resubmitted for filing only if—

(i) the drug is marketed as a nonprescription drug, under conditions of use comparable to the conditions specified in the request, for such period as the Secretary determines appropriate (not to exceed 5 consecutive years) pursuant to an application approved under section 355 of this title; and

(ii) during such period, 1,000,000 retail packages of the drug, or an equivalent quantity as determined by the Secretary, were distributed for retail sale, as determined in such manner as the Secretary finds appropriate.

(E) Rule of application

Except in the case of a request involving a drug described in section 360fff(9) of this title, as in effect on January 1, 2017, if the Secretary refuses to file a request under this paragraph, the requestor may not file such request over protest under paragraph (5)(A)(iii).

(7) Packaging

An administrative order issued under paragraph (2), (4)(A), or (5) may include requirements for the packaging of a drug to encourage use in accordance with labeling. Such requirements may include unit dose packaging, requirements for products intended for use by pediatric populations, requirements to reduce risk of harm from unsupervised ingestion, and other appropriate requirements. This paragraph does not authorize the Food and Drug Administration to require standards or testing procedures as described in part 1700 of title 16, Code of Federal Regulations.

(8) Final and tentative final monographs for category I drugs deemed final administrative orders

(A) In general

A final monograph or tentative final monograph described in subparagraph (B) shall be deemed to be a final administrative order under this subsection and may be amended, revoked, or otherwise modified in accordance with the procedures of this subsection.

(B) Monographs described

For purposes of subparagraph (A), a final monograph or tentative final monograph is described in this subparagraph if it—

(i) establishes conditions of use for a drug described in paragraph (1) or (2) of subsection (a); and

(ii) represents the most recently promulgated version of such conditions, including as modified, in whole or in part, by any proposed or final rule.

(C) Deemed orders include harmonizing technical amendments

The deemed establishment of a final administrative order under subparagraph (A) shall be construed to include any technical amendments to such order as the Secretary determines necessary to ensure that such order is appropriately harmonized, in terms of terminology or cross-references, with the applicable provisions of this chapter (and regulations thereunder) and any other orders issued under this section.

(c) Procedure for minor changes

(1) In general

Minor changes in the dosage form of a drug that is described in paragraph (1) or (2) of subsection (a) or the subject of an order issued under subsection (b) may be made by a requestor without the issuance of an order under subsection (b) if—

(A) the requestor maintains such information as is necessary to demonstrate that the change—

(i) will not affect the safety or effectiveness of the drug; and

(ii) will not materially affect the extent of absorption or other exposure to the active ingredient in comparison to a suitable reference product; and

(B) the change is in conformity with the requirements of an applicable administrative order issued by the Secretary under paragraph (3).

(2) Additional information

(A) Access to records

A sponsor shall submit records requested by the Secretary relating to such a minor change under section 374(a)(4) of this title, within 15 business days of receiving such a request, or such longer period as the Secretary may provide.

(B) Insufficient information

If the Secretary determines that the information contained in such records is not sufficient to demonstrate that the change does not affect the safety or effectiveness of the drug or materially affect the extent of absorption or other exposure to the active ingredient, the Secretary—

(i) may so inform the sponsor of the drug in writing; and

(ii) if the Secretary so informs the sponsor, shall provide the sponsor of the drug with a reasonable opportunity to provide additional information.

(C) Failure to submit sufficient information

If the sponsor fails to provide such additional information within a time prescribed by the Secretary, or if the Secretary determines that such additional information does not demonstrate that the change does not—

(i) affect the safety or effectiveness of the drug; or

(ii) materially affect the extent of absorption or other exposure to the active ingredient in comparison to a suitable reference product,

the drug as modified is a new drug under section 321(p) of this title and shall be deemed to be misbranded under section 352(ee) of this title.

(3) Determining whether a change will affect safety or effectiveness

(A) In general

The Secretary shall issue one or more administrative orders specifying requirements for determining whether a minor change made by a sponsor pursuant to this subsection will affect the safety or effectiveness of a drug or materially affect the extent of absorption or other exposure to an active ingredient in the drug in comparison to a suitable reference product, together with guidance for applying those orders to specific dosage forms.

(B) Standard practices

The orders and guidance issued by the Secretary under subparagraph (A) shall take into account relevant public standards and standard practices for evaluating the quality of drugs, and may take into account the special needs of populations, including children.

(d) Confidentiality of information submitted to the Secretary

(1) In general

Subject to paragraph (2), any information, including reports of testing conducted on the drug or drugs involved, that is submitted by a requestor in connection with proceedings on an order under this section (including any minor change under subsection (c)) and is a trade secret or confidential information subject to section 552(b)(4) of title 5 or section 1905 of title 18 shall not be disclosed to the public unless the requestor consents to that disclosure.

(2) Public availability

(A) In general

Except as provided in subparagraph (B), the Secretary shall—

(i) make any information submitted by a requestor in support of a request under subsection (b)(5)(A) available to the public not later than the date on which the proposed order is issued; and

(ii) make any information submitted by any other person with respect to an order requested (or initiated by the Secretary) under subsection (b), available to the public upon such submission.

(B) Limitations on public availability

Information described in subparagraph (A) shall not be made public if—

(i) the information pertains to pharmaceutical quality information, unless such information is necessary to establish standards under which a drug is generally recognized as safe and effective under section 321(p)(1) of this title;

(ii) the information is submitted in a requestor-initiated request, but the requestor withdraws such request, in accordance with withdrawal procedures established by the Secretary, before the Secretary issues the proposed order;

(iii) the Secretary requests and obtains the information under subsection (c) and such information is not submitted in relation to an order under subsection (b); or

(iv) the information is of the type contained in raw datasets.

(e) Updates to drug listing information

A sponsor who makes a change to a drug subject to this section shall submit updated drug listing information for the drug in accordance with section 360(j) of this title within 30 calendar days of the date when the drug is first commercially marketed, except that a sponsor who was the order requestor with respect to an order subject to subsection (b)(5)(C) (or a licensee, assignee, or successor in interest of such requestor) shall submit updated drug listing information on or before the date when the drug is first commercially marketed.

(f) Approvals under section 355 of this title

The provisions of this section shall not be construed to preclude a person from seeking or maintaining the approval of an application for a drug under sections 355(b)(1), 355(b)(2), and 355(j) of this title. A

determination under this section that a drug is not subject to section 353(b)(1) of this title, is generally recognized as safe and effective under section 321(p)(1) of this title, and is not a new drug under section 321(p) of this title shall constitute a finding that the drug is safe and effective that may be relied upon for purposes of an application under section 355(b)(2) of this title, so that the applicant shall be required to submit for purposes of such application only information needed to support any modification of the drug that is not covered by such determination under this section.

(g) Public availability of administrative orders

The Secretary shall establish, maintain, update (as determined necessary by the Secretary but no less frequently than annually), and make publicly available, with respect to orders issued under this section—

(1) a repository of each final order and interim final order in effect, including the complete text of the order; and

(2) a listing of all orders proposed and under development under subsection (b)(2), including—

(A) a brief description of each such order; and

(B) the Secretary's expectations, if resources permit, for issuance of proposed orders over a 3-year period.

(h) Development advice to sponsors or requestors

The Secretary shall establish procedures under which sponsors or requestors may meet with appropriate officials of the Food and Drug Administration to obtain advice on the studies and other information necessary to support submissions under this section and other matters relevant to the regulation of nonprescription drugs and the development of new nonprescription drugs under this section.

(i) Participation of multiple sponsors or requestors

The Secretary shall establish procedures to facilitate efficient participation by multiple sponsors or requestors in proceedings under this section, including provision for joint meetings with multiple sponsors or requestors or with organizations nominated by sponsors or requestors to represent their interests in a proceeding.

(j) Electronic format

All submissions under this section shall be in electronic format.

(k) Effect on existing regulations governing nonprescription drugs

(1) Regulations of general applicability to nonprescription drugs

Except as provided in this subsection, nothing in this section supersedes regulations establishing general requirements for nonprescription drugs, including regulations of general applicability contained in parts 201, 250, and 330 of title 21, Code of Federal Regulations, or any successor regulations. The Secretary shall establish or modify such regulations by means of rulemaking in accordance with section 553 of title 5.

(2) Regulations establishing requirements for specific nonprescription drugs

(A) The provisions of section 310.545 of title 21, Code of Federal Regulations, as in effect on the day before March 27, 2020, shall be deemed to be a final order under subsection (b).

(B) Regulations in effect on the day before March 27, 2020, establishing requirements for specific nonprescription drugs marketed pursuant to this section (including such requirements in parts 201 and 250 of title 21, Code of Federal Regulations), shall be deemed to be final orders under subsection (b), only as they apply to drugs—

(i) subject to paragraph (1), (2), (3), or (4) of subsection (a); or

(ii) otherwise subject to an order under this section.

(3) Withdrawal of regulations

The Secretary shall withdraw regulations establishing final monographs and the procedures governing the over-the-counter drug review under part 330 and other relevant parts of title 21, Code of Federal Regulations (as in effect on the day before March 27, 2020), or make technical changes to such regulations to ensure conformity with appropriate terminology and cross references. Notwithstanding subchapter II of chapter 5 of title 5, any such withdrawal or technical changes shall be made without

public notice and comment and shall be effective upon publication through notice in the Federal Register (or upon such date as specified in such notice).

(l) Guidance

The Secretary shall issue guidance that specifies—

(1) the procedures and principles for formal meetings between the Secretary and sponsors or requestors for drugs subject to this section;

(2) the format and content of data submissions to the Secretary under this section;

(3) the format of electronic submissions to the Secretary under this section;

(4) consolidated proceedings for appeal and the procedures for such proceedings where appropriate; and

(5) for minor changes in drugs, recommendations on how to comply with the requirements in orders issued under subsection (c)(3).

(m) Rule of construction

(1) In general

This section shall not affect the treatment or status of a nonprescription drug—

(A) that is marketed without an application approved under section 355 of this title as of March 27, 2020;

(B) that is not subject to an order issued under this section; and

(C) to which paragraph (1), (2), (3), (4), or (5) of subsection (a) do not apply.

(2) Treatment of products previously found to be subject to time and extent requirements

(A) Notwithstanding subsection (a), a drug described in subparagraph (B) may only be lawfully marketed, without an application approved under section 355 of this title, pursuant to an order issued under this section.

(B) A drug described in this subparagraph is a drug which, prior to March 27, 2020, the Secretary determined in a proposed or final rule to be ineligible for review under the OTC drug review (as such phrase "OTC drug review" was used in section 330.14 of title 21, Code of Federal Regulations, as in effect on the day before March 27, 2020).

(3) Preservation of authority

(A) Nothing in paragraph (1) shall be construed to preclude or limit the applicability of any provision of this chapter other than this section.

(B) Nothing in subsection (a) shall be construed to prohibit the Secretary from issuing an order under this section finding a drug to be not generally recognized as safe and effective under section 321(p)(1) of this title, as the Secretary determines appropriate.

(n) Investigational new drugs

A drug is not subject to this section if an exemption for investigational use under section 355(i) of this title is in effect for such drug.

(o) Inapplicability of Paperwork Reduction Act

Chapter 35 of title 44 shall not apply to collections of information made under this section.

(p) Inapplicability of notice and comment rulemaking and other requirements

The requirements of subsection (b) shall apply with respect to orders issued under this section instead of the requirements of subchapter II of chapter 5 of title 5.

(q) Definitions

In this section:

(1) The term "nonprescription drug" refers to a drug not subject to the requirements of section 353(b)(1) of this title.

(2) The term "sponsor" refers to any person marketing, manufacturing, or processing a drug that—

(A) is listed pursuant to section 360(j) of this title; and

(B) is or will be subject to an administrative order under this section of the Food and Drug Administration.

(3) The term "requestor" refers to any person or group of persons marketing, manufacturing, processing, or developing a drug.

(June 25, 1938, ch. 675, §505G, as added Pub. L. 116–136, div. A, title III, §3851(a), Mar. 27, 2020, 134 Stat. 435.)

Statutory Notes and Related Subsidiaries

Drugs Excluded From the Over-the-Counter Drug Review

Pub. L. 116–136, div. A, title III, §3853, Mar. 27, 2020, 134 Stat. 454, provided that:

"(a) In General.—Nothing in this Act [probably should be "this subtitle", meaning subtitle F (§§3851–3862) of title III of div. A of Pub. L. 116–136, enacting this section, section 360fff–8 of this title, and subpart 10 of part C of subchapter VII of this chapter, amending sections 352, 360fff–3, 379j–52, 379r, and 381 of this title, repealing section 360fff–5 of this title, and enacting provisions set out as notes under this section and sections 360fff–3, 360fff–6, 379j–52, and 379j–71 of this title] (or the amendments made by this Act) shall apply to any nonprescription drug (as defined in section 505G(q) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355h(q)], as added by section 3851 of this subtitle) which was excluded by the Food and Drug Administration from the Over-the-Counter Drug Review in accordance with the paragraph numbered 25 on page 9466 of volume 37 of the Federal Register, published on May 11, 1972.

"(b) Rule of Construction.—Nothing in this section shall be construed to preclude or limit the applicability of any other provision of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.)."

Treatment of Authority Regarding Finalization of Sunscreen Monograph

Pub. L. 116–136, div. A, title III, §3854(c), Mar. 27, 2020, 134 Stat. 456, provided that:

"(1) In general.—

"(A) Revision of final sunscreen order.—The Secretary of Health and Human Services (referred to in this subsection as the 'Secretary') shall amend and revise the final administrative order concerning nonprescription sunscreen (referred to in this subsection as the 'sunscreen order') for which the content, prior to the date of enactment of this Act [Mar. 27, 2020], was represented by the final monograph for sunscreen drug products set forth in part 352 of title 21, Code of Federal Regulations (as in effect on May 21, 1999).

"(B) Issuance of revised sunscreen order; effective date.—A revised sunscreen order described in subparagraph (A) shall be—

"(i) issued in accordance with the procedures described in section 505G(b)(2) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355h(b)(2)];

"(ii) issued in proposed form not later than 18 months after the date of enactment of this Act; and

"(iii) issued by the Secretary at least 1 year prior to the effective date of the revised order.

"(2) Reports.—If a revised sunscreen order issued under paragraph (1) does not include provisions related to the effectiveness of various sun protection factor levels, and does not address all dosage forms known to the Secretary to be used in sunscreens marketed in the United States without a new drug application approved under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355), the Secretary shall submit a report to the Committee on Energy and Commerce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate on the rationale for omission of such provisions from such order, and a plan and timeline to compile any information necessary to address such provisions through such order."

Annual Update to Congress on Appropriate Pediatric Indication for Certain OTC Cough and Cold Drugs

Pub. L. 116–136, div. A, title III, §3855, Mar. 27, 2020, 134 Stat. 457, provided that:

"(a) In General.—Subject to subsection (c), the Secretary of Health and Human Services shall, beginning not later than 1 year after the date of enactment of this Act [Mar. 27, 2020], annually submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate a letter describing the progress of the Food and Drug Administration—

"(1) in evaluating the cough and cold monograph described in subsection (b) with respect to children under age 6; and

"(2) as appropriate, revising such cough and cold monograph to address such children through the order process under section 505G(b) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355h(b)], as added by section 3851 of this subtitle.

"(b) COUGH AND COLD MONOGRAPH DESCRIBED.—The cough and cold monograph described in this subsection consists of the conditions under which nonprescription drugs containing antitussive, expectorant, nasal decongestant, or antihistamine active ingredients (or combinations thereof) are generally recognized as safe and effective, as specified in part 341 of title 21, Code of Federal Regulations (as in effect immediately prior to the date of enactment of this Act), and included in an order deemed to be established under section 505G(b) of the Federal Food, Drug, and Cosmetic Act, as added by section 3851 of this subtitle.

"(c) DURATION OF AUTHORITY.—The requirement under subsection (a) shall terminate as of the date of a letter submitted by the Secretary of Health and Human Services pursuant to such subsection in which the Secretary indicates that the Food and Drug Administration has completed its evaluation and revised, in a final order, as applicable, the cough and cold monograph as described in subsection (a)(2)."

§356. Expedited approval of drugs for serious or life-threatening diseases or conditions

(a) Designation of a drug as a breakthrough therapy

(1) In general

The Secretary shall, at the request of the sponsor of a drug, expedite the development and review of such drug if the drug is intended, alone or in combination with 1 or more other drugs, to treat a serious or life-threatening disease or condition and preliminary clinical evidence indicates that the drug may demonstrate substantial improvement over existing therapies on 1 or more clinically significant endpoints, such as substantial treatment effects observed early in clinical development. (In this section, such a drug is referred to as a "breakthrough therapy".)

(2) Request for designation

The sponsor of a drug may request the Secretary to designate the drug as a breakthrough therapy. A request for the designation may be made concurrently with, or at any time after, the submission of an application for the investigation of the drug under section 355(i) of this title or section 351(a)(3) of the Public Health Service Act [42 U.S.C. 262(a)(3)].

(3) Designation

(A) In general

Not later than 60 calendar days after the receipt of a request under paragraph (2), the Secretary shall determine whether the drug that is the subject of the request meets the criteria described in paragraph (1). If the Secretary finds that the drug meets the criteria, the Secretary shall designate the drug as a breakthrough therapy and shall take such actions as are appropriate to expedite the development and review of the application for approval of such drug.

(B) Actions

The actions to expedite the development and review of an application under subparagraph (A) may include, as appropriate—

(i) holding meetings with the sponsor and the review team throughout the development of the drug;

(ii) providing timely advice to, and interactive communication with, the sponsor regarding the development of the drug to ensure that the development program to gather the nonclinical and clinical data necessary for approval is as efficient as practicable;

(iii) involving senior managers and experienced review staff, as appropriate, in a collaborative, cross-disciplinary review;

(iv) assigning a cross-disciplinary project lead for the Food and Drug Administration review team to facilitate an efficient review of the development program and to serve as a scientific liaison between the review team and the sponsor; and

(v) taking steps to ensure that the design of the clinical trials is as efficient as practicable, when scientifically appropriate, such as by minimizing the number of patients exposed to a potentially less efficacious treatment.

(b) Designation of drug as fast track product

(1) In general

The Secretary shall, at the request of the sponsor of a new drug, facilitate the development and expedite the review of such drug if it is intended, whether alone or in combination with one or more other drugs, for the treatment of a serious or life-threatening disease or condition, and it demonstrates the potential to address unmet medical needs for such a disease or condition, or if the Secretary designates the drug as a qualified infectious disease product under section 355f(d) of this title. (In this section, such a drug is referred to as a "fast track product".)

(2) Request for designation

The sponsor of a new drug may request the Secretary to designate the drug as a fast track product. A request for the designation may be made concurrently with, or at any time after, submission of an application for the investigation of the drug under section 355(i) of this title or section 351(a)(3) of the Public Health Service Act [42 U.S.C. 262(a)(3)].

(3) Designation

Within 60 calendar days after the receipt of a request under paragraph (2), the Secretary shall determine whether the drug that is the subject of the request meets the criteria described in paragraph (1). If the Secretary finds that the drug meets the criteria, the Secretary shall designate the drug as a fast track product and shall take such actions as are appropriate to expedite the development and review of the application for approval of such product.

(c) Accelerated approval of a drug for a serious or life-threatening disease or condition, including a fast track product

(1) In general

(A) Accelerated approval

The Secretary may approve an application for approval of a product for a serious or life-threatening disease or condition, including a fast track product, under section 355(c) of this title or section 351(a) of the Public Health Service Act [42 U.S.C. 262(a)] upon a determination that the product has an effect on a surrogate endpoint that is reasonably likely to predict clinical benefit, or on a clinical endpoint that can be measured earlier than irreversible morbidity or mortality, that is reasonably likely to predict an effect on irreversible morbidity or mortality or other clinical benefit, taking into account the severity, rarity, or prevalence of the condition and the availability or lack of alternative treatments. The approval described in the preceding sentence is referred to in this section as "accelerated approval".

(B) Evidence

The evidence to support that an endpoint is reasonably likely to predict clinical benefit under subparagraph (A) may include epidemiological, pathophysiological, therapeutic, pharmacologic, or other evidence developed using biomarkers, for example, or other scientific methods or tools.

(2) Limitation

Approval of a product under this subsection may be subject to 1 or both of the following requirements:

(A) That the sponsor conduct appropriate postapproval studies to verify and describe the predicted effect on irreversible morbidity or mortality or other clinical benefit.

(B) That the sponsor submit copies of all promotional materials related to the product during the preapproval review period and, following approval and for such period thereafter as the Secretary determines to be appropriate, at least 30 days prior to dissemination of the materials.

(3) Expedited withdrawal of approval

The Secretary may withdraw approval of a product approved under accelerated approval using expedited procedures (as prescribed by the Secretary in regulations which shall include an opportunity for an informal hearing) if—

(A) the sponsor fails to conduct any required postapproval study of the drug with due diligence;

(B) a study required to verify and describe the predicted effect on irreversible morbidity or mortality or other clinical benefit of the product fails to verify and describe such effect or benefit;

(C) other evidence demonstrates that the product is not safe or effective under the conditions of use; or

(D) the sponsor disseminates false or misleading promotional materials with respect to the product.

(d) Review of incomplete applications for approval of a fast track product

(1) In general

If the Secretary determines, after preliminary evaluation of clinical data submitted by the sponsor, that a fast track product may be effective, the Secretary shall evaluate for filing, and may commence review of portions of, an application for the approval of the product before the sponsor submits a complete application. The Secretary shall commence such review only if the applicant—

(A) provides a schedule for submission of information necessary to make the application complete; and

(B) pays any fee that may be required under section 379h of this title.

(2) Exception

Any time period for review of human drug applications that has been agreed to by the Secretary and that has been set forth in goals identified in letters of the Secretary (relating to the use of fees collected under section 379h of this title to expedite the drug development process and the review of human drug applications) shall not apply to an application submitted under paragraph (1) until the date on which the application is complete.

(e) Construction

(1) Purpose

The amendments made by the Food and Drug Administration Safety and Innovation Act and the 21st Century Cures Act to this section are intended to encourage the Secretary to utilize innovative and flexible approaches to the assessment of products under accelerated approval for treatments for patients with serious or life-threatening diseases or conditions and unmet medical needs.

(2) Construction

Nothing in this section shall be construed to alter the standards of evidence under subsection (c) or (d) of section 355 of this title (including the substantial evidence standard in section 355(d) of this title) or under section 351(a) of the Public Health Service Act [42 U.S.C. 262(a)]. Such sections and standards of evidence apply to the review and approval of products under this section, including whether a product is safe and effective. Nothing in this section alters the ability of the Secretary to rely on evidence that does not come from adequate and well-controlled investigations for the purpose of determining whether an endpoint is reasonably likely to predict clinical benefit as described in subsection (b)(1)(B).

(f) Awareness efforts

The Secretary shall—

(1) develop and disseminate to physicians, patient organizations, pharmaceutical and biotechnology companies, and other appropriate persons a description of the provisions of this section applicable to breakthrough therapies, accelerated approval, and and [1] fast track products; and

(2) establish a program to encourage the development of surrogate and clinical endpoints, including biomarkers, and other scientific methods and tools that can assist the Secretary in determining whether the evidence submitted in an application is reasonably likely to predict clinical benefit for serious or life-threatening conditions for which significant unmet medical needs exist.

(g) Regenerative advanced therapy

(1) In general

The Secretary, at the request of the sponsor of a drug, shall facilitate an efficient development program for, and expedite review of, such drug if the drug qualifies as a regenerative advanced therapy under the criteria described in paragraph (2).

(2) Criteria

A drug is eligible for designation as a regenerative advanced therapy under this subsection if—

(A) the drug is a regenerative medicine therapy (as defined in paragraph (8));

(B) the drug is intended to treat, modify, reverse, or cure a serious or life-threatening disease or condition; and

(C) preliminary clinical evidence indicates that the drug has the potential to address unmet medical needs for such a disease or condition.

(3) Request for designation

The sponsor of a drug may request the Secretary to designate the drug as a regenerative advanced therapy concurrently with, or at any time after, submission of an application for the investigation of the drug under section 355(i) of this title or section 351(a)(3) of the Public Health Service Act [42 U.S.C. 262(a)(3)].

(4) Designation

Not later than 60 calendar days after the receipt of a request under paragraph (3), the Secretary shall determine whether the drug that is the subject of the request meets the criteria described in paragraph (2). If the Secretary determines that the drug meets the criteria, the Secretary shall designate the drug as a regenerative advanced therapy and shall take such actions as are appropriate under paragraph (1). If the Secretary determines that a drug does not meet the criteria for such designation, the Secretary shall include with the determination a written description of the rationale for such determination.

(5) Actions

The sponsor of a regenerative advanced therapy shall be eligible for the actions to expedite development and review of such therapy under subsection (a)(3)(B), including early interactions to discuss any potential surrogate or intermediate endpoint to be used to support the accelerated approval of an application for the product under subsection (c).

(6) Access to expedited approval pathways

An application for a regenerative advanced therapy under section 355(b)(1) of this title or section 351(a) of the Public Health Service Act [42 U.S.C. 262(a)] may be—

(A) eligible for priority review, as described in the Manual of Policies and Procedures of the Food and Drug Administration and goals identified in the letters described in section 101(b) of the Prescription Drug User Fee Amendments of 2012; and

(B) eligible for accelerated approval under subsection (c), as agreed upon pursuant to subsection (a)(3)(B), through, as appropriate—

(i) surrogate or intermediate endpoints reasonably likely to predict long-term clinical benefit; or

(ii) reliance upon data obtained from a meaningful number of sites, including through expansion to additional sites, as appropriate.

(7) Postapproval requirements

The sponsor of a regenerative advanced therapy that is granted accelerated approval and is subject to the postapproval requirements under subsection (c) may, as appropriate, fulfill such requirements, as the Secretary may require, through—

(A) the submission of clinical evidence, clinical studies, patient registries, or other sources of real world evidence, such as electronic health records;

(B) the collection of larger confirmatory data sets, as agreed upon pursuant to subsection (a)(3)(B); or

(C) postapproval monitoring of all patients treated with such therapy prior to approval of the therapy.

(8) Definition

For purposes of this section, the term "regenerative medicine therapy" includes cell therapy, therapeutic tissue engineering products, human cell and tissue products, and combination products using any such therapies or products, except for those regulated solely under section 361 of the Public Health Service Act [42 U.S.C. 264] and part 1271 of title 21, Code of Federal Regulations.

(h) Limited population pathway for antibacterial and antifungal drugs

(1) In general

The Secretary may approve an antibacterial or antifungal drug, alone or in combination with one or more other drugs, as a limited population drug pursuant to this subsection only if—

(A) the drug is intended to treat a serious or life-threatening infection in a limited population of patients with unmet needs;

(B) the standards for approval under section 355(c) and (d) of this title, or the standards for licensure under section 351 of the Public Health Service Act [42 U.S.C. 262], as applicable, are met; and

(C) the Secretary receives a written request from the sponsor to approve the drug as a limited population drug pursuant to this subsection.

(2) Benefit-risk consideration

The Secretary's determination of safety and effectiveness of an antibacterial or antifungal drug shall reflect the benefit-risk profile of such drug in the intended limited population, taking into account the severity, rarity, or prevalence of the infection the drug is intended to treat and the availability or lack of alternative treatment in such limited population. Such drug may be approved under this subsection notwithstanding a lack of evidence to fully establish a favorable benefit-risk profile in a population that is broader than the intended limited population.

(3) Additional requirements

A drug approved under this subsection shall be subject to the following requirements, in addition to any other applicable requirements of this chapter:

(A) Labeling

To indicate that the safety and effectiveness of a drug approved under this subsection has been demonstrated only with respect to a limited population—

(i) all labeling and advertising of an antibacterial or antifungal drug approved under this subsection shall contain the statement "Limited Population" in a prominent manner and adjacent to, and not more prominent than—

(I) the proprietary name of such drug, if any; or

(II) if there is no proprietary name, the established name of the drug, if any, as defined in section 353(e)(3) of this title, or, in the case of a drug that is a biological product, the proper name, as defined by regulation; and

(ii) the prescribing information for the drug required by section 201.57 of title 21, Code of Federal Regulations (or any successor regulation) shall also include the following statement: "This drug is indicated for use in a limited and specific population of patients.".

(B) Promotional material

The sponsor of an antibacterial or antifungal drug subject to this subsection shall submit to the Secretary copies of all promotional materials related to such drug at least 30 calendar days prior to dissemination of the materials.

(4) Other programs

A sponsor of a drug that seeks approval of a drug under this subsection may also seek designation or approval, as applicable, of such drug under other applicable sections or subsections of this chapter or the Public Health Service Act [42 U.S.C. 201 et seq.].

(5) Guidance

Not later than 18 months after December 13, 2016, the Secretary shall issue draft guidance describing criteria, processes, and other general considerations for demonstrating the safety and effectiveness of limited population antibacterial and antifungal drugs. The Secretary shall publish final guidance within 18 months of the close of the public comment period on such draft guidance. The Secretary may approve antibacterial and antifungal drugs under this subsection prior to issuing guidance under this paragraph.

(6) Advice

The Secretary shall provide prompt advice to the sponsor of a drug for which the sponsor seeks approval under this subsection to enable the sponsor to plan a development program to obtain the necessary data for such approval, and to conduct any additional studies that would be required to gain approval of such drug for use in a broader population.

(7) Termination of limitations

If, after approval of a drug under this subsection, the Secretary approves a broader indication for such drug under section 355(b) of this title or section 351(a) of the Public Health Service Act [42 U.S.C. 262(a)], the Secretary may remove any postmarketing conditions, including requirements with respect to labeling and review of promotional materials under paragraph (3), applicable to the approval of the drug under this subsection.

(8) Rules of construction

Nothing in this subsection shall be construed to alter the authority of the Secretary to approve drugs pursuant to this chapter or section 351 of the Public Health Service Act [42 U.S.C. 262], including the standards of evidence and applicable conditions for approval under such chapter or Act, the standards of approval of a drug under such chapter or Act, or to alter the authority of the Secretary to monitor drugs pursuant to such chapter or Act.

(9) Reporting and accountability

(A) Biennial reporting

The Secretary shall report to Congress not less often than once every 2 years on the number of requests for approval, and the number of approvals, of an antibacterial or antifungal drug under this subsection.

(B) GAO report

Not later than December 2021, the Comptroller General of the United States shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Health, Education, Labor and Pensions of the Senate a report on the coordination of activities required under section 319E of the Public Health Service Act [42 U.S.C. 247d–5]. Such report shall include a review of such activities, and the extent to which the use of the pathway established under this subsection has streamlined premarket approval for antibacterial or antifungal drugs for limited populations, if such pathway has functioned as intended, if such pathway has helped provide for safe and effective treatment for patients, if such premarket approval would be appropriate for other categories of drugs, and if the authorities under this subsection have affected antibacterial or antifungal resistance.

(June 25, 1938, ch. 675, §506, as added Pub. L. 105–115, title I, §112(a), Nov. 21, 1997, 111 Stat. 2309; amended Pub. L. 112–144, title VIII, §803, title IX, §§901(b), 902(a), July 9, 2012, 126 Stat. 1079, 1083, 1086; Pub. L. 114–255, div. A, title III, §§3033(a), (c), 3042, Dec. 13, 2016, 130 Stat. 1101, 1103, 1112.)

Editorial Notes

References in Text

The Food and Drug Administration Safety and Innovation Act, referred to in subsec. (e)(1), is Pub. L. 112–144. For the amendments made to this section by the Act, see 2012 Amendment notes below.

The 21st Century Cures Act, referred to in subsec. (e)(1), is Pub. L. 114–255. For the amendments made to this section by the Act, see 2016 Amendment notes below.

Section 101(b) of the Prescription Drug User Fee Amendments of 2012, referred to in subsec. (g)(6)(A), is section 101(b) of Pub. L. 112–144, which is set out as a note under section 379g of this title.

The Public Health Service Act, referred to in subsec. (h)(4), is act July 1, 1944, ch. 373, 58 Stat. 682, which is classified generally to chapter 6A (§201 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 201 of Title 42 and Tables.

Prior Provisions

A prior section 356, act June 25, 1938, ch. 675, §506, as added Dec. 22, 1941, ch. 613, §3, 55 Stat. 851; amended Pub. L. 102–300, §6(b)(2), June 16, 1992, 106 Stat. 240; Pub. L. 103–80, §3(o), Aug. 13, 1993, 107 Stat. 777,

related to certification of drugs containing insulin, prior to repeal by Pub. L. 105–115, title I, §125(a)(1), Nov. 21, 1997, 111 Stat. 2325.

Amendments

2016—Subsec. (e). Pub. L. 114–255, §3033(a)(1), transferred subsec. (e) to appear before subsec. (f).

Subsec. (e)(1). Pub. L. 114–255, §3033(c), inserted "and the 21st Century Cures Act" after "Food and Drug Administration Safety and Innovation Act".

Subsec. (g). Pub. L. 114–255, §3033(a)(2), added subsec. (g).

Subsec. (h). Pub. L. 114–255, §3042, added subsec. (h).

2012—Pub. L. 112–144, §901(b), amended section generally. Prior to amendment, section consisted of subsecs. (a) to (d) relating to designation of drugs as fast track products, approval of applications for fast track products, review of incomplete applications for approval of fast track products, and awareness efforts, respectively.

Subsec. (a). Pub. L. 112–144, §902(a)(3), added subsec. (a). Former subsec. (a) redesignated (b).

Subsec. (a)(1). Pub. L. 112–144, §803, amended subsec. (a)(1), as amended by Pub. L. 112–144, §901(b), by inserting ", or if the Secretary designates the drug as a qualified infectious disease product under section 355f(d) of this title" after "such a disease or condition".

Subsecs. (b) to (d). Pub. L. 112–144, §902(a)(1), redesignated subsecs. (a) to (c) as (b) to (d), respectively. Former subsec. (d) relating to awareness efforts redesignated (f).

Subsec. (f). Pub. L. 112–144, §902(a)(2), which directed the redesignation of subsec. (d) as (f), was executed by redesignating the subsec. (d) relating to awareness efforts as (f), to reflect the probable intent of Congress and the subsequent amendment by Pub. L. 114–255, §3033(a)(1), which transferred subsec. (e) to appear before subsec. (f) "relating to awareness efforts".

Subsec. (f)(1). Pub. L. 112–144, §902(a)(4), substituted "applicable to breakthrough therapies, accelerated approval, and" for "applicable to accelerated approval".

Statutory Notes and Related Subsidiaries

Effective Date

Section effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as an Effective Date of 1997 Amendment note under section 321 of this title.

Construction of 2016 Amendments

Pub. L. 114–255, div. A, title III, §3033(b), Dec. 13, 2016, 130 Stat. 1103, provided that: "Nothing in this section [amending this section] and the amendments made by this section shall be construed to alter the authority of the Secretary of Health and Human Services—

> "(1) to approve drugs pursuant to the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) and section 351 of the Public Health Service Act (42 U.S.C. 262) as authorized prior to the date of enactment of the 21st Century Cures Act [Dec. 13, 2016], including the standards of evidence, and applicable conditions, for approval under such Acts; or
>
> "(2) to alter the authority of the Secretary to require postapproval studies pursuant to such Acts, as authorized prior to the date of enactment of the 21st Century Cures Act."

Pub. L. 114–255, div. A, title III, §3043, Dec. 13, 2016, 130 Stat. 1114, provided that: "Nothing in this subtitle [subtitle E (§§3041–3044) of title III of div. A of Pub. L. 114–255, enacting section 360a–2 of this title, amending this section, sections 352 and 360d of this title, and section 247d–5 of Title 42, The Public Health and Welfare, repealing section 247d–5a of Title 42, and enacting provisions set out as notes under section 360a–2 of this title and section 247d–5 of Title 42], or an amendment made by this subtitle, shall be construed to restrict the prescribing of antimicrobial drugs or other products, including drugs approved under subsection (h) of section 506 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 356[(h)]) (as added by section 3042), by health care professionals, or to limit the practice of health care."

Report on Regenerative Advanced Therapies

Pub. L. 114–255, div. A, title III, §3035, Dec. 13, 2016, 130 Stat. 1103, provided that:

"(a) Report to Congress.—Before March 1 of each calendar year, the Secretary of Health and Human Services shall, with respect to the previous calendar year, submit a report to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Energy and Commerce of the House of Representatives on—

> "(1) the number and type of applications for approval of regenerative advanced therapies filed, approved or licensed as applicable, withdrawn, or denied; and

"(2) how many of such applications or therapies, as applicable, were granted accelerated approval or priority review.

"(b) REGENERATIVE ADVANCED THERAPY.—In this section, the term 'regenerative advanced therapy' has the meaning given such term in section 506(g) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 356(g)], as added by section 3033 of this Act."

FINDINGS AND SENSE OF CONGRESS ON ENHANCEMENT OF ACCELERATED PATIENT ACCESS TO NEW MEDICAL TREATMENTS

Pub. L. 112–144, title IX, §901(a), July 9, 2012, 126 Stat. 1082, as amended by Pub. L. 114–255, div. A, title III, §3101(b)(1), Dec. 13, 2016, 130 Stat. 1156, provided that:

"(1) FINDINGS.—Congress finds as follows:

"(A) The Food and Drug Administration (referred to in this section as the 'FDA') serves a critical role in helping to assure that new medicines are safe and effective. Regulatory innovation is 1 element of the Nation's strategy to address serious or life-threatening diseases or conditions by promoting investment in and development of innovative treatments for unmet medical needs.

"(B) During the 2 decades following the establishment of the accelerated approval mechanism, advances in medical sciences, including genomics, molecular biology, and bioinformatics, have provided an unprecedented understanding of the underlying biological mechanism and pathogenesis of disease. A new generation of modern, targeted medicines is under development to treat serious and life-threatening diseases, some applying drug development strategies based on biomarkers or pharmacogenomics, predictive toxicology, clinical trial enrichment techniques, and novel clinical trial designs, such as adaptive clinical trials.

"(C) As a result of these remarkable scientific and medical advances, the FDA should be encouraged to implement more broadly effective processes for the expedited development and review of innovative new medicines intended to address unmet medical needs for serious or life-threatening diseases or conditions, including those for rare diseases or conditions, using a broad range of surrogate or clinical endpoints and modern scientific tools earlier in the drug development cycle when appropriate. This may result in fewer, smaller, or shorter clinical trials for the intended patient population or targeted subpopulation without compromising or altering the high standards of the FDA for the approval of drugs.

"(D) Patients benefit from expedited access to safe and effective innovative therapies to treat unmet medical needs for serious or life-threatening diseases or conditions.

"(E) For these reasons, the statutory authority in effect on the day before the date of enactment of this Act [July 9, 2012] governing expedited approval of drugs for serious or life-threatening diseases or conditions should be amended in order to enhance the authority of the FDA to consider appropriate scientific data, methods, and tools, and to expedite development and access to novel treatments for patients with a broad range of serious or life-threatening diseases or conditions.

"(2) SENSE OF CONGRESS.—It is the sense of Congress that the Food and Drug Administration should apply the accelerated approval and fast track provisions set forth in section 506 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 356), as amended by this section, to help expedite the development and availability to patients of treatments for serious or life-threatening diseases or conditions while maintaining safety and effectiveness standards for such treatments."

GUIDANCE; AMENDED REGULATIONS

Pub. L. 112–144, title IX, §901(c), July 9, 2012, 126 Stat. 1085, provided that:

"(1) DRAFT GUIDANCE.—Not later than 1 year after the date of enactment of this Act [July 9, 2012], the Secretary of Health and Human Services (referred to in this section as the 'Secretary') shall issue draft guidance to implement the amendments made by this section [amending this section]. In developing such guidance, the Secretary shall specifically consider issues arising under the accelerated approval and fast track processes under section 506 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 356], as amended by subsection (b), for drugs designated for a rare disease or condition under section 526 of such Act (21 U.S.C. 360bb) and shall also consider any unique issues associated with very rare diseases.

"(2) FINAL GUIDANCE.—Not later than 1 year after the issuance of draft guidance under paragraph (1), and after an opportunity for public comment, the Secretary shall—

"(A) issue final guidance; and

"(B) amend the regulations governing accelerated approval in parts 314 and 601 of title 21, Code of Federal Regulations, as necessary to conform such regulations with the amendment made by subsection (b).

"(3) CONSIDERATION.—In developing the guidance under paragraphs (1) and (2)(A) and the amendments under paragraph (2)(B), the Secretary shall consider how to incorporate novel approaches to the review of surrogate

endpoints based on pathophysiologic and pharmacologic evidence in such guidance, especially in instances where the low prevalence of a disease renders the existence or collection of other types of data unlikely or impractical.

"(4) CONFORMING CHANGES.—The Secretary shall issue, as necessary, conforming amendments to the applicable regulations under title 21, Code of Federal Regulations, governing accelerated approval.

"(5) NO EFFECT OF INACTION ON REQUESTS.—The issuance (or nonissuance) of guidance or conforming regulations implementing the amendment made by subsection (b) shall not preclude the review of, or action on, a request for designation or an application for approval submitted pursuant to section 506 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 356], as amended by subsection (b)."

Pub. L. 112–144, title IX, §902(b), July 9, 2012, 126 Stat. 1087, provided that:

"(1) IN GENERAL.—

"(A) GUIDANCE.—Not later than 18 months after the date of enactment of this Act [July 9, 2012], the Secretary of Health and Human Services (referred to in this section as the 'Secretary') shall issue draft guidance on implementing the requirements with respect to breakthrough therapies, as set forth in section 506(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 356(a)), as amended by this section. The Secretary shall issue final guidance not later than 1 year after the close of the comment period for the draft guidance.

"(B) AMENDED REGULATIONS.—

"(i) IN GENERAL.—If the Secretary determines that it is necessary to amend the regulations under title 21, Code of Federal Regulations in order to implement the amendments made by this section to section 506(a) of the Federal Food, Drug, and Cosmetic Act, the Secretary shall amend such regulations not later than 2 years after the date of enactment of this Act.

"(ii) PROCEDURE.—In amending regulations under clause (i), the Secretary shall—

"(I) issue a notice of proposed rulemaking that includes the proposed regulation;

"(II) provide a period of not less than 60 days for comments on the proposed regulation; and

"(III) publish the final regulation not less than 30 days before the effective date of the regulation.

"(iii) RESTRICTIONS.—Notwithstanding any other provision of law, the Secretary shall promulgate regulations implementing the amendments made by this section only as described in clause (ii).

"(2) REQUIREMENTS.—Guidance issued under this section shall—

"(A) specify the process and criteria by which the Secretary makes a designation under section 506(a)(3) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 356(a)(3)]; and

"(B) specify the actions the Secretary shall take to expedite the development and review of a breakthrough therapy pursuant to such designation under such section 506(a)(3), including updating good review management practices to reflect breakthrough therapies."

Pub. L. 105–115, title I, §112(b), Nov. 21, 1997, 111 Stat. 2310, provided that: "Within 1 year after the date of enactment of this Act [Nov. 21, 1997], the Secretary of Health and Human Services shall issue guidance for fast track products (as defined in [former] section 506(a)(1) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 356(a)(1)]) that describes the policies and procedures that pertain to section 506 of such Act."

[1] *So in original.*

§356–1. Accelerated approval of priority countermeasures

(a) In general

The Secretary of Health and Human Services may designate a priority countermeasure as a fast-track product pursuant to section 356 of this title or as a device granted review priority pursuant to section 360e(d)(5) [1] of this title. Such a designation may be made prior to the submission of—

(1) a request for designation by the sponsor or applicant; or

(2) an application for the investigation of the drug under section 355(i) of this title or section 262(a)(3) of title 42.

Nothing in this subsection shall be construed to prohibit a sponsor or applicant from declining such a designation.

(b) Use of animal trials

A drug for which approval is sought under section 355(b) of this title or section 262 of title 42 on the basis of evidence of effectiveness that is derived from animal studies pursuant to section 123 [1] may be

designated as a fast track product for purposes of this section.

(c) Priority review of drugs and biological products

A priority countermeasure that is a drug or biological product shall be considered a priority drug or biological product for purposes of performance goals for priority drugs or biological products agreed to by the Commissioner of Food and Drugs.

(d) Definitions

For purposes of this title: [1]

(1) The term "priority countermeasure" has the meaning given such term in section 247d–6(h)(4) [1] of title 42.

(2) The term "priority drugs or biological products" means a drug or biological product that is the subject of a drug or biologics application referred to in section 101(4) of the Food and Drug Administration Modernization Act of 1997.

(Pub. L. 107–188, title I, §122, June 12, 2002, 116 Stat. 613.)

Editorial Notes

References in Text

Section 360e(d)(5) of this title, referred to in subsec. (a), was struck out and former subsec. (d)(6) redesignated subsec. (d)(5) of section 360e by Pub. L. 114–255, div. A, title III, §3051(c)(1), Dec. 13, 2016, 130 Stat. 1124. Section 360e(d)(5) no longer relates to grants of review priority.

Section 123, referred to in subsec. (b), is section 123 of Pub. L. 107–188, title I, June 12, 2002, 116 Stat. 613, which is not classified to the Code.

This title, referred to in subsec. (d), is title I of Pub. L. 107–188, June 12, 2002, 116 Stat. 596, which enacted this section, section 669a of Title 29, Labor, and sections 244, 245, 247d–3a, 247d–3b, 247d–7a to 247d–7d, 300hh, 300hh–11 to 300hh–13, 1320b–5, and 7257d of Title 42, The Public Health and Welfare, amended sections 247d to 247d–6, 264, 266, 290hh–1, and 5196b of Title 42, and enacted provisions set out as notes preceding section 8101 of Title 38, Veterans' Benefits, and under sections 201, 244, 247d, 247d–6, 300hh, 300hh–12, and 1320b–5 of Title 42. For complete classification of this title to the Code, see Tables.

Section 247d–6(h)(4) of title 42, referred to in subsec. (d)(1), was redesignated section 247d–6(e)(4) by Pub. L. 109–417, title III, §304(3), Dec. 19, 2006, 120 Stat. 2861.

Section 101(4) of the Food and Drug Administration Modernization Act of 1997, referred to in subsec. (d)(2), is section 101(4) of Pub. L. 105–115, which is set out as a note under section 379g of this title.

Codification

Section was enacted as part of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, and not as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

[1] *See References in Text note below.*

§356a. Manufacturing changes

(a) In general

With respect to a drug for which there is in effect an approved application under section 355 or 360b of this title or a license under section 262 of title 42, a change from the manufacturing process approved pursuant to such application or license may be made, and the drug as made with the change may be distributed, if—

(1) the holder of the approved application or license (referred to in this section as a "holder") has validated the effects of the change in accordance with subsection (b); and

(2)(A) in the case of a major manufacturing change, the holder has complied with the requirements of subsection (c); or

(B) in the case of a change that is not a major manufacturing change, the holder complies with the applicable requirements of subsection (d).

(b) Validation of effects of changes

For purposes of subsection (a)(1), a drug made with a manufacturing change (whether a major manufacturing change or otherwise) may be distributed only if, before distribution of the drug as so made, the holder involved validates the effects of the change on the identity, strength, quality, purity, and potency of the drug as the identity, strength, quality, purity, and potency may relate to the safety or effectiveness of the drug.

(c) Major manufacturing changes

(1) Requirement of supplemental application

For purposes of subsection (a)(2)(A), a drug made with a major manufacturing change may be distributed only if, before the distribution of the drug as so made, the holder involved submits to the Secretary a supplemental application for such change and the Secretary approves the application. The application shall contain such information as the Secretary determines to be appropriate, and shall include the information developed under subsection (b) by the holder in validating the effects of the change.

(2) Changes qualifying as major changes

For purposes of subsection (a)(2)(A), a major manufacturing change is a manufacturing change that is determined by the Secretary to have substantial potential to adversely affect the identity, strength, quality, purity, or potency of the drug as they may relate to the safety or effectiveness of a drug. Such a change includes a change that—

(A) is made in the qualitative or quantitative formulation of the drug involved or in the specifications in the approved application or license referred to in subsection (a) for the drug (unless exempted by the Secretary by regulation or guidance from the requirements of this subsection);

(B) is determined by the Secretary by regulation or guidance to require completion of an appropriate clinical study demonstrating equivalence of the drug to the drug as manufactured without the change; or

(C) is another type of change determined by the Secretary by regulation or guidance to have a substantial potential to adversely affect the safety or effectiveness of the drug.

(d) Other manufacturing changes

(1) In general

For purposes of subsection (a)(2)(B), the Secretary may regulate drugs made with manufacturing changes that are not major manufacturing changes as follows:

(A) The Secretary may in accordance with paragraph (2) authorize holders to distribute such drugs without submitting a supplemental application for such changes.

(B) The Secretary may in accordance with paragraph (3) require that, prior to the distribution of such drugs, holders submit to the Secretary supplemental applications for such changes.

(C) The Secretary may establish categories of such changes and designate categories to which subparagraph (A) applies and categories to which subparagraph (B) applies.

(2) Changes not requiring supplemental application

(A) Submission of report

A holder making a manufacturing change to which paragraph (1)(A) applies shall submit to the Secretary a report on the change, which shall contain such information as the Secretary determines to be appropriate, and which shall include the information developed under subsection (b) by the holder in validating the effects of the change. The report shall be submitted by such date as the Secretary may specify.

(B) Authority regarding annual reports

In the case of a holder that during a single year makes more than one manufacturing change to which paragraph (1)(A) applies, the Secretary may in carrying out subparagraph (A) authorize the holder to comply with such subparagraph by submitting a single report for the year that provides the information required in such subparagraph for all the changes made by the holder during the year.

(3) Changes requiring supplemental application

(A) Submission of supplemental application

The supplemental application required under paragraph (1)(B) for a manufacturing change shall contain such information as the Secretary determines to be appropriate, which shall include the information developed under subsection (b) by the holder in validating the effects of the change.

(B) Authority for distribution

In the case of a manufacturing change to which paragraph (1)(B) applies:

(i) The holder involved may commence distribution of the drug involved 30 days after the Secretary receives the supplemental application under such paragraph, unless the Secretary notifies the holder within such 30-day period that prior approval of the application is required before distribution may be commenced.

(ii) The Secretary may designate a category of such changes for the purpose of providing that, in the case of a change that is in such category, the holder involved may commence distribution of the drug involved upon the receipt by the Secretary of a supplemental application for the change.

(iii) If the Secretary disapproves the supplemental application, the Secretary may order the manufacturer to cease the distribution of the drugs that have been made with the manufacturing change.

(June 25, 1938, ch. 675, §506A, as added Pub. L. 105–115, title I, §116(a), Nov. 21, 1997, 111 Stat. 2313.)

Statutory Notes and Related Subsidiaries

Effective Date

Pub. L. 105–115, title I, §116(b), Nov. 21, 1997, 111 Stat. 2315, provided that: "The amendment made by subsection (a) [enacting this section] takes effect upon the effective date of regulations promulgated by the Secretary of Health and Human Services to implement such amendment, or upon the expiration of the 24-month period beginning on the date of the enactment of this Act [Nov. 21, 1997], whichever occurs first."

§356b. Reports of postmarketing studies

(a) Submission

(1) In general

A sponsor of a drug that has entered into an agreement with the Secretary to conduct a postmarketing study of a drug shall submit to the Secretary, within 1 year after the approval of such drug and annually thereafter until the study is completed or terminated, a report of the progress of the study or the reasons for the failure of the sponsor to conduct the study. The report shall be submitted in such form as is prescribed by the Secretary in regulations issued by the Secretary.

(2) Agreements prior to effective date

Any agreement entered into between the Secretary and a sponsor of a drug, prior to November 21, 1997, to conduct a postmarketing study of a drug shall be subject to the requirements of paragraph (1). An initial report for such an agreement shall be submitted within 6 months after the date of the issuance of the regulations under paragraph (1).

(b) Consideration of information as public information

Any information pertaining to a report described in subsection (a) shall be considered to be public information to the extent that the information is necessary—

(1) to identify the sponsor; and

(2) to establish the status of a study described in subsection (a) and the reasons, if any, for any failure to carry out the study.

(c) Status of studies and reports

The Secretary shall annually develop and publish in the Federal Register a report that provides information on the status of the postmarketing studies—

(1) that sponsors have entered into agreements to conduct; and
(2) for which reports have been submitted under subsection (a)(1).

(d) Disclosure

If a sponsor fails to complete an agreed upon study required by this section by its original or otherwise negotiated deadline, the Secretary shall publish a statement on the Internet site of the Food and Drug Administration stating that the study was not completed and, if the reasons for such failure to complete the study were not satisfactory to the Secretary, a statement that such reasons were not satisfactory to the Secretary.

(e) Notification

With respect to studies of the type required under section 356(c)(2)(A) of this title or under section 314.510 or 601.41 of title 21, Code of Federal Regulations, as each of such sections was in effect on the day before the effective date of this subsection, the Secretary may require that a sponsor who, for reasons not satisfactory to the Secretary, fails to complete by its deadline a study under any of such sections of such type for a drug or biological product (including such a study conducted after such effective date) notify practitioners who prescribe such drug or biological product of the failure to complete such study and the questions of clinical benefit, and, where appropriate, questions of safety, that remain unanswered as a result of the failure to complete such study. Nothing in this subsection shall be construed as altering the requirements of the types of studies required under section 356(c)(2)(A) of this title or under section 314.510 or 601.41 of title 21, Code of Federal Regulations, as so in effect, or as prohibiting the Secretary from modifying such sections of title 21 of such Code to provide for studies in addition to those of such type.

(June 25, 1938, ch. 675, §506B, as added Pub. L. 105–115, title I, §130(a), Nov. 21, 1997, 111 Stat. 2331; amended Pub. L. 107–188, title V, §506, June 12, 2002, 116 Stat. 693; Pub. L. 112–144, title IX, §902(c), July 9, 2012, 126 Stat. 1088.)

Editorial Notes

References in Text

The effective date of this subsection, referred to in subsec. (e), is Oct. 1, 2002, see Effective Date of 2002 Amendment note set out below.

Amendments

2012—Subsec. (e). Pub. L. 112–144 substituted "section 356(c)(2)(A) of this title" for "section 356(b)(2)(A) of this title" in two places.

2002—Subsecs. (d), (e). Pub. L. 107–188 added subsecs. (d) and (e).

Statutory Notes and Related Subsidiaries

Effective Date of 2002 Amendment

Pub. L. 107–188, title V, §508, June 12, 2002, 116 Stat. 694, provided that: "The amendments made by this subtitle [subtitle A (§§501–509) of title V of Pub. L. 107–188, amending this section and sections 379g and 379h of this title] shall take effect October 1, 2002."

Effective Date

Section effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as an Effective Date of 1997 Amendment note under section 321 of this title.

Report to Congressional Committees

Pub. L. 105–115, title I, §130(b), Nov. 21, 1997, 111 Stat. 2331, provided that not later than Oct. 1, 2001, the Secretary was to submit to Congress a report containing a summary of the reports submitted under section 356b of this title and an evaluation and legislative recommendations relating to postmarketing studies of drugs.

§356c. Discontinuance or interruption in the production of life-saving drugs

(a) In general

A manufacturer of a drug—

(1) that is—

(A) life-supporting;

(B) life-sustaining; or

(C) intended for use in the prevention or treatment of a debilitating disease or condition, including any such drug used in emergency medical care or during surgery or any such drug that is critical to the public health during a public health emergency declared by the Secretary under section 247d of title 42; and

(2) that is not a radio pharmaceutical drug product or any other product as designated by the Secretary,

shall notify the Secretary, in accordance with subsection (b), of a permanent discontinuance in the manufacture of the drug or an interruption of the manufacture of the drug that is likely to lead to a meaningful disruption in the supply of that drug in the United States,,[1] or a permanent discontinuance in the manufacture of an active pharmaceutical ingredient or an interruption in the manufacture of the active pharmaceutical ingredient of such drug that is likely to lead to a meaningful disruption in the supply of the active pharmaceutical ingredient of such drug, and the reasons for such discontinuance or interruption. Notification under this subsection shall include disclosure of reasons for the discontinuation or interruption, and if applicable, an active pharmaceutical ingredient is a reason for, or risk factor in, such discontinuation or interruption, the source of the active pharmaceutical ingredient and any alternative sources for the active pharmaceutical ingredient known by the manufacturer; whether any associated device used for preparation or administration included in the drug is a reason for, or a risk factor in, such discontinuation or interruption; the expected duration of the interruption; and such other information as the Secretary may require.

(b) Timing

A notice required under subsection (a) shall be submitted to the Secretary—

(1) at least 6 months prior to the date of the discontinuance or interruption; or

(2) if compliance with paragraph (1) is not possible, as soon as practicable.

(c) Distribution

To the maximum extent practicable, the Secretary shall distribute, through such means as the Secretary deems appropriate, information on the discontinuance or interruption of the manufacture of the drugs described in subsection (a) to appropriate organizations, including physician, health provider, and patient organizations, as described in section 356e of this title.

(d) Confidentiality

Nothing in this section shall be construed as authorizing the Secretary to disclose any information that is a trade secret or confidential information subject to section 552(b)(4) of title 5 or section 1905 of title 18.

(e) Coordination with Attorney General

Not later than 30 days after the receipt of a notification described in subsection (a), the Secretary shall —

(1) determine whether the notification pertains to a controlled substance subject to a production quota under section 826 of this title; and

(2) if necessary, as determined by the Secretary—

(A) notify the Attorney General that the Secretary has received such a notification;

(B) request that the Attorney General increase the aggregate and individual production quotas under section 826 of this title applicable to such controlled substance and any ingredient therein to a

level the Secretary deems necessary to address a shortage of a controlled substance based on the best available market data; and

(C) if the Attorney General determines that the level requested is not necessary to address a shortage of a controlled substance, the Attorney General shall provide to the Secretary a written response detailing the basis for the Attorney General's determination.

The Secretary shall make the written response provided under subparagraph (C) available to the public on the Internet Web site of the Food and Drug Administration.

(f) Failure to meet requirements

If a person fails to submit information required under subsection (a) in accordance with subsection (b)—

(1) the Secretary shall issue a letter to such person informing such person of such failure;

(2) not later than 30 calendar days after the issuance of a letter under paragraph (1), the person who receives such letter shall submit to the Secretary a written response to such letter setting forth the basis for noncompliance and providing information required under subsection (a); and

(3) not later than 45 calendar days after the issuance of a letter under paragraph (1), the Secretary shall make such letter and any response to such letter under paragraph (2) available to the public on the Internet Web site of the Food and Drug Administration, with appropriate redactions made to protect information described in subsection (d), except that, if the Secretary determines that the letter under paragraph (1) was issued in error or, after review of such response, the person had a reasonable basis for not notifying as required under subsection (a), the requirements of this paragraph shall not apply.

(g) Expedited inspections and reviews

If, based on notifications described in subsection (a) or any other relevant information, the Secretary concludes that there is, or is likely to be, a drug shortage of a drug described in subsection (a), the Secretary shall, as appropriate—

(1) prioritize and expedite the review of a supplement to a new drug application submitted under section 355(b) of this title, an abbreviated new drug application submitted under section 355(j) of this title, or a supplement to such an application submitted under section 355(j) of this title, that could help mitigate or prevent such shortage; or

(2) prioritize and expedite an inspection or reinspection of an establishment that could help mitigate or prevent such drug shortage.

(h) Definitions

For purposes of this section—

(1) the term "drug"—

(A) means a drug (as defined in section 321(g) of this title) that is intended for human use and that is subject to section 353(b)(1) of this title; and

(B) does not include biological products (as defined in section 262 of title 42), unless otherwise provided by the Secretary in the regulations promulgated under subsection (i);

(2) the term "drug shortage" or "shortage", with respect to a drug, means a period of time when the demand or projected demand for the drug within the United States exceeds the supply of the drug; and

(3) the term "meaningful disruption"—

(A) means a change in production that is reasonably likely to lead to a reduction in the supply of a drug by a manufacturer that is more than negligible and affects the ability of the manufacturer to fill orders or meet expected demand for its product; and

(B) does not include interruptions in manufacturing due to matters such as routine maintenance or insignificant changes in manufacturing so long as the manufacturer expects to resume operations in a short period of time.

(i) Regulations

(1) In general

Not later than 18 months after July 9, 2012, the Secretary shall adopt a final regulation implementing this section.

(2) Contents

Such regulation shall define, for purposes of this section, the terms "life-supporting", "life-sustaining", and "intended for use in the prevention or treatment of a debilitating disease or condition".

(3) Inclusion of biological products

(A) In general

The Secretary may by regulation apply this section to biological products (as defined in section 262 of title 42), including plasma products derived from human plasma protein and their recombinant analogs, if the Secretary determines such inclusion would benefit the public health. Such regulation shall take into account any supply reporting programs and shall aim to reduce duplicative notification.

(B) Rule for vaccines

If the Secretary applies this section to vaccines pursuant to subparagraph (A), the Secretary shall—

(i) consider whether the notification requirement under subsection (a) may be satisfied by submitting a notification to the Centers for Disease Control and Prevention under the vaccine shortage notification program of such Centers; and

(ii) explain the determination made by the Secretary under clause (i) in the regulation.

(4) Procedure

In promulgating a regulation implementing this section, the Secretary shall—

(A) issue a notice of proposed rulemaking that includes the proposed regulation;

(B) provide a period of not less than 60 days for comments on the proposed regulation; and

(C) publish the final regulation not less than 30 days before the regulation's effective date.

(5) Restrictions

Notwithstanding any other provision of Federal law, in implementing this section, the Secretary shall only promulgate regulations as described in paragraph (4).

(j) Risk management plans

Each manufacturer of a drug described in subsection (a) or of any active pharmaceutical ingredient or any associated medical device used for preparation or administration included in the drug, shall develop, maintain, and implement, as appropriate, a redundancy risk management plan that identifies and evaluates risks to the supply of the drug, as applicable, for each establishment in which such drug or active pharmaceutical ingredient of such drug is manufactured. A risk management plan under this section shall be subject to inspection and copying by the Secretary pursuant to an inspection or a request under section 374(a)(4) of this title.

(June 25, 1938, ch. 675, §506C, as added Pub. L. 105–115, title I, §131(a), Nov. 21, 1997, 111 Stat. 2332; amended Pub. L. 112–144, title X, §1001(a), July 9, 2012, 126 Stat. 1099; Pub. L. 114–255, div. A, title III, §3101(a)(2)(E), Dec. 13, 2016, 130 Stat. 1153; Pub. L. 116–136, div. A, title III, §§3111–3112(b), Mar. 27, 2020, 134 Stat. 361, 362.)

Editorial Notes

Amendments

2020—Subsec. (a). Pub. L. 116–136, §3112(a)(2), in concluding provisions, inserted ", or a permanent discontinuance in the manufacture of an active pharmaceutical ingredient or an interruption in the manufacture of the active pharmaceutical ingredient of such drug that is likely to lead to a meaningful disruption in the supply of the active pharmaceutical ingredient of such drug," before "and the reasons" and inserted at end "Notification under this subsection shall include disclosure of reasons for the discontinuation or interruption, and if applicable, an active pharmaceutical ingredient is a reason for, or risk factor in, such discontinuation or interruption, the source of the active pharmaceutical ingredient and any alternative sources for the active pharmaceutical ingredient known by the manufacturer; whether any associated device used for preparation or administration included in the drug is a reason

for, or a risk factor in, such discontinuation or interruption; the expected duration of the interruption; and such other information as the Secretary may require."

Subsec. (a)(1)(C). Pub. L. 116–136, §3112(a)(1), inserted "or any such drug that is critical to the public health during a public health emergency declared by the Secretary under section 247d of title 42" after "during surgery".

Subsec. (g). Pub. L. 116–136, §3111(1), which directed substitution of "the Secretary shall, as appropriate" for "the Secretary may" in par. (1), was executed by making the substitution in introductory provisions to reflect the probable intent of Congress.

Subsec. (g)(1). Pub. L. 116–136, §3111(2), inserted "prioritize and" before "expedite the review".

Subsec. (g)(2). Pub. L. 116–136, §3111(3), inserted "prioritize and" before "expedite an inspection".

Subsec. (j). Pub. L. 116–136, §3112(b), added subsec. (j).

2016—Subsec. (c). Pub. L. 114–255, §3101(a)(2)(E)(i), substituted "discontinuance" for "discontinuation".

Subsec. (g)(1). Pub. L. 114–255, §3101(a)(2)(E)(ii), substituted "section 355(j) of this title, that could help" for "section 355(j) of this title that could help".

2012—Pub. L. 112–144 amended section generally. Prior to amendment, section related to discontinuance of life saving products.

Statutory Notes and Related Subsidiaries

Effective Date of 2020 Amendment

Pub. L. 116–136, div. A, title III, §3112(g), Mar. 27, 2020, 134 Stat. 363, provided that: "The amendments made by this section [amending this section and sections 356e, 360, and 374 of this title] and section 3111 [amending this section] shall take effect on the date that is 180 days after the date of enactment of this Act [Mar. 27, 2020]."

Effective Date

Section effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as an Effective Date of 1997 Amendment note under section 321 of this title.

Construction of 2020 Amendment: Confidentiality

Pub. L. 116–136, div. A, title III, §3112(f), Mar. 27, 2020, 134 Stat. 363, provided that: "Nothing in the amendments made by this section [see Effective Date of 2020 Amendment note set out above] shall be construed as authorizing the Secretary to disclose any information that is a trade secret or confidential information subject to section 552(b)(4) of title 5, United States Code, or section 1905 of title 18, United States Code."

Effect of Notification

Pub. L. 112–144, title X, §1001(b), July 9, 2012, 126 Stat. 1101, provided that: "The submission of a notification to the Secretary of Health and Human Services (referred to in this title [see Tables for classification] as the 'Secretary') for purposes of complying with the requirement in section 506C(a) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 356c(a)] (as amended by subsection (a)) shall not be construed—

"(1) as an admission that any product that is the subject of such notification violates any provision of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.); or

"(2) as evidence of an intention to promote or market the product for an indication or use for which the product has not been approved by the Secretary."

Executive Documents

Ex. Ord. No. 13588. Reducing Prescription Drug Shortages

Ex. Ord. No. 13588, Oct. 31, 2011, 76 F.R. 68295, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy*. Shortages of pharmaceutical drugs pose a serious and growing threat to public health. While a very small number of drugs in the United States experience a shortage in any given year, the number of prescription drug shortages in the United States nearly tripled between 2005 and 2010, and shortages are becoming more severe as well as more frequent. The affected medicines include cancer treatments, anesthesia drugs, and other drugs that are critical to the treatment and prevention of serious diseases and life-threatening conditions.

For example, over approximately the last 5 years, data indicates that the use of sterile injectable cancer treatments has increased by about 20 percent, without a corresponding increase in production capacity. While manufacturers

are currently in the process of expanding capacity, it may be several years before production capacity has been significantly increased. Interruptions in the supplies of these drugs endanger patient safety and burden doctors, hospitals, pharmacists, and patients. They also increase health care costs, particularly because some participants in the market may use shortages as opportunities to hoard scarce drugs or charge exorbitant prices.

The Food and Drug Administration (FDA) in the Department of Health and Human Services has been working diligently to address this problem through its existing regulatory framework. While the root problems and many of their solutions are outside of the FDA's control, the agency has worked cooperatively with manufacturers to prevent or mitigate shortages by expediting review of certain regulatory submissions and adopting a flexible approach to drug manufacturing and importation regulations where appropriate. As a result, the FDA prevented 137 drug shortages in 2010 and 2011. Despite these successes, however, the problem of drug shortages has continued to grow.

Many different factors contribute to drug shortages, and solving this critical public health problem will require a multifaceted approach. An important factor in many of the recent shortages appears to be an increase in demand that exceeds current manufacturing capacity. While manufacturers are in the process of expanding capacity, one important step is ensuring that the FDA and the public receive adequate advance notice of shortages whenever possible. The FDA cannot begin to work with manufacturers or use the other tools at its disposal until it knows there is a potential problem. Similarly, early disclosure of a shortage can help hospitals, doctors, and patients make alternative arrangements before a shortage becomes a crisis. However, drug manufacturers have not consistently provided the FDA with adequate notice of potential shortages.

As part of my Administration's broader effort to work with manufacturers, health care providers, and other stakeholders to prevent drug shortages, this order directs the FDA to take steps that will help to prevent and reduce current and future disruptions in the supply of lifesaving medicines.

SEC. 2. *Broader Reporting of Manufacturing Discontinuances*. To the extent permitted by law, the FDA shall use all appropriate administrative tools, including its authority to interpret and administer the reporting requirements in 21 U.S.C. 356c, to require drug manufacturers to provide adequate advance notice of manufacturing discontinuances that could lead to shortages of drugs that are life-supporting or life-sustaining, or that prevent debilitating disease.

SEC. 3. *Expedited Regulatory Review*. To the extent practicable, and consistent with its statutory responsibility to ensure the safety and effectiveness of the drug supply, the FDA shall take steps to expand its current efforts to expedite its regulatory reviews, including reviews of new drug suppliers, manufacturing sites, and manufacturing changes, whenever it determines that expedited review would help to avoid or mitigate existing or potential drug shortages. In prioritizing and allocating its limited resources, the FDA should consider both the severity of the shortage and the importance of the affected drug to public health.

SEC. 4. *Review of Certain Behaviors by Market Participants*. The FDA shall communicate to the Department of Justice (DOJ) any findings that shortages have led market participants to stockpile the affected drugs or sell them at exorbitant prices. The DOJ shall then determine whether these activities are consistent with applicable law. Based on its determination, DOJ, in coordination with other State and Federal regulatory agencies as appropriate, should undertake whatever enforcement actions, if any, it deems appropriate.

SEC. 5. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA.

[1] *So in original.*

§356c–1. Annual reporting on drug shortages

(a) Annual reports to Congress

Not later than March 31 of each calendar year, the Secretary shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Health, Education, Labor, and

Pensions of the Senate a report, with respect to the preceding calendar year, on drug shortages that—

(1) specifies the number of manufacturers that submitted a notification to the Secretary under section 356c(a) of this title during such calendar year;

(2) describes the communication between the field investigators of the Food and Drug Administration and the staff of the Center for Drug Evaluation and Research's Office of Compliance and Drug Shortage Program, including the Food and Drug Administration's procedures for enabling and ensuring such communication;

(3)(A) lists the major actions taken by the Secretary to prevent or mitigate the drug shortages described in paragraph (7);

(B) in the list under subparagraph (A), includes—

(i) the number of applications and supplements for which the Secretary expedited review under section 356c(g)(1) of this title during such calendar year; and

(ii) the number of establishment inspections or reinspections that the Secretary expedited under section 356c(g)(2) of this title during such calendar year;

(4) describes the coordination between the Food and Drug Administration and the Drug Enforcement Administration on efforts to prevent or alleviate drug shortages;

(5) identifies the number of and describes the instances in which the Food and Drug Administration exercised regulatory flexibility and discretion to prevent or alleviate a drug shortage;

(6) lists the names of manufacturers that were issued letters under section 356c(f) of this title; and

(7) specifies the number of drug shortages occurring during such calendar year, as identified by the Secretary.

(b) Trend analysis

The Secretary is authorized to retain a third party to conduct a study, if the Secretary believes such a study would help clarify the causes, trends, or solutions related to drug shortages.

(c) Definition

In this section, the term "drug shortage" or "shortage" has the meaning given such term in section 356c of this title.

(June 25, 1938, ch. 675, §506C–1, as added Pub. L. 112–144, title X, §1002, July 9, 2012, 126 Stat. 1102; amended Pub. L. 114–255, div. A, title III, §3101(a)(2)(F), Dec. 13, 2016, 130 Stat. 1153.)

Editorial Notes

Amendments

2016—Subsec. (a). Pub. L. 114–255, in introductory provisions, substituted "Not later than March 31 of each calendar year," for "Not later than the end of calendar year 2013, and not later than the end of each calendar year thereafter," and inserted ", with respect to the preceding calendar year," after "a report".

§356d. Coordination; task force and strategic plan

(a) Task force and strategic plan

(1) In general

(A) Task force

As soon as practicable after July 9, 2012, the Secretary shall establish a task force to develop and implement a strategic plan for enhancing the Secretary's response to preventing and mitigating drug shortages.

(B) Strategic plan

The strategic plan described in subparagraph (A) shall include—

(i) plans for enhanced interagency and intra-agency coordination, communication, and decisionmaking;

(ii) plans for ensuring that drug shortages are considered when the Secretary initiates a regulatory action that could precipitate a drug shortage or exacerbate an existing drug shortage;

(iii) plans for effective communication with outside stakeholders, including who the Secretary should alert about potential or actual drug shortages, how the communication should occur, and what types of information should be shared;

(iv) plans for considering the impact of drug shortages on research and clinical trials; and

(v) an examination of whether to establish a "qualified manufacturing partner program", as described in subparagraph (C).

(C) Description of program

In conducting the examination of a "qualified manufacturing partner program" under subparagraph (B)(v), the Secretary—

(i) shall take into account that—

(I) a "qualified manufacturer", for purposes of such program, would need to have the capability and capacity to supply products determined or anticipated to be in shortage; and

(II) in examining the capability and capacity to supply products in shortage, the "qualified manufacturer" could have a site that manufactures a drug listed under section 356e of this title or have the capacity to produce drugs in response to a shortage within a rapid timeframe; and

(ii) shall examine whether incentives are necessary to encourage the participation of "qualified manufacturers" in such a program.

(D) Consultation

In carrying out this paragraph, the task force shall ensure consultation with the appropriate offices within the Food and Drug Administration, including the Office of the Commissioner, the Center for Drug Evaluation and Research, the Office of Regulatory Affairs, and employees within the Department of Health and Human Services with expertise regarding drug shortages. The Secretary shall engage external stakeholders and experts as appropriate.

(2) Timing

Not later than 1 year after July 9, 2012, the task force shall—

(A) publish the strategic plan described in paragraph (1); and

(B) submit such plan to Congress.

(b) Communication

The Secretary shall ensure that, prior to any enforcement action or issuance of a warning letter that the Secretary determines could reasonably be anticipated to lead to a meaningful disruption in the supply in the United States of a drug described under section 356c(a) of this title, there is communication with the appropriate office of the Food and Drug Administration with expertise regarding drug shortages regarding whether the action or letter could cause, or exacerbate, a shortage of the drug.

(c) Action

If the Secretary determines, after the communication described in subsection (b), that an enforcement action or a warning letter could reasonably cause or exacerbate a shortage of a drug described under section 356c(a) of this title, then the Secretary shall evaluate the risks associated with the impact of such shortage upon patients and those risks associated with the violation involved before taking such action or issuing such letter, unless there is imminent risk of serious adverse health consequences or death to humans.

(d) Reporting by other entities

The Secretary shall identify or establish a mechanism by which health care providers and other third-party organizations may report to the Secretary evidence of a drug shortage.

(e) Review and construction

No determination, finding, action, or omission of the Secretary under this section shall—

(1) be subject to judicial review; or

(2) be construed to establish a defense to an enforcement action by the Secretary.

(f) Sunset

Subsections (a), (b), (c), and (e) shall cease to be effective on the date that is 5 years after July 9, 2012.

(June 25, 1938, ch. 675, §506D, as added Pub. L. 112–144, title X, §1003, July 9, 2012, 126 Stat. 1103.)

§356e. Drug shortage list

(a) Establishment

The Secretary shall maintain an up-to-date list of drugs that are determined by the Secretary to be in shortage in the United States.

(b) Contents

For each drug on such list, the Secretary shall include the following information:

(1) The name of the drug in shortage, including the National Drug Code number for such drug.

(2) The name of each manufacturer of such drug.

(3) The reason for the shortage, as determined by the Secretary, selecting from the following categories:

(A) Requirements related to complying with good manufacturing practices.

(B) Regulatory delay.

(C) Shortage of an active ingredient.

(D) Shortage of an inactive ingredient component.

(E) Discontinuance of the manufacture of the drug.

(F) Delay in shipping of the drug.

(G) Demand increase for the drug.

(4) The estimated duration of the shortage as determined by the Secretary.

(c) Public availability

(1) In general

Subject to paragraphs (2) and (3), the Secretary shall make the information in such list publicly available.

(2) Trade secrets and confidential information

Nothing in this section alters or amends section 1905 of title 18 or section 552(b)(4) of title 5.

(3) Public health exception

The Secretary may choose not to make information collected under this section publicly available under paragraph (1) or section 356c(c) of this title if the Secretary determines that disclosure of such information would adversely affect the public health (such as by increasing the possibility of hoarding or other disruption of the availability of drug products to patients).

(d) Interagency notification

Not later than 180 days after March 27, 2020, and every 90 days thereafter, the Secretary shall transmit a report regarding the drugs of the current drug shortage list under this section to the Administrator of the Centers for Medicare & Medicaid Services.

(June 25, 1938, ch. 675, §506E, as added Pub. L. 112–144, title X, §1004, July 9, 2012, 126 Stat. 1104; amended Pub. L. 114–255, div. A, title III, §3101(a)(2)(G), Dec. 13, 2016, 130 Stat. 1153; Pub. L. 116–136, div. A, title III, §3112(c), Mar. 27, 2020, 134 Stat. 362.)

Editorial Notes

Amendments

2020—Subsec. (d). Pub. L. 116–136 added subsec. (d).

2016—Subsec. (b)(3)(E). Pub. L. 114–255, which directed substitution of "discontinuance" for "discontinuation", was executed by substituting "Discontinuance" for "Discontinuation" to reflect the probable intent of Congress.

Statutory Notes and Related Subsidiaries

Effective Date of 2020 Amendment

Amendment by Pub. L. 116–136 effective 180 days after Mar. 27, 2020, see section 3112(g) of Pub. L. 116–136, set out as a note under section 356c of this title.

§356f. Hospital repackaging of drugs in shortage

(a) Definitions

In this section:

(1) Drug

The term "drug" excludes any controlled substance (as such term is defined in section 802 of this title).

(2) Health system

The term "health system" means a collection of hospitals that are owned and operated by the same entity and that share access to databases with drug order information for their patients.

(3) Repackage

For the purposes of this section only, the term "repackage", with respect to a drug, means to divide the volume of a drug into smaller amounts in order to—

(A) extend the supply of a drug in response to the placement of the drug on a drug shortage list under section 356e of this title; and

(B) facilitate access to the drug by hospitals within the same health system.

(b) Exclusion from registration

Notwithstanding any other provision of this chapter, a hospital shall not be considered an establishment for which registration is required under section 360 of this title solely because it repackages a drug and transfers it to another hospital within the same health system in accordance with the conditions in subsection (c)—

(1) during any period in which the drug is listed on the drug shortage list under section 356e of this title; or

(2) during the 60-day period following any period described in paragraph (1).

(c) Conditions

Subsection (b) shall only apply to a hospital, with respect to the repackaging of a drug for transfer to another hospital within the same health system, if the following conditions are met:

(1) Drug for intrasystem use only

In no case may a drug that has been repackaged in accordance with this section be sold or otherwise distributed by the health system or a hospital within the system to an entity or individual that is not a hospital within such health system.

(2) Compliance with State rules

Repackaging of a drug under this section shall be done in compliance with applicable State requirements of each State in which the drug is repackaged and received.

(d) Termination

This section shall not apply on or after the date on which the Secretary issues final guidance that clarifies the policy of the Food and Drug Administration regarding hospital pharmacies repackaging and safely transferring repackaged drugs to other hospitals within the same health system during a drug shortage.

(June 25, 1938, ch. 675, §506F, as added Pub. L. 112–144, title X, §1007, July 9, 2012, 126 Stat. 1106.)

§356g. Standards for regenerative medicine and regenerative advanced therapies

(a) In general

Not later than 2 years after December 13, 2016, the Secretary, in consultation with the National Institute of Standards and Technology and stakeholders (including regenerative medicine and advanced therapies manufacturers and clinical trial sponsors, contract manufacturers, academic institutions, practicing clinicians, regenerative medicine and advanced therapies industry organizations, and standard setting organizations), shall facilitate an effort to coordinate and prioritize the development of standards and consensus definition of terms, through a public process, to support, through regulatory predictability, the development, evaluation, and review of regenerative medicine therapies and regenerative advanced therapies, including with respect to the manufacturing processes and controls of such products.

(b) Activities

(1) In general

In carrying out this section, the Secretary shall continue to—

(A) identify opportunities to help advance the development of regenerative medicine therapies and regenerative advanced therapies;

(B) identify opportunities for the development of laboratory regulatory science research and documentary standards that the Secretary determines would help support the development, evaluation, and review of regenerative medicine therapies and regenerative advanced therapies through regulatory predictability; and

(C) work with stakeholders, such as those described in subsection (a), as appropriate, in the development of such standards.

(2) Regulations and guidance

Not later than 1 year after the development of standards as described in subsection (a), the Secretary shall review relevant regulations and guidance and, through a public process, update such regulations and guidance as the Secretary determines appropriate.

(c) Definitions

For purposes of this section, the terms "regenerative medicine therapy" and "regenerative advanced therapy" have the meanings given such terms in section 356(g) of this title.

(June 25, 1938, ch. 675, §506G, as added Pub. L. 114–255, div. A, title III, §3036, Dec. 13, 2016, 130 Stat. 1104; amended Pub. L. 115–52, title IX, §901(b), Aug. 18, 2017, 131 Stat. 1076.)

Editorial Notes

Amendments

2017—Subsec. (b)(1)(A). Pub. L. 115–52 substituted "identify" for "identity".

Statutory Notes and Related Subsidiaries

Guidance Regarding Devices Used in the Recovery, Isolation, or Delivery of Regenerative Advanced Therapies

Pub. L. 114–255, div. A, title III, §3034, Dec. 13, 2016, 130 Stat. 1103, provided that:

"(a) Draft Guidance.—Not later than 1 year after the date of enactment of the 21st Century Cures Act [Dec. 13, 2016], the Secretary of Health and Human Services, acting through the Commissioner of Food and Drugs, shall issue draft guidance clarifying how, in the context of regenerative advanced therapies, the Secretary will evaluate devices used in the recovery, isolation, or delivery of regenerative advanced therapies. In doing so, the Secretary shall specifically address—

"(1) how the Food and Drug Administration intends to simplify and streamline regulatory requirements for combination device and cell or tissue products;

"(2) what, if any, intended uses or specific attributes would result in a device used with a regenerative therapy product to be classified as a class III device;

"(3) when the Food and Drug Administration considers it is necessary, if ever, for the intended use of a device to be limited to a specific intended use with only one particular type of cell; and

"(4) application of the least burdensome approach to demonstrate how a device may be used with more than one cell type.

"(b) FINAL GUIDANCE.—Not later than 12 months after the close of the period for public comment on the draft guidance under subsection (a), the Secretary of Health and Human Services shall finalize such guidance."

§356h. Competitive generic therapies

(a) In general

The Secretary may, at the request of an applicant of a drug that is designated as a competitive generic therapy pursuant to subsection (b), expedite the development and review of an abbreviated new drug application under section 355(j) of this title for such drug.

(b) Designation process

(1) Request

The applicant may request the Secretary to designate the drug as a competitive generic therapy.

(2) Timing

A request under paragraph (1) may be made concurrently with, or at any time prior to, the submission of an abbreviated new drug application for the drug under section 355(j) of this title.

(3) Criteria

A drug is eligible for designation as a competitive generic therapy under this section if the Secretary determines that there is inadequate generic competition.

(4) Designation

Not later than 60 calendar days after the receipt of a request under paragraph (1), the Secretary may —

(A) determine whether the drug that is the subject of the request meets the criteria described in paragraph (3); and

(B) if the Secretary finds that the drug meets such criteria, designate the drug as a competitive generic therapy.

(c) Actions

In expediting the development and review of an application under subsection (a), the Secretary may, as requested by the applicant, take actions including the following:

(1) Hold meetings with the applicant and the review team throughout the development of the drug prior to submission of the application for such drug under section 355(j) of this title.

(2) Provide timely advice to, and interactive communication with, the applicant regarding the development of the drug to ensure that the development program to gather the data necessary for approval is as efficient as practicable.

(3) Involve senior managers and experienced review staff, as appropriate, in a collaborative, coordinated review of such application, including with respect to drug-device combination products and other complex products.

(4) Assign a cross-disciplinary project lead—

(A) to facilitate an efficient review of the development program and application, including manufacturing inspections; and

(B) to serve as a scientific liaison between the review team and the applicant.

(d) Reporting requirement

Not later than one year after the date of the approval of an application under section 355(j) of this title with respect to a drug for which the development and review is expedited under this section, the sponsor

of such drug shall report to the Secretary on whether the drug has been marketed in interstate commerce since the date of such approval.

(e) Definitions

In this section:

(1) The term "generic drug" means a drug that is approved pursuant to section 355(j) of this title.

(2) The term "inadequate generic competition" means, with respect to a drug, there is not more than one approved drugs [1] on the list of drugs described in section 355(j)(7)(A) of this title (not including drugs on the discontinued section of such list) that is—

(A) the reference listed drug; or

(B) a generic drug with the same reference listed drug as the drug for which designation as a competitive generic therapy is sought.

(3) The term "reference listed drug" means the listed drug (as such term is used in section 355(j) of this title) for the drug involved.

(June 25, 1938, ch. 675, §506H, as added Pub. L. 115–52, title VIII, §803(a), Aug. 18, 2017, 131 Stat. 1070.)

Statutory Notes and Related Subsidiaries

Guidance; Amended Regulations

Pub. L. 115–52, title VIII, §803(b), Aug. 18, 2017, 131 Stat. 1071, provided that:

"(1) In general.—

"(A) Issuance.—The Secretary of Health and Human Services shall—

"(i) not later than 18 months after the date of enactment of this Act [Aug. 18, 2017], issue draft guidance on section 506H of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 356h], as added by subsection (a); and

"(ii) not later than 1 year after the close of the comment period for the draft guidance, issue final guidance on such section 506H.

"(B) Contents.—The guidance issued under this paragraph shall—

"(i) specify the process and criteria by which the Secretary makes a designation under section 506H of the Federal Food, Drug, and Cosmetic Act, as added by subsection (a);

"(ii) specify the actions the Secretary may take to expedite the development and review of a competitive generic therapy pursuant to such a designation; and

"(iii) include good review management practices for competitive generic therapies.

"(2) Amended regulations.—The Secretary of Health and Human Services shall issue or revise any regulations as may be necessary to carry out this section not later than 2 years after the date of enactment of this Act [Aug. 18, 2017]."

[1] *So in original. Probably should be "drug".*

§356i. Prompt reports of marketing status

(a) Notification of withdrawal

The holder of an application approved under subsection (c) or (j) of section 355 of this title shall notify the Secretary in writing 180 days prior to withdrawing the approved drug from sale, or if 180 days is not practicable as soon as practicable but not later than the date of withdrawal. The holder shall include with such notice the—

(1) National Drug Code;

(2) identity of the drug by established name and by proprietary name, if any;

(3) new drug application number or abbreviated application number;

(4) strength of the drug;

(5) date on which the drug is expected to no longer be available for sale; and

(6) reason for withdrawal of the drug.

(b) Notification of drug not available for sale

The holder of an application approved under subsection (c) or (j) [1] shall notify the Secretary in writing within 180 calendar days of the date of approval of the drug if the drug will not be available for sale within 180 calendar days of such date of approval. The holder shall include with such notice the—

(1) identity of the drug by established name and by proprietary name, if any;
(2) new drug application number or abbreviated application number;
(3) strength of the drug;
(4) date on which the drug will be available for sale, if known; and
(5) reason for not marketing the drug after approval.

(c) Additional one-time report

Within 180 days of August 18, 2017, all holders of applications approved under subsection (c) or (j) of section 355 of this title shall review the information in the list published under subsection [2] 355(j)(7)(A) of this title and shall notify the Secretary in writing that—

(1) all of the application holder's drugs in the active section of the list published under subsection [2] 355(j)(7)(A) of this title are available for sale; or

(2) one or more of the application holder's drugs in the active section of the list published under subsection [2] 355(j)(7)(A) of this title have been withdrawn from sale or have never been available for sale, and include with such notice the information required pursuant to subsection (a) or (b), as applicable.

(d) Failure to meet requirements

If a holder of an approved application fails to submit the information required under subsection (a), (b), or (c), the Secretary may move the application holder's drugs from the active section of the list published under subsection [2] 355(j)(7)(A) of this title to the discontinued section of the list, except that the Secretary shall remove from the list in accordance with subsection [2] 355(j)(7)(C) of this title drugs the Secretary determines have been withdrawn from sale for reasons of safety of [3] effectiveness.

(e) Updates

The Secretary shall update the list published under subsection [2] 355(j)(7)(A) of this title based on the information provided under subsections (a), (b), and (c) by moving drugs that are not available for sale from the active section to the discontinued section of the list, except that drugs the Secretary determines have been withdrawn from sale for reasons of safety or effectiveness shall be removed from the list in accordance with subsection [2] 355(j)(7)(C) of this title. The Secretary shall make monthly updates to the list based on the information provided pursuant to subsections (a) and (b), and shall update the list based on the information provided under subsection (c) as soon as practicable.

(f) Limitation on use of notices

Any notice submitted under this section shall not be made public by the Secretary and shall be used solely for the purpose of the updates described in subsection (e).

(June 25, 1938, ch. 675, §506I, as added Pub. L. 115–52, title VIII, §804, Aug. 18, 2017, 131 Stat. 1071.)

[1] *So in original. Probably means subsection (c) or (j) of section 355 of this title.*

[2] *So in original. Probably should be "section".*

[3] *So in original. Probably should be "or".*

§356j. Discontinuance or interruption in the production of medical devices

(a) In general

A manufacturer of a device that—

(1) is critical to public health during a public health emergency, including devices that are life-supporting, life-sustaining, or intended for use in emergency medical care or during surgery; or

(2) for which the Secretary determines that information on potential meaningful supply disruptions of such device is needed during, or in advance of, a public health emergency;

shall, during, or in advance of, a public health emergency declared by the Secretary under section 247d of title 42, notify the Secretary, in accordance with subsection (b), of a permanent discontinuance in the manufacture of the device (except for discontinuances as a result of an approved modification of the device) or an interruption of the manufacture of the device that is likely to lead to a meaningful disruption in the supply of that device in the United States, and the reasons for such discontinuance or interruption.

(b) Timing

A notice required under subsection (a) shall be submitted to the Secretary—

(1) at least 6 months prior to the date of the discontinuance or interruption; or

(2) if compliance with paragraph (1) is not possible, as soon as practicable.

(c) Distribution

(1) Public availability

To the maximum extent practicable, subject to paragraph (2), the Secretary shall distribute, through such means as the Secretary determines appropriate, information on the discontinuance or interruption of the manufacture of devices reported under subsection (a) to appropriate organizations, including physician, health provider, patient organizations, and supply chain partners, as appropriate and applicable, as described in subsection (g).

(2) Public health exception

The Secretary may choose not to make information collected under this section publicly available pursuant to this section if the Secretary determines that disclosure of such information would adversely affect the public health, such as by increasing the possibility of unnecessary over purchase of product, component parts, or other disruption of the availability of medical products to patients.

(d) Confidentiality

Nothing in this section shall be construed as authorizing the Secretary to disclose any information that is a trade secret or confidential information subject to section 552(b)(4) of title 5 or section 1905 of title 18.

(e) Failure to meet requirements

If a person fails to submit information required under subsection (a) in accordance with subsection (b)—

(1) the Secretary shall issue a letter to such person informing such person of such failure;

(2) not later than 30 calendar days after the issuance of a letter under paragraph (1), the person who receives such letter shall submit to the Secretary a written response to such letter setting forth the basis for noncompliance and providing information required under subsection (a); and

(3) not later than 45 calendar days after the issuance of a letter under paragraph (1), the Secretary shall make such letter and any response to such letter under paragraph (2) available to the public on the internet website of the Food and Drug Administration, with appropriate redactions made to protect information described in subsection (d), except that, if the Secretary determines that the letter under paragraph (1) was issued in error or, after review of such response, the person had a reasonable basis for not notifying as required under subsection (a), the requirements of this paragraph shall not apply.

(f) Expedited inspections and reviews

If, based on notifications described in subsection (a) or any other relevant information, the Secretary concludes that there is, or is likely to be, a shortage of an [1] device, the Secretary shall, as appropriate—

(1) prioritize and expedite the review of a submission under section 360c(f)(2) of this title, 360e of this title, review of a notification under section 360(k) of this title, or 360j(m) of this title for a device that could help mitigate or prevent such shortage; or

(2) prioritize and expedite an inspection or reinspection of an establishment that could help mitigate or prevent such shortage.

(g) Device shortage list

(1) Establishment

The Secretary shall establish and maintain an up-to-date list of devices that are determined by the Secretary to be in shortage in the United States.

(2) Contents

For each device included on the list under paragraph (1), the Secretary shall include the following information:

(A) The category or name of the device in shortage.

(B) The name of each manufacturer of such device.

(C) The reason for the shortage, as determined by the Secretary, selecting from the following categories:

(i) Requirements related to complying with good manufacturing practices.

(ii) Regulatory delay.

(iii) Shortage or discontinuance of a component or part.

(iv) Discontinuance of the manufacture of the device.

(v) Delay in shipping of the device.

(vi) Delay in sterilization of the device.

(vii) Demand increase for the device.

(viii) Facility closure.

(D) The estimated duration of the shortage as determined by the Secretary.

(3) Public availability

(A) In general

Subject to subparagraphs (B) and (C), the Secretary shall make the information in the list under paragraph (1) publicly available.

(B) Trade secrets and confidential information

Nothing in this subsection shall be construed to alter or amend section 1905 of title 18 or section 552(b)(4) of title 5.

(C) Public health exception

The Secretary may elect not to make information collected under this subsection publicly available if the Secretary determines that disclosure of such information would adversely affect the public health (such as by increasing the possibility of hoarding or other disruption of the availability of the device to patients).

(h) Rule of construction

Nothing in this section shall be construed to affect the authority of the Secretary on March 27, 2020, to expedite the review of devices under section 360e of this title, section 360e–3 of this title relating to the priority review program for devices, and section 360bbb–3 of this title relating to the emergency use authorization authorities.

(i) Definitions

In this section:

(1) Meaningful disruption

The term "meaningful disruption"—

(A) means a change in production that is reasonably likely to lead to a reduction in the supply of a device by a manufacturer that is more than negligible and affects the ability of the manufacturer to fill orders or meet expected demand for its product;

(B) does not include interruptions in manufacturing due to matters such as routine maintenance or insignificant changes in manufacturing so long as the manufacturer expects to resume operations in a

short period of time, not to exceed 6 months;

(C) does not include interruptions in manufacturing of components or raw materials so long as such interruptions do not result in a shortage of the device and the manufacturer expects to resume operations in a reasonable period of time; and

(D) does not include interruptions in manufacturing that do not lead to a reduction in procedures or diagnostic tests associated with a medical device designed to perform more than one procedure or diagnostic test.

(2) Shortage

The term "shortage", with respect to a device, means a period of time when the demand or projected demand for the device within the United States exceeds the supply of the device.

(June 25, 1938, ch. 675, §506J, as added Pub. L. 116–136, div. A, title III, §3121, Mar. 27, 2020, 134 Stat. 363.)

[1] *So in original. Probably should be "a".*

§357. Qualification of drug development tools

(a) Process for qualification

(1) In general

The Secretary shall establish a process for the qualification of drug development tools for a proposed context of use under which—

(A)(i) a requestor initiates such process by submitting a letter of intent to the Secretary; and

(ii) the Secretary accepts or declines to accept such letter of intent;

(B)(i) if the Secretary accepts the letter of intent, a requestor submits a qualification plan to the Secretary; and

(ii) the Secretary accepts or declines to accept the qualification plan; and

(C)(i) if the Secretary accepts the qualification plan, the requestor submits to the Secretary a full qualification package;

(ii) the Secretary determines whether to accept such qualification package for review; and

(iii) if the Secretary accepts such qualification package for review, the Secretary conducts such review in accordance with this section.

(2) Acceptance and review of submissions

(A) In general

Subparagraphs (B), (C), and (D) shall apply with respect to the treatment of a letter of intent, a qualification plan, or a full qualification package submitted under paragraph (1) (referred to in this paragraph as "qualification submissions").

(B) Acceptance factors; nonacceptance

The Secretary shall determine whether to accept a qualification submission based on factors which may include the scientific merit of the qualification submission. A determination not to accept a submission under paragraph (1) shall not be construed as a final determination by the Secretary under this section regarding the qualification of a drug development tool for its proposed context of use.

(C) Prioritization of qualification review

The Secretary may prioritize the review of a full qualification package submitted under paragraph (1) with respect to a drug development tool, based on factors determined appropriate by the Secretary, including—

(i) as applicable, the severity, rarity, or prevalence of the disease or condition targeted by the drug development tool and the availability or lack of alternative treatments for such disease or condition; and

(ii) the identification, by the Secretary or by biomedical research consortia and other expert stakeholders, of such a drug development tool and its proposed context of use as a public health

priority.

(D) Engagement of external experts

The Secretary may, for purposes of the review of qualification submissions, through the use of cooperative agreements, grants, or other appropriate mechanisms, consult with biomedical research consortia and may consider the recommendations of such consortia with respect to the review of any qualification plan submitted under paragraph (1) or the review of any full qualification package under paragraph (3).

(3) Review of full qualification package

The Secretary shall—

(A) conduct a comprehensive review of a full qualification package accepted under paragraph (1)(C); and

(B) determine whether the drug development tool at issue is qualified for its proposed context of use.

(4) Qualification

The Secretary shall determine whether a drug development tool is qualified for a proposed context of use based on the scientific merit of a full qualification package reviewed under paragraph (3).

(b) Effect of qualification

(1) In general

A drug development tool determined to be qualified under subsection (a)(4) for a proposed context of use specified by the requestor may be used by any person in such context of use for the purposes described in paragraph (2).

(2) Use of a drug development tool

Subject to paragraph (3), a drug development tool qualified under this section may be used for—

(A) supporting or obtaining approval or licensure (as applicable) of a drug or biological product (including in accordance with section 356(c) of this title) under section 355 of this title or section 351 of the Public Health Service Act [42 U.S.C. 262]; or

(B) supporting the investigational use of a drug or biological product under section 355(i) of this title or section 351(a)(3) of the Public Health Service Act [42 U.S.C. 262(a)(3)].

(3) Rescission or modification

(A) In general

The Secretary may rescind or modify a determination under this section to qualify a drug development tool if the Secretary determines that the drug development tool is not appropriate for the proposed context of use specified by the requestor. Such a determination may be based on new information that calls into question the basis for such qualification.

(B) Meeting for review

If the Secretary rescinds or modifies under subparagraph (A) a determination to qualify a drug development tool, the requestor involved shall, on request, be granted a meeting with the Secretary to discuss the basis of the Secretary's decision to rescind or modify the determination before the effective date of the rescission or modification.

(c) Transparency

(1) In general

Subject to paragraph (3), the Secretary shall make publicly available, and update on at least a biannual basis, on the Internet website of the Food and Drug Administration the following:

(A) Information with respect to each qualification submission under the qualification process under subsection (a), including—

(i) the stage of the review process applicable to the submission;

(ii) the date of the most recent change in stage status;

(iii) whether external scientific experts were utilized in the development of a qualification plan or the review of a full qualification package; and

(iv) submissions from requestors under the qualification process under subsection (a), including any data and evidence contained in such submissions, and any updates to such submissions.

(B) The Secretary's formal written determinations in response to such qualification submissions.

(C) Any rescissions or modifications under subsection (b)(3) of a determination to qualify a drug development tool.

(D) Summary reviews that document conclusions and recommendations for determinations to qualify drug development tools under subsection (a).

(E) A comprehensive list of—

(i) all drug development tools qualified under subsection (a); and

(ii) all surrogate endpoints which were the basis of approval or licensure (as applicable) of a drug or biological product (including in accordance with section 356(c) of this title) under section 355 of this title or section 351 of the Public Health Service Act [42 U.S.C. 262].

(2) Relation to Trade Secrets Act

Information made publicly available by the Secretary under paragraph (1) shall be considered a disclosure authorized by law for purposes of section 1905 of title 18.

(3) Applicability

(A) In general

Nothing in this section shall be construed as authorizing or directing the Secretary to disclose—

(i) any information contained in an application submitted under section 355 of this title or section 351 of the Public Health Service Act [42 U.S.C. 262] that is confidential commercial or trade secret information subject to section 552(b)(4) of title 5 or section 1905 of title 18; or

(ii) in the case of a drug development tool that may be used to support the development of a qualified countermeasure, security countermeasure, or qualified pandemic or epidemic product, as defined in sections 319F–1, 319F–2, and 319F–3, respectively, of the Public Health Service Act [42 U.S.C. 247d–6a, 247d–6b, 247d–6d], any information that the Secretary determines has a significant potential to affect national security.

(B) Public acknowledgment

In the case that the Secretary, pursuant to subparagraph (A)(ii), does not make information publicly available, the Secretary shall provide on the internet website of the Food and Drug Administration an acknowledgment of the information that has not been disclosed, pursuant to subparagraph (A)(ii).

(d) Rule of construction

Nothing in this section shall be construed—

(1) to alter the standards of evidence under subsection (c) or (d) of section 355 of this title, including the substantial evidence standard in such subsection (d), or under section 351 of the Public Health Service Act [42 U.S.C. 262] (as applicable); or

(2) to limit the authority of the Secretary to approve or license products under this chapter or the Public Health Service Act [42 U.S.C. 201 et seq.], as applicable (as in effect before December 13, 2016).

(e) Definitions

In this section:

(1) Biomarker

The term "biomarker"—

(A) means a characteristic (such as a physiologic, pathologic, or anatomic characteristic or measurement) that is objectively measured and evaluated as an indicator of normal biologic processes, pathologic processes, or biological responses to a therapeutic intervention; and

(B) includes a surrogate endpoint.

(2) Biomedical research consortia

The term "biomedical research consortia" means collaborative groups that may take the form of public-private partnerships and may include government agencies, institutions of higher education (as defined in section 1001(a) of title 20), patient advocacy groups, industry representatives, clinical and scientific experts, and other relevant entities and individuals.

(3) Clinical outcome assessment

The term "clinical outcome assessment" means—

(A) a measurement of a patient's symptoms, overall mental state, or the effects of a disease or condition on how the patient functions; and

(B) includes a patient-reported outcome.

(4) Context of use

The term "context of use" means, with respect to a drug development tool, the circumstances under which the drug development tool is to be used in drug development and regulatory review.

(5) Drug development tool

The term "drug development tool" includes—

(A) a biomarker;

(B) a clinical outcome assessment; and

(C) any other method, material, or measure that the Secretary determines aids drug development and regulatory review for purposes of this section.

(6) Patient-reported outcome

The term "patient-reported outcome" means a measurement based on a report from a patient regarding the status of the patient's health condition without amendment or interpretation of the patient's report by a clinician or any other person.

(7) Qualification

The terms "qualification" and "qualified" mean a determination by the Secretary that a drug development tool and its proposed context of use can be relied upon to have a specific interpretation and application in drug development and regulatory review under this chapter.

(8) Requestor

The term "requestor" means an entity or entities, including a drug sponsor or a biomedical research consortia, seeking to qualify a drug development tool for a proposed context of use under this section.

(9) Surrogate endpoint

The term "surrogate endpoint" means a marker, such as a laboratory measurement, radiographic image, physical sign, or other measure, that is not itself a direct measurement of clinical benefit, and—

(A) is known to predict clinical benefit and could be used to support traditional approval of a drug or biological product; or

(B) is reasonably likely to predict clinical benefit and could be used to support the accelerated approval of a drug or biological product in accordance with section 356(c) of this title.

(June 25, 1938, ch. 675, §507, as added Pub. L. 114–255, div. A, title III, §3011(a), Dec. 13, 2016, 130 Stat. 1086; amended Pub. L. 116–22, title VII, §705(e), June 24, 2019, 133 Stat. 964.)

Editorial Notes

References in Text

The Public Health Service Act, referred to in subsec. (d)(2), is act July 1, 1944, ch. 373, 58 Stat. 682, which is classified generally to chapter 6A (§201 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 201 of Title 42 and Tables.

Prior Provisions

A prior section 357, act June 25, 1938, ch. 675, §507, as added July 6, 1945, ch. 281, §3, 59 Stat. 463; amended Mar. 10, 1947, ch. 16, §3, 61 Stat. 12; July 13, 1949, ch. 305, §2, 63 Stat. 409; Aug. 5, 1953, ch. 334, §2, 67 Stat. 389; Pub. L. 87–781, title I, §§105(a), (b), (d)–(f), 106(a), (b), Oct. 10, 1962, 76 Stat. 785, 786, 787; Pub. L. 90–

399, §105(b), July 13, 1968, 82 Stat. 352; Pub. L. 102–300, §6(b)(2), June 16, 1992, 106 Stat. 240; Pub. L. 103–80, §3(p), Aug. 13, 1993, 107 Stat. 777, related to certification of drugs containing penicillin, streptomycin, chlortetracycline, chloramphenicol, bacitracin, or any other antibiotic drug, prior to repeal by Pub. L. 105–115, title I, §125(b)(1), Nov. 21, 1997, 111 Stat. 2325.

Amendments

2019—Subsec. (c)(3). Pub. L. 116–22 designated existing provisions as subpar. (A), inserted heading and "or directing" after "authorizing" in text, substituted "disclose—" for "disclose", designated remainder of existing provisions as cl. (i) of subpar. (A), substituted ";or" for period at end, and added cl. (ii) of subpar. (A) and subpar. (B).

Statutory Notes and Related Subsidiaries

Guidance

Pub. L. 114–255, div. A, title III, §3011(b), Dec. 13, 2016, 130 Stat. 1089, provided that:

"(1) In general.—The Secretary of Health and Human Services (referred to in this section [this note] as the 'Secretary') shall, in consultation with biomedical research consortia (as defined in subsection (e) of section 507 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 357] (as added by subsection (a)) and other interested parties through a collaborative public process, issue guidance to implement such section 507 that—

"(A) provides a conceptual framework describing appropriate standards and scientific approaches to support the development of biomarkers delineated under the taxonomy established under paragraph (3);

"(B) with respect to the qualification process under such section 507—

"(i) describes the requirements that entities seeking to qualify a drug development tool under such section shall observe when engaging in such process;

"(ii) outlines reasonable timeframes for the Secretary's review of letters, qualification plans, or full qualification packages submitted under such process; and

"(iii) establishes a process by which such entities or the Secretary may consult with biomedical research consortia and other individuals and entities with expert knowledge and insights that may assist the Secretary in the review of qualification plans and full qualification submissions under such section; and

"(C) includes such other information as the Secretary determines appropriate.

"(2) Timing.—Not later than 3 years after the date of the enactment of this Act [Dec. 13, 2016], the Secretary shall issue draft guidance under paragraph (1) on the implementation of section 507 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 357] (as added by subsection (a)). The Secretary shall issue final guidance on the implementation of such section not later than 6 months after the date on which the comment period for the draft guidance closes.

"(3) Taxonomy.—

"(A) In general.—For purposes of informing guidance under this subsection, the Secretary shall, in consultation with biomedical research consortia and other interested parties through a collaborative public process, establish a taxonomy for the classification of biomarkers (and related scientific concepts) for use in drug development.

"(B) Public availability.—Not later than 2 years after the date of the enactment of this Act, the Secretary shall make such taxonomy publicly available in draft form for public comment. The Secretary shall finalize the taxonomy not later than 1 year after the close of the public comment period."

§358. Authority to designate official names

(a) Necessity or desirability; use in official compendiums; infringement of trademarks

The Secretary may designate an official name for any drug or device if he determines that such action is necessary or desirable in the interest of usefulness and simplicity. Any official name designated under this section for any drug or device shall be the only official name of that drug or device used in any official compendium published after such name has been prescribed or for any other purpose of this chapter. In no event, however, shall the Secretary establish an official name so as to infringe a valid trademark.

(b) Review of names in official compendiums

Within a reasonable time after October 10, 1962, and at such other times as he may deem necessary, the Secretary shall cause a review to be made of the official names by which drugs are identified in the official United States Pharmacopoeia, the official Homoeopathic Pharmacopoeia of the United States, and the official National Formulary, and all supplements thereto, and at such times as he may deem necessary shall cause a review to be made of the official names by which devices are identified in any official compendium (and all supplements thereto) to determine whether revision of any of those names is necessary or desirable in the interest of usefulness and simplicity.

(c) Determinations of complexity, usefulness, multiplicity, or lack of name; designation by Secretary

Whenever he determines after any such review that (1) any such official name is unduly complex or is not useful for any other reason, (2) two or more official names have been applied to a single drug or device, or to two or more drugs which are identical in chemical structure and pharmacological action and which are substantially identical in strength, quality, and purity, or to two or more devices which are substantially equivalent in design and purpose or (3) no official name has been applied to a medically useful drug or device, he shall transmit in writing to the compiler of each official compendium in which that drug or drugs or device are identified and recognized his request for the recommendation of a single official name for such drug or drugs or device which will have usefulness and simplicity. Whenever such a single official name has not been recommended within one hundred and eighty days after such request, or the Secretary determines that any name so recommended is not useful for any reason, he shall designate a single official name for such drug or drugs or device. Whenever he determines that the name so recommended is useful, he shall designate that name as the official name of such drug or drugs or device. Such designation shall be made as a regulation upon public notice and in accordance with the procedure set forth in section 553 of title 5.

(d) Revised official names; compilation, publication, and public distribution of listings

After each such review, and at such other times as the Secretary may determine to be necessary or desirable, the Secretary shall cause to be compiled, published, and publicly distributed a list which shall list all revised official names of drugs or devices designated under this section and shall contain such descriptive and explanatory matter as the Secretary may determine to be required for the effective use of those names.

(e) Request by compiler of official compendium for designation of name

Upon a request in writing by any compiler of an official compendium that the Secretary exercise the authority granted to him under subsection (a), he shall upon public notice and in accordance with the procedure set forth in section 553 of title 5 designate the official name of the drug or device for which the request is made.

(June 25, 1938, ch. 675, §508, as added Pub. L. 87–781, title I, §111(a), Oct. 10, 1962, 76 Stat. 789; amended Pub. L. 94–295, §5(b), May 28, 1976, 90 Stat. 581; Pub. L. 103–80, §3(q), Aug. 13, 1993, 107 Stat. 777.)

Editorial Notes

Amendments

1993—Subsecs. (c), (e). Pub. L. 103–80 substituted reference to section 553 of title 5 for "section 4 of the Administrative Procedure Act (5 U.S.C. 1003)".

1976—Subsec. (a). Pub. L. 94–295 substituted "drug or device" for "drug" wherever appearing.

Subsec. (b). Pub. L. 94–295 substituted "National Formulary, and all supplements thereto, and at such times as he may deem necessary shall cause a review to be made of the official names by which devices are identified in any official compendium (and all supplements thereto)" for "National Formulary, and all supplements thereto,".

Subsec. (c)(2). Pub. L. 94–295 inserted "or device" after "single drug", and "or to two or more devices which are substantially equivalent in design and purpose" after "purity,".

Subsec. (c)(3). Pub. L. 94–295 inserted "or device" after "useful drug" and after "drug or drugs" wherever appearing.

Subsec. (d). Pub. L. 94–295 inserted "or devices" after "drugs".

Subsec. (e). Pub. L. 94–295 substituted "drug or device" for "drug".

Statutory Notes and Related Subsidiaries

Effective Date

Pub. L. 87–781, title I, §111(b), Oct. 10, 1962, 76 Stat. 790, provided that: "This section [enacting this section] shall take effect on the date of its enactment [Oct. 10, 1962]."

§359. Nonapplicability of subchapter to cosmetics

This subchapter, as amended by the Drug Amendments of 1962, shall not apply to any cosmetic unless such cosmetic is also a drug or device or component thereof.

(June 25, 1938, ch. 675, §509, as added Pub. L. 87–781, title I, §113, Oct. 10, 1962, 76 Stat. 791.)

Editorial Notes

References in Text

This subchapter, as amended by the Drug Amendments of 1962, referred to in text, means the amendment of this subchapter by Pub. L. 87–781 which enacted sections 358 to 360 of this title, amended sections 351 to 353, 355, and 357 of this title, and enacted provisions set out as notes under sections 352, 355, 358, and 360 of this title.

The Drug Amendments of 1962, referred to in text, is Pub. L. 87–781, Oct. 10, 1962, 76 Stat. 780, as amended. For complete classification of this Act to the Code, see Short Title of 1962 Amendment note set out under section 301 of this title and Tables.

§360. Registration of producers of drugs or devices

(a) Definitions

As used in this section—

(1) the term "manufacture, preparation, propagation, compounding, or processing" shall include repackaging or otherwise changing the container, wrapper, or labeling of any drug package or device package in furtherance of the distribution of the drug or device from the original place of manufacture to the person who makes final delivery or sale to the ultimate consumer or user; and

(2) the term "name" shall include in the case of a partnership the name of each partner and, in the case of a corporation, the name of each corporate officer and director, and the State of incorporation.

(b) Annual registration

(1) During the period beginning on October 1 and ending on December 31 of each year, every person who owns or operates any establishment in any State engaged in the manufacture, preparation, propagation, compounding, or processing of a drug or drugs shall register with the Secretary the name of such person, places of business of such person, all such establishments, the unique facility identifier of each such establishment, and a point of contact e-mail address.

(2) During the period beginning on October 1 and ending on December 31 of each year, every person who owns or operates any establishment in any State engaged in the manufacture, preparation, propagation, compounding, or processing of a device or devices shall register with the Secretary his name, places of business, and all such establishments.

(3) The Secretary shall specify the unique facility identifier system that shall be used by registrants under paragraph (1). The requirement to include a unique facility identifier in a registration under paragraph (1) shall not apply until the date that the identifier system is specified by the Secretary under the preceding sentence.

(c) New producers

Every person upon first engaging in the manufacture, preparation, propagation, compounding, or processing of a drug or drugs or a device or devices in any establishment which he owns or operates in any State shall immediately register with the Secretary—

(1) with respect to drugs, the information described under subsection (b)(1); and

(2) with respect to devices, the information described under subsection (b)(2)..[1]

(d) Additional establishments

Every person duly registered in accordance with the foregoing subsections of this section shall immediately register with the Secretary any additional establishment which he owns or operates in any State and in which he begins the manufacture, preparation, propagation, compounding, or processing of a drug or drugs or a device or devices.

(e) Registration number; uniform system for identification of devices intended for human use

The Secretary may assign a registration number to any person or any establishment registered in accordance with this section. The Secretary may also assign a listing number to each drug or class of drugs listed under subsection (j). Any number assigned pursuant to the preceding sentence shall be the same as that assigned pursuant to the National Drug Code. The Secretary may by regulation prescribe a uniform system for the identification of devices intended for human use and may require that persons who are required to list such devices pursuant to subsection (j) shall list such devices in accordance with such system.

(f) Availability of registrations for inspection

The Secretary shall make available for inspection, to any person so requesting, any registration filed pursuant to this section; except that any list submitted pursuant to paragraph (3) of subsection (j) and the information accompanying any list or notice filed under paragraph (1) or (2) of that subsection shall be exempt from such inspection unless the Secretary finds that such an exemption would be inconsistent with protection of the public health.

(g) Exclusions from application of section

The foregoing subsections of this section shall not apply to—

(1) pharmacies which maintain establishments in conformance with any applicable local laws regulating the practice of pharmacy and medicine and which are regularly engaged in dispensing prescription drugs or devices, upon prescriptions of practitioners licensed to administer such drugs or devices to patients under the care of such practitioners in the course of their professional practice, and which do not manufacture, prepare, propagate, compound, or process drugs or devices for sale other than in the regular course of their business of dispensing or selling drugs or devices at retail;

(2) practitioners licensed by law to prescribe or administer drugs or devices and who manufacture, prepare, propagate, compound, or process drugs or devices solely for use in the course of their professional practice;

(3) persons who manufacture, prepare, propagate, compound, or process drugs or devices solely for use in research, teaching, or chemical analysis and not for sale;

(4) any distributor who acts as a wholesale distributor of devices, and who does not manufacture, repackage, process, or relabel a device; or

(5) such other classes of persons as the Secretary may by regulation exempt from the application of this section upon a finding that registration by such classes of persons in accordance with this section is not necessary for the protection of the public health.

In this subsection, the term "wholesale distributor" means any person (other than the manufacturer or the initial importer) who distributes a device from the original place of manufacture to the person who makes the final delivery or sale of the device to the ultimate consumer or user.

(h) Inspections

(1) In general

Every establishment that is required to be registered with the Secretary under this section shall be subject to inspection pursuant to section 374 of this title.

(2) Risk-based schedule for devices

(A) In general

The Secretary, acting through one or more officers or employees duly designated by the Secretary, shall inspect establishments described in paragraph (1) that are engaged in the manufacture, propagation, compounding, or processing of a device or devices (referred to in this subsection as "device establishments") in accordance with a risk-based schedule established by the Secretary.

(B) Factors and considerations

In establishing the risk-based schedule under subparagraph (A), the Secretary shall—

(i) apply, to the extent applicable for device establishments, the factors identified in paragraph (4); and

(ii) consider the participation of the device establishment, as applicable, in international device audit programs in which the United States participates or the United States recognizes for purposes of inspecting device establishments.

(3) Risk-based schedule for drugs

The Secretary, acting through one or more officers or employees duly designated by the Secretary, shall inspect establishments described in paragraph (1) that are engaged in the manufacture, preparation, propagation, compounding, or processing of a drug or drugs (referred to in this subsection as "drug establishments") in accordance with a risk-based schedule established by the Secretary.

(4) Risk factors

In establishing a risk-based schedule under paragraph (2) or (3), the Secretary shall inspect establishments according to the known safety risks of such establishments, which shall be based on the following factors:

(A) The compliance history of the establishment.

(B) The record, history, and nature of recalls linked to the establishment.

(C) The inherent risk of the drug or device manufactured, prepared, propagated, compounded, or processed at the establishment.

(D) The inspection frequency and history of the establishment, including whether the establishment has been inspected pursuant to section 374 of this title within the last 4 years.

(E) Whether the establishment has been inspected by a foreign government or an agency of a foreign government recognized under section 384e of this title.

(F) Any other criteria deemed necessary and appropriate by the Secretary for purposes of allocating inspection resources.

(5) Effect of status

In determining the risk associated with an establishment for purposes of establishing a risk-based schedule under paragraph (3), the Secretary shall not consider whether the drugs manufactured, prepared, propagated, compounded, or processed by such establishment are drugs described in section 353(b) of this title.

(6) Annual report on inspections of establishments

Beginning in 2014, not later than May 1 of each year, the Secretary shall make available on the Internet Web site of the Food and Drug Administration a report regarding—

(A)(i) the number of domestic and foreign establishments registered pursuant to this section in the previous calendar year; and

(ii) the number of such domestic establishments and the number of such foreign establishments that the Secretary inspected in the previous calendar year;

(B) with respect to establishments that manufacture, prepare, propagate, compound, or process an active ingredient of a drug or a finished drug product, the number of each such type of establishment; and

(C) the percentage of the budget of the Food and Drug Administration used to fund the inspections described under subparagraph (A).

(i) Registration of foreign establishments

(1) Every person who owns or operates any establishment within any foreign country engaged in the manufacture, preparation, propagation, compounding, or processing of a drug or device that is imported or

offered for import into the United States shall, through electronic means in accordance with the criteria of the Secretary—

(A) upon first engaging in any such activity, immediately submit a registration to the Secretary that includes—

(i) with respect to drugs, the name and place of business of such person, all such establishments, the unique facility identifier of each such establishment, a point of contact e-mail address, the name of the United States agent of each such establishment, the name of each importer of such drug in the United States that is known to the establishment, and the name of each person who imports or offers for import such drug to the United States for purposes of importation; and

(ii) with respect to devices, the name and place of business of the establishment, the name of the United States agent for the establishment, the name of each importer of such device in the United States that is known to the establishment, and the name of each person who imports or offers for import such device to the United States for purposes of importation; and

(B) each establishment subject to the requirements of subparagraph (A) shall thereafter register with the Secretary during the period beginning on October 1 and ending on December 31 of each year.

(2) The establishment shall also provide the information required by subsection (j).

(3) The Secretary is authorized to enter into cooperative arrangements with officials of foreign countries to ensure that adequate and effective means are available for purposes of determining, from time to time, whether drugs or devices manufactured, prepared, propagated, compounded, or processed by an establishment described in paragraph (1), if imported or offered for import into the United States, shall be refused admission on any of the grounds set forth in section 381(a) of this title.

(4) The Secretary shall specify the unique facility identifier system that shall be used by registrants under paragraph (1) with respect to drugs. The requirement to include a unique facility identifier in a registration under paragraph (1) with respect to drugs shall not apply until the date that the identifier system is specified by the Secretary under the preceding sentence.

(j) Filing of lists of drugs and devices manufactured, prepared, propagated and compounded by registrants; statements; accompanying disclosures

(1) Every person who registers with the Secretary under subsection (b), (c), (d), or (i) shall, at the time of registration under any such subsection, file with the Secretary a list of all drugs and a list of all devices and a brief statement of the basis for believing that each device included in the list is a device rather than a drug (with each drug and device in each list listed by its established name (as defined in section 352(e) of this title) and by any proprietary name) which are being manufactured, prepared, propagated, compounded, or processed by him for commercial distribution and which he has not included in any list of drugs or devices filed by him with the Secretary under this paragraph or paragraph (2) before such time of registration. Such list shall be prepared in such form and manner as the Secretary may prescribe and shall be accompanied by—

(A) in the case of a drug contained in the applicable list and subject to section 355 or 360b of this title, or a device intended for human use contained in the applicable list with respect to which a performance standard has been established under section 360d of this title or which is subject to section 360e of this title, a reference to the authority for the marketing of such drug or device and a copy of all labeling for such drug or device;

(B) in the case of any other drug or device contained in an applicable list—

(i) which drug is subject to section 353(b)(1) of this title, or which device is a restricted device, a copy of all labeling for such drug or device, a representative sampling of advertisements for such drug or device, and, upon request made by the Secretary for good cause, a copy of all advertisements for a particular drug product or device, or

(ii) which drug is not subject to section 353(b)(1) of this title or which device is not a restricted device, the label and package insert for such drug or device and a representative sampling of any other labeling for such drug or device;

(C) in the case of any drug contained in an applicable list which is described in subparagraph (B), a quantitative listing of its active ingredient or ingredients, except that with respect to a particular drug product the Secretary may require the submission of a quantitative listing of all ingredients if he finds that such submission is necessary to carry out the purposes of this chapter;

(D) if the registrant filing a list has determined that a particular drug product or device contained in such list is not subject to section 355 or 360b of this title, or the particular device contained in such list is not subject to a performance standard established under section 360d of this title or to section 360e of this title or is not a restricted device a brief statement of the basis upon which the registrant made such determination if the Secretary requests such a statement with respect to that particular drug product or device; and

(E) in the case of a drug contained in the applicable list, the name and place of business of each manufacturer of an excipient of the listed drug with which the person listing the drug conducts business, including all establishments used in the production of such excipient, the unique facility identifier of each such establishment, and a point of contact e-mail address for each such excipient manufacturer.

(2) Each person who registers with the Secretary under this section shall report to the Secretary, with regard to drugs once during the month of June of each year and once during the month of December of each year, and with regard to devices once each year during the period beginning on October 1 and ending on December 31, the following information:

(A) A list of each drug or device introduced by the registrant for commercial distribution which has not been included in any list previously filed by him with the Secretary under this subparagraph or paragraph (1) of this subsection. A list under this subparagraph shall list a drug or device by its established name (as defined in section 352(e) of this title), and by any proprietary name it may have and shall be accompanied by the other information required by paragraph (1).

(B) If since the date the registrant last made a report under this paragraph (or if he has not made a report under this paragraph, since February 1, 1973) he has discontinued the manufacture, preparation, propagation, compounding, or processing for commercial distribution of a drug or device included in a list filed by him under subparagraph (A) or paragraph (1); notice of such discontinuance, the date of such discontinuance, and the identity (by established name (as defined in section 352(e) of this title) and by any proprietary name) of such drug or device.

(C) If since the date the registrant reported pursuant to subparagraph (B) a notice of discontinuance he has resumed the manufacture, preparation, propagation, compounding, or processing for commercial distribution of the drug or device with respect to which such notice of discontinuance was reported; notice of such resumption, the date of such resumption, the identity of such drug or device (each by established name (as defined in section 352(e) of this title) and by any proprietary name), and the other information required by paragraph (1), unless the registrant has previously reported such resumption to the Secretary pursuant to this subparagraph.

(D) Any material change in any information previously submitted pursuant to this paragraph or paragraph (1).

(3)(A) Each person who registers with the Secretary under this section with regard to a drug shall report annually to the Secretary on the amount of each drug listed under paragraph (1) that was manufactured, prepared, propagated, compounded, or processed by such person for commercial distribution. Such information may be required to be submitted in an electronic format as determined by the Secretary. The Secretary may require that information required to be reported under this paragraph be submitted at the time a public health emergency is declared by the Secretary under section 247d of title 42.

(B) By order of the Secretary, certain biological products or categories of biological products regulated under section 262 of title 42 may be exempt from some or all of the reporting requirements under subparagraph (A), if the Secretary determines that applying such reporting requirements to such biological products or categories of biological products is not necessary to protect the public health.

(4) The Secretary may also require each registrant under this section to submit a list of each drug product which (A) the registrant is manufacturing, preparing, propagating, compounding, or processing for commercial distribution, and (B) contains a particular ingredient. The Secretary may not require the

submission of such a list unless he has made a finding that the submission of such a list is necessary to carry out the purposes of this chapter.

(5) The Secretary shall require persons subject to this subsection to use, for purposes of this subsection, the unique facility identifier systems specified under subsections (b)(3) and (i)(4) with respect to drugs. Such requirement shall not apply until the date that the identifier system under subsection (b)(3) or (i)(4), as applicable, is specified by the Secretary.

(k) Report preceding introduction of devices into interstate commerce

Each person who is required to register under this section and who proposes to begin the introduction or delivery for introduction into interstate commerce for commercial distribution of a device intended for human use shall, at least ninety days before making such introduction or delivery, report to the Secretary or person who is accredited under section 360m(a) of this title (in such form and manner as the Secretary shall by regulation prescribe)—

(1) the class in which the device is classified under section 360c of this title or if such person determines that the device is not classified under such section, a statement of that determination and the basis for such person's determination that the device is or is not so classified, and

(2) action taken by such person to comply with requirements under section 360d or 360e of this title which are applicable to the device.

A notification submitted under this subsection that contains clinical trial data for an applicable device clinical trial (as defined in section 282(j)(1) of title 42) shall be accompanied by the certification required under section 282(j)(5)(B) of such title. Such certification shall not be considered an element of such notification.

(l) Exemption from reporting requirements

(1) A report under subsection (k) is not required for a device intended for human use that is exempted from the requirements of this subsection under subsection (m) or is within a type that has been classified into class I under section 360c of this title. The exception established in the preceding sentence does not apply to any class I device that is intended for a use which is of substantial importance in preventing impairment of human health, or to any class I device that presents a potential unreasonable risk of illness or injury.

(2) Not later than 120 calendar days after December 13, 2016, and at least once every 5 years thereafter, as the Secretary determines appropriate, the Secretary shall identify, through publication in the Federal Register, any type of class I device that the Secretary determines no longer requires a report under subsection (k) to provide reasonable assurance of safety and effectiveness. Upon such publication—

(A) each type of class I device so identified shall be exempt from the requirement for a report under subsection (k); and

(B) the classification regulation applicable to each such type of device shall be deemed amended to incorporate such exemption.

(m) List of exempt class II devices; initial and final determinations by Secretary; publication in Federal Register

(1) The Secretary shall—

(A) not later than 90 days after December 13, 2016, and at least once every 5 years thereafter, as the Secretary determines appropriate—

(i) publish in the Federal Register a notice that contains a list of each type of class II device that the Secretary determines no longer requires a report under subsection (k) to provide reasonable assurance of safety and effectiveness; and

(ii) provide for a period of not less than 60 calendar days for public comment beginning on the date of the publication of such notice; and

(B) not later than 210 calendar days after December 13, 2016, publish in the Federal Register a list representing the Secretary's final determination with respect to the devices contained in the list published under subparagraph (A).

(2) Beginning on the date that is 1 calendar day after the date of publication of the final list under paragraph (1)(B), the Secretary may exempt a class II device from the requirement to submit a report under subsection (k), upon the Secretary's own initiative or a petition of an interested person, if the Secretary determines that such report is not necessary to assure the safety and effectiveness of the device. The Secretary shall publish in the Federal Register notice of the intent of the Secretary to exempt the device, or of the petition, and provide a 60-calendar-day period for public comment. Within 120 days after the issuance of the notice in the Federal Register, the Secretary shall publish an order in the Federal Register that sets forth the final determination of the Secretary regarding the exemption of the device that was the subject of the notice. If the Secretary fails to respond to a petition within 180 days of receiving it, the petition shall be deemed to be granted.

(3) Upon the publication of the final list under paragraph (1)(B)—

(A) each type of class II device so listed shall be exempt from the requirement for a report under subsection (k); and

(B) the classification regulation applicable to each such type of device shall be deemed amended to incorporate such exemption.

(n) Review of report; time for determination by Secretary

(1) The Secretary shall review the report required in subsection (k) and make a determination under section 360c(f)(1) of this title not later than 90 days after receiving the report.

(2)(A) Not later than 18 months after July 9, 2012, the Secretary shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate a report regarding when a premarket notification under subsection (k) should be submitted for a modification or change to a legally marketed device. The report shall include the Secretary's interpretation of the following terms: "could significantly affect the safety or effectiveness of the device", "a significant change or modification in design, material, chemical composition, energy source, or manufacturing process", and "major change or modification in the intended use of the device". The report also shall discuss possible processes for industry to use to determine whether a new submission under subsection (k) is required and shall analyze how to leverage existing quality system requirements to reduce premarket burden, facilitate continual device improvement, and provide reasonable assurance of safety and effectiveness of modified devices. In developing such report, the Secretary shall consider the input of interested stakeholders.

(B) The Secretary shall withdraw the Food and Drug Administration draft guidance entitled "Guidance for Industry and FDA Staff—510(k) Device Modifications: Deciding When to Submit a 510(k) for a Change to an Existing Device", dated July 27, 2011, and shall not use this draft guidance as part of, or for the basis of, any premarket review or any compliance or enforcement decisions or actions. The Secretary shall not issue—

(i) any draft guidance or proposed regulation that addresses when to submit a premarket notification submission for changes and modifications made to a manufacturer's previously cleared device before the receipt by the Committee on Energy and Commerce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate of the report required in subparagraph (A); and

(ii) any final guidance or regulation on that topic for one year after date of receipt of such report by the Committee on Energy and Commerce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate.

(C) The Food and Drug Administration guidance entitled "Deciding When to Submit a 510(k) for a Change to an Existing Device", dated January 10, 1997, shall be in effect until the subsequent issuance of guidance or promulgation, if appropriate, of a regulation described in subparagraph (B), and the Secretary shall interpret such guidance in a manner that is consistent with the manner in which the Secretary has interpreted such guidance since 1997.

(o) Reprocessed single-use devices

(1) With respect to reprocessed single-use devices for which reports are required under subsection (k):

(A) The Secretary shall identify such devices or types of devices for which reports under such subsection must, in order to ensure that the device is substantially equivalent to a predicate device,

include validation data, the types of which shall be specified by the Secretary, regarding cleaning and sterilization, and functional performance demonstrating that the single-use device will remain substantially equivalent to its predicate device after the maximum number of times the device is reprocessed as intended by the person submitting the premarket notification. Within six months after October 26, 2002, the Secretary shall publish in the Federal Register a list of the types so identified, and shall revise the list as appropriate. Reports under subsection (k) for devices or types of devices within a type included on the list are, upon publication of the list, required to include such validation data.

(B) In the case of each report under subsection (k) that was submitted to the Secretary before the publication of the initial list under subparagraph (A), or any revision thereof, and was for a device or type of device included on such list, the person who submitted the report under subsection (k) shall submit validation data as described in subparagraph (A) to the Secretary not later than nine months after the publication of the list. During such nine-month period, the Secretary may not take any action under this chapter against such device solely on the basis that the validation data for the device have not been submitted to the Secretary. After the submission of the validation data to the Secretary, the Secretary may not determine that the device is misbranded under section 352(o) of this title or adulterated under section 351(f)(1)(B) of this title, or take action against the device under section 331(p) of this title for failure to provide any information required by subsection (k) until (i) the review is terminated by withdrawal of the submission of the report under subsection (k); (ii) the Secretary finds the data to be acceptable and issues a letter; or (iii) the Secretary determines that the device is not substantially equivalent to a predicate device. Upon a determination that a device is not substantially equivalent to a predicate device, or if such submission is withdrawn, the device can no longer be legally marketed.

(C) In the case of a report under subsection (k) for a device identified under subparagraph (A) that is of a type for which the Secretary has not previously received a report under such subsection, the Secretary may, in advance of revising the list under subparagraph (A) to include such type, require that the report include the validation data specified in subparagraph (A).

(D) Section 352(o) of this title applies with respect to the failure of a report under subsection (k) to include validation data required under subparagraph (A).

(2) With respect to critical or semi-critical reprocessed single-use devices that, under subsection (l) or (m), are exempt from the requirement of submitting reports under subsection (k):

(A) The Secretary shall identify such devices or types of devices for which such exemptions should be terminated in order to provide a reasonable assurance of the safety and effectiveness of the devices. The Secretary shall publish in the Federal Register a list of the devices or types of devices so identified, and shall revise the list as appropriate. The exemption for each device or type included on the list is terminated upon the publication of the list. For each report under subsection (k) submitted pursuant to this subparagraph the Secretary shall require the validation data described in paragraph (1)(A).

(B) For each device or type of device included on the list under subparagraph (A), a report under subsection (k) shall be submitted to the Secretary not later than 15 months after the publication of the initial list, or a revision of the list, whichever terminates the exemption for the device. During such 15-month period, the Secretary may not take any action under this chapter against such device solely on the basis that such report has not been submitted to the Secretary. After the submission of the report to the Secretary the Secretary may not determine that the device is misbranded under section 352(o) of this title or adulterated under section 351(f)(1)(B) of this title, or take action against the device under section 331(p) of this title for failure to provide any information required by subsection (k) until (i) the review is terminated by withdrawal of the submission; (ii) the Secretary determines by order that the device is substantially equivalent to a predicate device; or (iii) the Secretary determines by order that the device is not substantially equivalent to a predicate device. Upon a determination that a device is not substantially equivalent to a predicate device, the device can no longer be legally marketed.

(C) In the case of semi-critical devices, the initial list under subparagraph (A) shall be published not later than 18 months after the effective date of this subsection. In the case of critical devices, the initial list under such subparagraph shall be published not later than six months after such effective date.

(D) Section 352(o) of this title applies with respect to the failure to submit a report under subsection (k) that is required pursuant to subparagraph (A), including a failure of the report to include validation data required in such subparagraph.

(E) The termination under subparagraph (A) of an exemption under subsection (l) or (m) for a critical or semi-critical reprocessed single-use device does not terminate the exemption under subsection (l) or (m) for the original device.

(p) Electronic registration and listing

(1) In general

Registrations and listings under this section (including the submission of updated information) shall be submitted to the Secretary by electronic means unless the Secretary grants a request for waiver of such requirement because use of electronic means is not reasonable for the person requesting such waiver.

(2) Electronic database

Not later than 2 years after the Secretary specifies a unique facility identifier system under subsections (b) and (i), the Secretary shall maintain an electronic database, which shall not be subject to inspection under subsection (f), populated with the information submitted as described under paragraph (1) that—

(A) enables personnel of the Food and Drug Administration to search the database by any field of information submitted in a registration described under paragraph (1), or combination of such fields; and

(B) uses the unique facility identifier system to link with other relevant databases within the Food and Drug Administration, including the database for submission of information under section 381(r) of this title.

(3) Risk-based information and coordination

The Secretary shall ensure the accuracy and coordination of relevant Food and Drug Administration databases in order to identify and inform risk-based inspections under subsection (h).

(q) Reusable medical devices

(1) In general

Not later than 180 days after December 13, 2016, the Secretary shall identify and publish a list of reusable device types for which reports under subsection (k) are required to include—

(A) instructions for use, which have been validated in a manner specified by the Secretary; and

(B) validation data, the types of which shall be specified by the Secretary;

regarding cleaning, disinfection, and sterilization, and for which a substantial equivalence determination may be based.

(2) Revision of list

The Secretary shall revise the list under paragraph (2),[2] as the Secretary determines appropriate, with notice in the Federal Register.

(3) Content of reports

Reports under subsection (k) that are submitted after the publication of the list described in paragraph (1), for devices or types of devices included on such list, shall include such instructions for use and validation data.

(June 25, 1938, ch. 675, §510, as added Pub. L. 87–781, title III, §302, Oct. 10, 1962, 76 Stat. 794; amended Pub. L. 89–74, §4, July 15, 1965, 79 Stat. 231; Pub. L. 91–513, title II, §701(e), Oct. 27, 1970, 84 Stat. 1282; Pub. L. 92–387, §§3, 4(a)–(c), Aug. 16, 1972, 86 Stat. 560–562; Pub. L. 94–295, §4(a), May 28, 1976, 90 Stat. 579; Pub. L. 105–115, title I, §125(a)(2)(C), title II, §§206(a), 209(a), 213(b), title IV, §417, Nov. 21, 1997, 111 Stat. 2325, 2338, 2341, 2347, 2379; Pub. L. 107–188, title III, §321(a), June 12, 2002, 116 Stat. 675; Pub. L. 107–250, title II, §§201(e), 207, 211, title III, §302(b), Oct. 26, 2002, 116 Stat. 1609, 1613, 1614, 1616; Pub. L. 108–214, §2(c)(2), Apr. 1, 2004, 118 Stat. 576; Pub. L. 110–85, title II, §§222–224, title VIII, §801(b)(3)(C), Sept. 27, 2007, 121 Stat. 853, 921; Pub. L. 112–144, title VI, §604, title VII, §§701, 702(b)–705, July 9, 2012, 126 Stat. 1052, 1064-1066; Pub. L. 114–255, div. A, title III, §§3054, 3059(a), 3101(a)(2)(H), Dec. 13, 2016, 130 Stat. 1126, 1130, 1154; Pub. L. 115–52, title VII,

§701(a), title IX, §901(e), Aug. 18, 2017, 131 Stat. 1054, 1076; Pub. L. 116–136, div. A, title III, §3112(e), Mar. 27, 2020, 134 Stat. 363.)

Editorial Notes

References in Text

The effective date of this subsection, referred to in subsec. (o)(2)(C), probably means the date of the enactment of Pub. L. 107–250, which enacted subsec. (o) of this section and was approved Oct. 26, 2002.

Amendments

2020—Subsec. (j)(3) to (5). Pub. L. 116–136 added par. (3) and redesignated former pars. (3) and (4) as (4) and (5), respectively. Amendment was executed to reflect the probable intent of Congress, notwithstanding omission of the word "and" in name of Act being amended.

2017—Subsec. (h)(2). Pub. L. 115–52, §701(a)(1), added par. (2) and struck out former par. (2). Prior to amendment, text read as follows: "Every establishment described in paragraph (1), in any State, that is engaged in the manufacture, propagation, compounding, or processing of a device or devices classified in class II or III shall be so inspected by one or more officers or employees duly designated by the Secretary, or by persons accredited to conduct inspections under section 374(g) of this title, at least once in the 2-year period beginning with the date of registration of such establishment pursuant to this section and at least once in every successive 2-year period thereafter."

Subsec. (h)(4). Pub. L. 115–52, §701(a)(2)(A), substituted "paragraph (2) or (3)" for "paragraph (3)" in introductory provisions.

Subsec. (h)(4)(C). Pub. L. 115–52, §701(a)(2)(B), inserted "or device" after "drug".

Subsec. (h)(6). Pub. L. 115–52, §901(e), substituted "May 1" for "February 1" in introductory provisions.

2016—Subsec. (h)(4). Pub. L. 114–255, §3101(a)(2)(H)(i), substituted "establishing a risk-based schedule" for "establishing the risk-based scheduled" in introductory provisions.

Subsec. (h)(6)(A). Pub. L. 114–255, §3101(a)(2)(H)(ii)(I), substituted "calendar" for "fiscal" in cls. (i) and (ii).

Subsec. (h)(6)(B). Pub. L. 114–255, §3101(a)(2)(H)(ii)(II), substituted "an active ingredient of a drug or a finished drug product" for "an active ingredient of a drug, a finished drug product, or an excipient of a drug".

Subsec. (l). Pub. L. 114–255, §3054(a), designated existing provisions as par. (1) and added par. (2).

Subsec. (m)(1). Pub. L. 114–255, §3054(b)(1), added par. (1) and struck out former par. (1) which read as follows: "Not later than 60 days after November 21, 1997, the Secretary shall publish in the Federal Register a list of each type of class II device that does not require a report under subsection (k) to provide reasonable assurance of safety and effectiveness. Each type of class II device identified by the Secretary as not requiring the report shall be exempt from the requirement to provide a report under subsection (k) as of the date of the publication of the list in the Federal Register. The Secretary shall publish such list on the Internet site of the Food and Drug Administration. The list so published shall be updated not later than 30 days after each revision of the list by the Secretary."

Subsec. (m)(2). Pub. L. 114–255, §3054(b)(2)(B), substituted "60-calendar-day period" for "30-day period".

Pub. L. 114–255, §3054(b)(2)(A), which directed the substitution of "1 calendar day after the date of publication of the final list under paragraph (1)(B)," for "1 day after the date of publication of a list under this subsection,", was executed by making the substitution for "1 day after the date of the publication of a list under this subsection," to reflect the probable intent of Congress.

Subsec. (m)(3). Pub. L. 114–255, §3054(b)(2)(C), added par. (3).

Subsec. (q). Pub. L. 114–255, §3059(a), added subsec. (q).

2012—Subsec. (b)(1). Pub. L. 112–144, §701(1)(A), which directed amendment of par. (1) by "striking 'On or before' and all that follows through the period at the end and inserting the following: 'During the period beginning on October 1 and ending on December 31 of each year, every person who owns or operates any establishment in any State engaged in the manufacture, preparation, propagation, compounding, or processing of a drug or drugs shall register with the Secretary the name of such person, places of business of such person, all such establishments, the unique facility identifier of each such establishment, and a point of contact e-mail address.; and", was executed as if an end quotation mark for the inserted material followed "address.", to reflect the probable intent of Congress. Prior to amendment, stricken text read as follows: "On or before December 31 of each year every person who owns or operates any establishment in any State engaged in the manufacture, preparation, propagation, compounding, or processing of a drug or drugs shall register with the Secretary his name, places of business, and all such establishments."

Subsec. (b)(3). Pub. L. 112–144, §701(1)(B), added par. (3).

Subsec. (c). Pub. L. 112–144, §701(2), substituted "with the Secretary—" and pars. (1) and (2) for "with the Secretary his name, place of business, and such establishment".

Subsec. (h). Pub. L. 112–144, §705, amended subsec. (h) generally. Prior to amendment, text read as follows: "Every establishment in any State registered with the Secretary pursuant to this section shall be subject to inspection pursuant to section 374 of this title and every such establishment engaged in the manufacture, propagation, compounding, or processing of a drug or drugs or of a device or devices classified in class II or III shall be so inspected by one or more officers or employees duly designated by the Secretary, or by persons accredited to conduct inspections under section 374(g) of this title, at least once in the two-year period beginning with the date of registration of such establishment pursuant to this section and at least once in every successive two-year period thereafter."

Subsec. (i)(1). Pub. L. 112–144, §702(b)(1)(A), amended introductory provisions generally. Prior to amendment, text read as follows: "Any establishment within any foreign country engaged in the manufacture, preparation, propagation, compounding, or processing of a drug or device that is imported or offered for import into the United States shall, through electronic means in accordance with the criteria of the Secretary—".

Subsec. (i)(1)(A). Pub. L. 112–144, §702(b)(1)(B), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "upon first engaging in any such activity, immediately register with the Secretary the name and place of business of the establishment, the name of the United States agent for the establishment, the name of each importer of such drug or device in the United States that is known to the establishment, and the name of each person who imports or offers for import such drug or device to the United States for purposes of importation; and".

Subsec. (i)(1)(B). Pub. L. 112–144, §702(b)(1)(C), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: "each establishment subject to the requirements of subparagraph (A) shall thereafter—

"(i) with respect to drugs, register with the Secretary on or before December 31 of each year; and

"(ii) with respect to devices, register with the Secretary during the period beginning on October 1 and ending on December 31 of each year."

Subsec. (i)(4). Pub. L. 112–144, §702(b)(2), added par. (4).

Subsec. (j)(1)(E). Pub. L. 112–144, §703(1), added subpar. (E).

Subsec. (j)(4). Pub. L. 112–144, §703(2), added par. (4).

Subsec. (n). Pub. L. 112–144, §604, designated existing provisions as par. (1) and added par. (2).

Subsec. (p). Pub. L. 112–144, §704, inserted subsec. heading, designated existing provisions as par. (1) and inserted par. heading, and added pars. (2) and (3).

2007—Subsec. (b). Pub. L. 110–85, §222(a), designated existing provisions as par. (1), struck out "or a device or devices" after "drug or drugs", and added par. (2).

Subsec. (i)(1). Pub. L. 110–85, §222(b), inserted text of par. (1) and struck out former text of par. (1) which related to registration requirement for foreign establishments engaged in the manufacture, preparation, propagation, compounding, or processing of a drug or device to be imported or offered for import into the United States.

Subsec. (j)(2). Pub. L. 110–85, §223, in introductory provisions, substituted "Each person who registers with the Secretary under this section shall report to the Secretary, with regard to drugs once during the month of June of each year and once during the month of December of each year, and with regard to devices once each year during the period beginning on October 1 and ending on December 31, the following information:" for "Each person who registers with the Secretary under this section shall report to the Secretary once during the month of June of each year and once during the month of December of each year the following information:".

Subsec. (k). Pub. L. 110–85, §801(b)(3)(C), inserted concluding provisions.

Subsec. (p). Pub. L. 110–85, §224, amended subsec. (p) generally. Prior to amendment, subsec. (p) read as follows: "Registrations under subsections (b), (c), (d), and (i) of this section (including the submission of updated information) shall be submitted to the Secretary by electronic means, upon a finding by the Secretary that the electronic receipt of such registrations is feasible, unless the Secretary grants a request for waiver of such requirement because use of electronic means is not reasonable for the person requesting such waiver."

2004—Subsec. (o)(1)(B), (2)(B). Pub. L. 108–214, §2(c)(2)(A), (B)(i), substituted "or adulterated" for ", adulterated".

Subsec. (o)(2)(E). Pub. L. 108–214, §2(c)(2)(B)(ii), substituted "semi-critical" for "semicritical".

2002—Subsec. (h). Pub. L. 107–250, §201(e), inserted ", or by persons accredited to conduct inspections under section 374(g) of this title," after "duly designated by the Secretary".

Subsec. (i)(1). Pub. L. 107–188, §321(a)(1), substituted "On or before December 31 of each year, any establishment" for "Any establishment" and "shall, through electronic means in accordance with the criteria of the Secretary, register with the Secretary the name and place of business of the establishment, the name of the United States agent for the establishment, the name of each importer of such drug or device in the United States that is known to the establishment, and the name of each person who imports or offers for import such drug or device to

the United States for purposes of importation" for "shall register with the Secretary the name and place of business of the establishment and the name of the United States agent for the establishment".

Subsec. (j)(1). Pub. L. 107–188, §321(a)(2), substituted "subsection (b), (c), (d), or (i)" for "subsection (b), (c), or (d)" in first sentence.

Subsec. (m)(1). Pub. L. 107–250, §211, inserted at end "The Secretary shall publish such list on the Internet site of the Food and Drug Administration. The list so published shall be updated not later than 30 days after each revision of the list by the Secretary."

Subsec. (o). Pub. L. 107–250, §302(b), added subsec. (o).

Subsec. (p). Pub. L. 107–250, §207, added subsec. (p).

1997—Subsec. (g). Pub. L. 105–115, §213(b)(3), inserted at end "In this subsection, the term 'wholesale distributor' means any person (other than the manufacturer or the initial importer) who distributes a device from the original place of manufacture to the person who makes the final delivery or sale of the device to the ultimate consumer or user."

Subsec. (g)(4), (5). Pub. L. 105–115, §213(b)(1), (2), added par. (4) and redesignated former par. (4) as (5).

Subsec. (i). Pub. L. 105–115, §417, amended subsec. (i) generally. Prior to amendment, subsec. (i) read as follows: "Any establishment within any foreign country engaged in the manufacture, preparation, propagation, compounding, or processing of a drug or drugs, or a device or devices, shall be permitted to register under this section pursuant to regulations promulgated by the Secretary. Such regulations shall require such establishment to provide the information required by subsection (j) of this section and shall require such establishment to provide the information required by subsection (j) of this section in the case of a device or devices and shall include provisions for registration of any such establishment upon condition that adequate and effective means are available, by arrangement with the government of such foreign country or otherwise, to enable the Secretary to determine from time to time whether drugs or devices manufactured, prepared, propagated, compounded, or processed in such establishment, if imported or offered for import into the United States, shall be refused admission on any of the grounds set forth in section 381(a) of this title."

Subsec. (j)(1)(A), (D). Pub. L. 105–115, §125(a)(2)(C), struck out ", 356, 357," before "or 360b of this title".

Subsec. (k). Pub. L. 105–115, §206(a)(1), inserted "or person who is accredited under section 360m(a) of this title" after "report to the Secretary".

Subsecs. (l), (m). Pub. L. 105–115, §206(a)(2), added subsecs. (l) and (m).

Subsec. (n). Pub. L. 105–115, §209(a), added subsec. (n).

1976—Subsec. (a)(1). Pub. L. 94–295, §4(a)(2), substituted "drug package or device package" for "drug package", "distribution of the drug or device" for "distribution of the drug", and "ultimate consumer or user" for "ultimate consumer".

Subsecs. (b) to (d). Pub. L. 94–295, §4(a)(3), inserted "or a device or devices" after "drug or drugs".

Subsec. (e). Pub. L. 94–295, §4(a)(4), authorized the Secretary to prescribe by regulation a uniform system for the identification of devices intended for human use and authorized him, in addition, to require that persons who are required to list devices pursuant to subsec. (j) also list such devices in accordance with the system.

Subsec. (g)(1) to (3). Pub. L. 94–295, §4(a)(5), substituted "drugs or devices" for "drugs".

Subsec. (h). Pub. L. 94–295, §4(a)(6), inserted reference to establishments engaged in the manufacture, propagation, compounding, or processing of a drug or drugs or of a device or devices classified in class II or III.

Subsec. (i). Pub. L. 94–295, §4(a)(7), inserted reference to devices and inserted requirement that regulations require establishments to provide the information required by subsection (j) of this section in the case of a device or devices.

Subsec. (j)(1). Pub. L. 94–295, §4(a)(8)(A), in introductory provisions substituted "a list of all drugs and a list of all devices and a brief statement of the basis for believing that each device included in the list is a device rather than a drug (with each drug and device in each list listed by its established name" for "a list of all drugs (by established name" and "drugs or devices filed" for "drugs filed".

Subsec. (j)(1)(A). Pub. L. 94–295, §4(a)(8)(B), substituted "the applicable list" for "such list", inserted "or a device intended for human use contained in the applicable list with respect to which a performance standard has been established under section 360d of this title or which is subject to section 360e of this title," after "360b of this title,", and substituted "such drug or device" for "such drug" wherever appearing.

Subsec. (j)(1)(B). Pub. L. 94–295, §4(a)(8)(C), in introductory provisions substituted "drug or device contained in an applicable list" for "drug contained in such list".

Subsec. (j)(1)(B)(i). Pub. L. 94–295, §4(a)(8)(D), substituted "which drug is subject to section 353(b)(1) of this title, or which device is a restricted device, a copy of all labeling for such drug or device, a representative sampling of advertisements for such drug or device, and, upon request made by the Secretary for good cause, a copy of all advertisements for a particular drug product or device, or" for "which is subject to section 353(b)(1) of this title, a

copy of all labeling for such drug, a representative sampling of advertisements for such drug, and, upon request made by the Secretary for good cause, a copy of all advertisements for a particular drug product, or".

Subsec. (j)(1)(B)(ii). Pub. L. 94–295, §4(a)(8)(E), substituted "which drug is not subject to section 353(b)(1) of this title or which device is not a restricted device, the label and package insert for such drug or device and a representative sampling of any other labeling for such drug or device" for "which is not subject to section 353(b)(1) of this title, the label and package insert for such drug and a representative sampling of any other labeling for such drug".

Subsec. (j)(1)(C). Pub. L. 94–295, §4(a)(8)(F), substituted "an applicable list" for "such list".

Subsec. (j)(1)(D). Pub. L. 94–295, §4(a)(8)(G), substituted "a list" for "the list", inserted "or the particular device contained in such list is not subject to a performance standard established under section 360d of this title or to section 360e of this title or is not a restricted device" after "or 360b of this title,", and substituted "particular drug product or device" for "particular drug product" wherever appearing.

Subsec. (j)(2). Pub. L. 94–295, §4(a)(8)(H), substituted "drug or device" for "drug" in subpars. (A), (B), and (C), and substituted "(each by established name" for "(by established name" in subpar. (C).

Subsec. (k). Pub. L. 94–295, §4(a)(9), added subsec. (k).

1972—Subsec. (e). Pub. L. 92–387, §4(a), inserted provision that the Secretary may assign a listing number to each drug or class of drugs listed under subsec. (j).

Subsec. (f). Pub. L. 92–387, §4(b), inserted exception that the list submitted under subsec. (j)(3) and information submitted under subsec. (j)(1), (2) shall be exempt from inspection unless the Secretary determines otherwise.

Subsec. (i). Pub. L. 92–387, §4(c), inserted provision that the regulations shall require such establishment to provide the information required by subsec. (j).

Subsec. (j). Pub. L. 92–387, §3, added subsec. (j).

1970—Subsec. (a). Pub. L. 91–513 struck out provisions defining the wholesaling, jobbing, or distributing of depressant or stimulant drugs.

Subsec. (b). Pub. L. 91–513 struck out provisions covering establishments engaged in the wholesaling, jobbing, or distributing of depressant or stimulant drugs and the inclusion of the fact of such activity in the annual registration.

Subsec. (c). Pub. L. 91–513 struck out provisions covering new registrations of persons first engaging in the wholesaling, jobbing, or distributing of depressant or stimulant drugs and the inclusion of the fact of such activity in the registration.

Subsec. (d). Pub. L. 91–513 struck out number designation "(1)" preceding first sentence, struck out portion of such redesignated provisions covering the wholesaling, jobbing, or distributing of depressant or stimulant drugs, and struck out par. (2) covering the filing of supplemental registration whenever a person not previously engaged or involved with depressant or stimulant drugs goes into the manufacturing, preparation, or processing thereof.

1965—Pub. L. 89–74, §4(e), included certain wholesalers in section catchline.

Subsec. (a)(2), (3). Pub. L. 89–74, §4(a), added par. (2) and redesignated former par. (2) as (3).

Subsecs. (b), (c). Pub. L. 89–74, §4(b), (c), inserted "or in the wholesaling, jobbing, or distributing of any depressant or stimulant drug" after "drug or drugs" and inserted requirement that establishment indicate activity in depressant or stimulant drugs at time of registration.

Subsec. (d). Pub. L. 89–74 §4(d), designated existing provisions as par. (1), inserted "or the wholesaling, jobbing, or distributing of any depressant or stimulant drug" and the requirement that the additional establishment indicate activity in depressant or stimulant drugs at time of registration, and added par. (2).

Statutory Notes and Related Subsidiaries

Effective Date of 2020 Amendment

Amendment by Pub. L. 116–136 effective 180 days after Mar. 27, 2020, see section 3112(g) of Pub. L. 116–136, set out as a note under section 356c of this title.

Effective Date of 2002 Amendment

Amendment by Pub. L. 107–188 effective upon the expiration of the 180-day period beginning June 12, 2002, see section 321(c) of Pub. L. 107–188, set out as a note under section 331 of this title.

Effective Date of 1997 Amendment

Amendment by sections 206(a), 209(a), 213(b), and 417 of Pub. L. 105–115 effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as a note under section 321 of this title.

Effective Date of 1972 Amendment

Pub. L. 92–387, §5, Aug. 16, 1972, 86 Stat. 562, provided that: "The amendments made by this Act [amending this section and sections 331 and 335 of this title and enacting provisions set out below] shall take effect on the first day of the sixth month beginning after the date of enactment of this Act [Aug. 16, 1972]."

Effective Date of 1970 Amendment

Amendment by Pub. L. 91–513 effective on first day of seventh calendar month that begins after Oct. 26, 1970, see section 704 of Pub. L. 91–513, set out as an Effective Date note under section 801 of this title.

Effective Date of 1965 Amendment

Amendment by Pub. L. 89–74 effective Feb. 1, 1966, subject to registration with Secretary of names, places of business, establishments, and other prescribed information prior to Feb. 1, 1966, see section 11 of Pub. L. 89–74, set out as a note under section 321 of this title.

Savings Provision

Amendment by Pub. L. 91–513 not to affect or abate any prosecutions for any violation of law or any civil seizures or forfeitures and injunctive proceedings commenced prior to the effective date of such amendment, and all administrative proceedings pending before the Bureau of Narcotics and Dangerous Drugs [now the Drug Enforcement Administration] on Oct. 27, 1970, to be continued and brought to final determination in accord with laws and regulations in effect prior to Oct. 27, 1970, see section 702 of Pub. L. 91–513, set out as a note under section 321 of this title.

Device Modifications

Pub. L. 114–255, div. A, title III, §3059(b), Dec. 13, 2016, 130 Stat. 1130, provided that: "The Secretary of Health and Human Services, acting through the Commissioner of Food and Drugs, shall issue final guidance regarding when a premarket notification under section 510(k) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360(k)) is required to be submitted for a modification or change to a legally marketed device. Such final guidance shall be issued not later than 1 year after the date on which the comment period closes for the draft guidance on such subject."

Declaration of Policy of Drug Listing Act of 1972

Pub. L. 92–387, §2, Aug. 16, 1972, 86 Stat. 559, provided that: "The Federal Government which is responsible for regulating drugs has no ready means of determining what drugs are actually being manufactured or packed by establishments registered under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.] except by periodic inspection of such registered establishments. Knowledge of which particular drugs are being manufactured or packed by each registered establishment would substantially assist in the enforcement of Federal laws requiring that such drugs be pure, safe, effective, and properly labeled. Information on the discontinuance of a particular drug could serve to alleviate the burden of reviewing and implementing enforcement actions against drugs which, although commercially discontinued, remain active for regulatory purposes. Information on the type and number of different drugs being manufactured or packed by drug establishments could permit more effective and timely regulation by the agencies of the Federal Government responsible for regulating drugs, including identification of which drugs in interstate commerce are subject to section 505 or 507 [21 U.S.C. 355, 357], or to other provisions of the Federal Food, Drug, and Cosmetic Act."

Congressional Declaration of Need for Registration and Inspection of Drug Establishments

Pub. L. 87–781, title III, §301, Oct. 10, 1962, 76 Stat. 793, provided that: "The Congress hereby finds and declares that in order to make regulation of interstate commerce in drugs effective, it is necessary to provide for registration and inspection of all establishments in which drugs are manufactured, prepared, propagated, compounded, or processed; that the products of all such establishments are likely to enter the channels of interstate commerce and directly affect such commerce; and that the regulation of interstate commerce in drugs without provision for registration and inspection of establishments that may be engaged only in intrastate commerce in such drugs would discriminate against and depress interstate commerce in such drugs, and adversely burden, obstruct, and affect such interstate commerce."

Registration of Certain Persons Owning or Operating Drug Establishments Prior to Oct. 10, 1962

Pub. L. 87–781, title III, §303, Oct. 10, 1962, 76 Stat. 795, provided that any person who, on the day immediately preceding Oct. 10, 1962, owned or operated an establishment which manufactured or processed drugs, registered before the first day of the seventh month following October, 1962, would be deemed to be registered in accordance with subsec. (b) of this section for the calendar year 1962 and if registered within this period and effected in 1963, be deemed in compliance for that calendar year.

[1] *So in original.*

[2] *So in original. Probably should be "paragraph (1),".*

§360a. Clinical trial guidance for antibiotic drugs

(a) In general

Not later than 1 year after September 27, 2007, the Secretary shall issue guidance for the conduct of clinical trials with respect to antibiotic drugs, including antimicrobials to treat acute bacterial sinusitis, acute bacterial otitis media, and acute bacterial exacerbation of chronic bronchitis. Such guidance shall indicate the appropriate models and valid surrogate markers.

(b) Review

Not later than 5 years after September 27, 2007, the Secretary shall review and update the guidance described under subsection (a) to reflect developments in scientific and medical information and technology.

(June 25, 1938, ch. 675, §511, as added Pub. L. 110–85, title IX, §911, Sept. 27, 2007, 121 Stat. 951.)

Editorial Notes

Prior Provisions

A prior section 360a, act June 25, 1938, ch. 675, §511, as added July 15, 1965, Pub. L. 89–74, §3(b), 79 Stat. 227; amended Oct. 24, 1968, Pub. L. 90–639, §2(a), 82 Stat. 1361, regulated the manufacture, compounding, and processing of depressant and stimulant drugs and their sale, delivery, disposal, possession, and recordkeeping activities connected therewith, prior to repeal by Pub. L. 91–513, title II, §§701(a), 704, Oct. 27, 1970, 84 Stat. 1281, 1284, effective on the first day of the seventh calendar month that began after Oct. 26, 1970.

§360a–1. Clinical trials

(a) Review and revision of guidance documents

(1) In general

The Secretary of Health and Human Services (referred to in this section as the "Secretary") shall review and, as appropriate, revise not fewer than 3 guidance documents per year, which shall include—

(A) reviewing the guidance documents of the Food and Drug Administration for the conduct of clinical trials with respect to antibacterial and antifungal drugs; and

(B) as appropriate, revising such guidance documents to reflect developments in scientific and medical information and technology and to ensure clarity regarding the procedures and requirements for approval of antibacterial and antifungal drugs under chapter V of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 351 et seq.).

(2) Issues for review

At a minimum, the review under paragraph (1) shall address the appropriate animal models of infection, in vitro techniques, valid microbiological surrogate markers, the use of noninferiority versus superiority trials, trial enrollment, data requirements, and appropriate delta values for noninferiority trials.

(3) Rule of construction

Except to the extent to which the Secretary makes revisions under paragraph (1)(B), nothing in this section shall be construed to repeal or otherwise effect the guidance documents of the Food and Drug Administration.

(b) Recommendations for investigations

(1) Request

The sponsor of a drug intended to be designated as a qualified infectious disease product may request that the Secretary provide written recommendations for nonclinical and clinical investigations which the Secretary believes may be necessary to be conducted with the drug before such drug may be approved under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) for use in treating, detecting, preventing, or identifying a qualifying pathogen, as defined in section 505E of such Act [21 U.S.C. 355f].

(2) Recommendations

If the Secretary has reason to believe that a drug for which a request is made under this subsection is a qualified infectious disease product, the Secretary shall provide the person making the request written recommendations for the nonclinical and clinical investigations which the Secretary believes, on the basis of information available to the Secretary at the time of the request, would be necessary for approval under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) of such drug for the use described in paragraph (1).

(c) Qualified infectious disease product

For purposes of this section, the term "qualified infectious disease product" has the meaning given such term in section 505E(g) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 355f(g)], as added by section 801 of this Act.

(Pub. L. 112–144, title VIII, §804, July 9, 2012, 126 Stat. 1080.)

Editorial Notes

References in Text

The Federal Food, Drug, and Cosmetic Act, referred to in subsec. (a)(1)(B), is act June 25, 1938, ch. 675, 52 Stat. 1040, which is classified generally to this chapter. Chapter V of the Act is classified generally to this subchapter. For complete classification of this Act to the Code, see section 301 of this title and Tables.

This Act, referred to in subsec. (c), is Pub. L. 112–144, July 9, 2012, 126 Stat. 993, known as the Food and Drug Administration Safety and Innovation Act. For complete classification of this Act to the Code, see Tables.

Codification

Section was enacted as part of the Food and Drug Administration Safety and Innovation Act, and not as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

§360a–2. Susceptibility test interpretive criteria for microorganisms

(a) Purpose; identification of criteria

(1) Purpose

The purpose of this section is to clarify the Secretary's authority to—

(A) efficiently update susceptibility test interpretive criteria for antimicrobial drugs when necessary for public health, due to, among other things, the constant evolution of microorganisms that leads to the development of resistance to drugs that have been effective in decreasing morbidity and mortality for patients, which warrants unique management of antimicrobial drugs that is inappropriate for most other drugs in order to delay or prevent the development of further resistance to existing therapies;

(B) provide for public notice of the availability of recognized interpretive criteria and interpretive criteria standards; and

(C) clear under section 360(k) of this title, classify under section 360c(f)(2) of this title, or approve under section 360e of this title, antimicrobial susceptibility testing devices utilizing updated, recognized susceptibility test interpretive criteria to characterize the in vitro susceptibility of particular bacteria, fungi, or other microorganisms, as applicable, to antimicrobial drugs.

(2) Identification of criteria

The Secretary shall identify appropriate susceptibility test interpretive criteria with respect to antimicrobial drugs—

(A) if such criteria are available on the date of approval of the drug under section 355 of this title or licensure of the drug under section 262 of title 42 (as applicable), upon such approval or licensure; or

(B) if such criteria are unavailable on such date, on the date on which such criteria are available for such drug.

(3) Bases for initial identification

The Secretary shall identify appropriate susceptibility test interpretive criteria under paragraph (2), based on the Secretary's review of, to the extent available and relevant—

(A) preclinical and clinical data, including pharmacokinetic, pharmacodynamic, and epidemiological data;

(B) the relationship of susceptibility test interpretive criteria to morbidity and mortality associated with the disease or condition for which such drug is used; and

(C) such other evidence and information as the Secretary considers appropriate.

(b) Susceptibility test Interpretive Criteria Website

(1) In general

Not later than 1 year after December 13, 2016, the Secretary shall establish, and maintain thereafter, on the website of the Food and Drug Administration, a dedicated website that contains a list of any appropriate new or updated susceptibility test interpretive criteria standards and interpretive criteria in accordance with paragraph (2) (referred to in this section as the "Interpretive Criteria Website").

(2) Listing of susceptibility test interpretive criteria standards and interpretive criteria

(A) In general

The list described in paragraph (1) shall consist of any new or updated susceptibility test interpretive criteria standards that are—

(i) established by a nationally or internationally recognized standard development organization that—

(I) establishes and maintains procedures to address potential conflicts of interest and ensure transparent decisionmaking;

(II) holds open meetings to ensure that there is an opportunity for public input by interested parties, and establishes and maintains processes to ensure that such input is considered in decisionmaking; and

(III) permits its standards to be made publicly available, through the National Library of Medicine or another similar source acceptable to the Secretary; and

(ii) recognized in whole, or in part, by the Secretary under subsection (c).

(B) Other list

The Interpretive Criteria Website shall, in addition to the list described in subparagraph (A), include a list of interpretive criteria, if any, that the Secretary has determined to be appropriate with respect to legally marketed antimicrobial drugs, where—

(i) the Secretary does not recognize, in whole or in part, an interpretive criteria standard described under subparagraph (A) otherwise applicable to such a drug;

(ii) the Secretary withdraws under subsection (c)(1)(A) recognition of a standard, in whole or in part, otherwise applicable to such a drug;

(iii) the Secretary approves an application under section 355 of this title or section 262 of title 42, as applicable, with respect to marketing of such a drug for which there are no relevant interpretive criteria included in a standard recognized by the Secretary under subsection (c); or

(iv) because the characteristics of such a drug differ from other drugs with the same active ingredient, the interpretive criteria with respect to such drug—

(I) differ from otherwise applicable interpretive criteria included in a standard listed under subparagraph (A) or interpretive criteria otherwise listed under this subparagraph; and

(II) are determined by the Secretary to be appropriate for the drug.

(C) Required statements

The Interpretive Criteria Website shall include statements conveying—

(i) that the website provides information about the in vitro susceptibility of bacteria, fungi, or other microorganisms, as applicable to a certain drug (or drugs);

(ii) that—

(I) the safety and efficacy of such drugs in treating clinical infections due to such bacteria, fungi, or other microorganisms, as applicable, may or may not have been established in adequate and well-controlled clinical trials in order for the susceptibility information described in clause (i) to be included on the website; and

(II) the clinical significance of such susceptibility information in such instances is unknown;

(iii) that the approved product labeling for specific drugs provides the uses for which the Secretary has approved the product; and

(iv) any other information that the Secretary determines appropriate to adequately convey the meaning of the data supporting the recognition or listing of susceptibility test interpretive criteria standards or susceptibility test interpretive criteria included on the website.

(3) Notice

Not later than the date on which the Interpretive Criteria Website is established, the Secretary shall publish a notice of that establishment in the Federal Register.

(4) Inapplicability of misbranding provision

The inclusion in the approved labeling of an antimicrobial drug of a reference or hyperlink to the Interpretive Criteria Website, in and of itself, shall not cause the drug to be misbranded in violation of section 352 of this title.

(5) Trade secrets and confidential information

Nothing in this section shall be construed as authorizing the Secretary to disclose any information that is a trade secret or confidential information subject to section 552(b)(4) of title 5.

(c) Recognition of susceptibility test interpretive criteria

(1) Evaluation and publication

(A) In general

Beginning on the date of the establishment of the Interpretive Criteria Website, and at least every 6 months thereafter, the Secretary shall—

(i) evaluate any appropriate new or updated susceptibility test interpretive criteria standards established by a nationally or internationally recognized standard development organization described in subsection (b)(2)(A)(i); and

(ii) publish on the public website of the Food and Drug Administration a notice—

(I) withdrawing recognition of any different susceptibility test interpretive criteria standard, in whole or in part;

(II) recognizing the new or updated standards;

(III) recognizing one or more parts of the new or updated interpretive criteria specified in such a standard and declining to recognize the remainder of such standard; and

(IV) making any necessary updates to the lists under subsection (b)(2).

(B) Upon approval of a drug

Upon the approval of an initial or supplemental application for an antimicrobial drug under section 355 of this title or section 262 of title 42, as applicable, where such approval is based on susceptibility test interpretive criteria which differ from those contained in a standard recognized, or from those otherwise listed, by the Secretary pursuant to this subsection, or for which there are no relevant interpretive criteria standards recognized, or interpretive criteria otherwise listed, by the Secretary pursuant to this subsection, the Secretary shall update the lists under subparagraphs (A) and (B) of subsection (b)(2) to include the susceptibility test interpretive criteria upon which such approval was based.

(2) Bases for updating interpretive criteria standards

In evaluating new or updated susceptibility test interpretive criteria standards under paragraph (1)(A), the Secretary may consider—

(A) the Secretary's determination that such a standard is not applicable to a particular drug because the characteristics of the drug differ from other drugs with the same active ingredient;

(B) information provided by interested third parties, including public comment on the annual compilation of notices published under paragraph (3);

(C) any bases used to identify susceptibility test interpretive criteria under subsection (a)(2); and

(D) such other information or factors as the Secretary determines appropriate.

(3) Annual compilation of notices

Each year, the Secretary shall compile the notices published under paragraph (1)(A) and publish such compilation in the Federal Register and provide for public comment. If the Secretary receives comments, the Secretary shall review such comments and, if the Secretary determines appropriate, update pursuant to this subsection susceptibility test interpretive criteria standards or criteria—

(A) recognized by the Secretary under this subsection; or

(B) otherwise listed on the Interpretive Criteria Website under subsection (b)(2).

(4) Relation to section 360d(c) of this title

Any susceptibility test interpretive standard recognized under this subsection or any criteria otherwise listed under subsection (b)(2)(B) shall be deemed to be recognized as a standard by the Secretary under section 360d(c)(1) of this title.

(5) Voluntary use of interpretive criteria

Nothing in this section prohibits a person from seeking approval or clearance of a drug or device, or changes to the drug or the device, on the basis of susceptibility test interpretive criteria which differ from those contained in a standard recognized, or from those otherwise listed, by the Secretary pursuant to subsection (b)(2).

(d) Antimicrobial drug labeling

(1) Drugs marketed prior to establishment of Interpretive Criteria Website

(A) In general

With respect to an antimicrobial drug lawfully introduced or delivered for introduction into interstate commerce for commercial distribution before the establishment of the Interpretive Criteria Website, a holder of an approved application under section 355 of this title or section 262 of title 42, as applicable, for each such drug, not later than 1 year after establishment of the Interpretive Criteria Website described in subsection (b)(1), shall remove susceptibility test interpretive criteria, if any, and related information from the approved drug labeling and replace it with a reference to the Interpretive Criteria Website.

(B) Labeling changes

The labeling changes required by this section shall be considered a minor change under section 314.70 of title 21, Code of Federal Regulations (or any successor regulations) that may be implemented through documentation in the next applicable annual report.

(2) Drugs marketed subsequent to establishment of Interpretive Criteria Website

With respect to antimicrobial drugs approved on or after the date of the establishment of the Interpretive Criteria Website described in subsection (b)(1), the labeling for such a drug shall include, in lieu of susceptibility test interpretive criteria and related information, a reference to such Website.

(e) Special condition for marketing of antimicrobial susceptibility testing devices

(1) In general

Notwithstanding sections 351, 352, 355, 360, 360c, and 360e of this title, if the conditions specified in paragraph (2) are met (in addition to other applicable provisions under this subchapter) with respect to an antimicrobial susceptibility testing device described in subsection (f)(1), the Secretary may authorize the marketing of such device for a use described in such subsection.

(2) Conditions applicable to antimicrobial susceptibility testing devices

The conditions specified in this paragraph are the following:

(A) The device is used to make a determination of susceptibility using susceptibility test interpretive criteria that are—

(i) included in a standard recognized by the Secretary under subsection (c); or

(ii) otherwise listed on the Interpretive Criteria Website under subsection (b)(2).

(B) The labeling of such device includes statements conveying—

(i) that the device provides information about the in vitro susceptibility of bacteria, fungi, or other microorganisms, as applicable to antimicrobial drugs;

(ii) that—

(I) the safety and efficacy of such drugs in treating clinical infections due to such bacteria, fungi, or other microorganisms, as applicable, may or may not have been established in adequate and well-controlled clinical trials in order for the device to report the susceptibility of such bacteria, fungi, or other microorganisms, as applicable, to such drugs; and

(II) the clinical significance of such susceptibility information in those instances is unknown;

(iii) that the approved labeling for drugs tested using such a device provides the uses for which the Secretary has approved such drugs; and

(iv) any other information the Secretary determines appropriate to adequately convey the meaning of the data supporting the recognition or listing of susceptibility test interpretive criteria standards or susceptibility test interpretive criteria described in subparagraph (A).

(C) The antimicrobial susceptibility testing device meets all other requirements to be cleared under section 360(k) of this title, classified under section 360c(f)(2) of this title, or approved under section 360e of this title.

(f) Definitions

In this section:

(1) The term "antimicrobial susceptibility testing device" means a device that utilizes susceptibility test interpretive criteria to determine and report the in vitro susceptibility of certain microorganisms to a drug (or drugs).

(2) The term "qualified infectious disease product" means a qualified infectious disease product designated under section 355f(d) of this title.

(3) The term "susceptibility test interpretive criteria" means—

(A) one or more specific numerical values which characterize the susceptibility of bacteria or other microorganisms to the drug tested; and

(B) related categorizations of such susceptibility, including categorization of the drug as susceptible, intermediate, resistant, or such other term as the Secretary determines appropriate.

(4)(A) The term "antimicrobial drug" means, subject to subparagraph (B), a systemic antibacterial or antifungal drug that—

(i) is intended for human use in the treatment of a disease or condition caused by a bacterium or fungus;

(ii) may include a qualified infectious disease product designated under section 355f(d) of this title; and

(iii) is subject to section 353(b)(1) of this title.

(B) If provided by the Secretary through regulations, such term may include—

(i) drugs other than systemic antibacterial and antifungal drugs; and

(ii) biological products (as such term is defined in section 262 of title 42) to the extent such products exhibit antimicrobial activity.

(5) The term "interpretive criteria standard" means a compilation of susceptibility test interpretive criteria developed by a standard development organization that meets the criteria set forth in subsection (b)(2)(A)(i).

(g) Rule of construction

Nothing in this section shall be construed to—

(1) alter the standards of evidence under subsection (c) or (d) of section 355 of this title (including the substantial evidence standard under section 355(d) of this title) or under section 262 of title 42 (as applicable); or

(2) with respect to clearing devices under section 360(k) of this title, classifying devices under section 360c(f)(2) of this title, or approving devices under section 360e of this title—

(A) apply with respect to any drug, device, or biological product, in any context other than an antimicrobial drug and an antimicrobial susceptibility testing device that uses susceptibility test interpretive criteria to characterize and report the susceptibility of certain bacteria, fungi, or other microorganisms, as applicable, to such drug to reflect patient morbidity and mortality in accordance with this section; or

(B) unless specifically stated, have any effect on authorities provided under other sections of this chapter, including any regulations issued under such sections.

(June 25, 1938, ch. 675, §511A, as added Pub. L. 114–255, div. A, title III, §3044(a), Dec. 13, 2016, 130 Stat. 1114.)

Statutory Notes and Related Subsidiaries

Construction

Nothing in this section to be construed to restrict the prescribing of antimicrobial drugs or other products, including drugs approved under section 356(h) of this title, by health care professionals, or to limit the practice of health care, see section 3043 of Pub. L. 114–255, set out as a Construction of 2016 Amendments note under section 356 of this title.

Requests for Updates to Interpretive Criteria Website

Pub. L. 114–255, div. A, title III, §3044(d), Dec. 13, 2016, 130 Stat. 1121, provided that: "Chapter 35 of title 44, United States Code, shall not apply to the collection of information from interested parties regarding updating the lists established under section 511A(b) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 360a–2(b)] and posted on the Interpretive Criteria Website established under section 511A(c) [probably means section 511A(b)] of such Act."

§360b. New animal drugs

(a) Unsafe new animal drugs and animal feed containing such drugs; conditions of safety; exemption of drugs for research; import tolerances

(1) A new animal drug shall, with respect to any particular use or intended use of such drug, be deemed unsafe for purposes of section 351(a)(5) of this title and section 342(a)(2)(C)(ii) of this title unless—

(A) there is in effect an approval of an application filed pursuant to subsection (b) with respect to such use or intended use of such drug, and such drug, its labeling, and such use conform to such approved application;

(B) there is in effect a conditional approval of an application filed pursuant to section 360ccc of this title with respect to such use or intended use of such drug, and such drug, its labeling, and such use conform to such conditionally approved application;

(C) there is in effect an index listing pursuant to section 360ccc–1 of this title with respect to such use or intended use of such drug in a minor species, and such drug, its labeling, and such use conform to such index listing; or

(D) there is in effect an authorization pursuant to section 360bbb–3 of this title with respect to such use or intended use of such drug, and such drug, its labeling, and such use conform to any conditions of such authorization.

A new animal drug shall also be deemed unsafe for such purposes in the event of removal from the establishment of a manufacturer, packer, or distributor of such drug for use in the manufacture of animal feed in any State unless at the time of such removal such manufacturer, packer, or distributor has an unrevoked written statement from the consignee of such drug, or notice from the Secretary, to the effect that, with respect to the use of such drug in animal feed, such consignee (i) holds a license issued under subsection (m) and has in its possession current approved labeling for such drug in animal feed; or (ii) will, if the consignee is not a user of the drug, ship such drug only to a holder of a license issued under subsection (m).

(2) An animal feed bearing or containing a new animal drug shall, with respect to any particular use or intended use of such animal feed be deemed unsafe for purposes of section 351(a)(6) of this title unless—

(A) there is in effect—

(i) an approval of an application filed pursuant to subsection (b) with respect to such drug, as used in such animal feed, and such animal feed and its labeling, distribution, holding, and use conform to such approved application;

(ii) a conditional approval of an application filed pursuant to section 360ccc of this title with respect to such drug, as used in such animal feed, and such animal feed and its labeling, distribution, holding, and use conform to such conditionally approved application; or

(iii) an index listing pursuant to section 360ccc–1 of this title with respect to such drug, as used in such animal feed, and such animal feed and its labeling, distribution, holding, and use conform to such index listing; and

(B) such animal feed is manufactured at a site for which there is in effect a license issued pursuant to subsection (m)(1) to manufacture such animal feed.

(3) A new animal drug or an animal feed bearing or containing a new animal drug shall not be deemed unsafe for the purposes of section 351(a)(5) or (6) of this title if such article is for investigational use and conforms to the terms of an exemption in effect with respect thereto under subsection (j).

(4)(A) Except as provided in subparagraph (B), if an approval of an application filed under subsection (b) is in effect with respect to a particular use or intended use of a new animal drug, the drug shall not be deemed unsafe for the purposes of paragraph (1) and shall be exempt from the requirements of section 352(f) of this title with respect to a different use or intended use of the drug, other than a use in or on animal feed, if such use or intended use—

(i) is by or on the lawful written or oral order of a licensed veterinarian within the context of a veterinarian-client-patient relationship, as defined by the Secretary; and

(ii) is in compliance with regulations promulgated by the Secretary that establish the conditions for such different use or intended use.

The regulations promulgated by the Secretary under clause (ii) may prohibit particular uses of an animal drug and shall not permit such different use of an animal drug if the labeling of another animal drug that contains the same active ingredient and which is in the same dosage form and concentration provides for such different use.

(B) If the Secretary finds that there is a reasonable probability that a use of an animal drug authorized under subparagraph (A) may present a risk to the public health, the Secretary may—

(i) establish a safe level for a residue of an animal drug when it is used for such different use authorized by subparagraph (A); and

(ii) require the development of a practical, analytical method for the detection of residues of such drug above the safe level established under clause (i).

The use of an animal drug that results in residues exceeding a safe level established under clause (i) shall be considered an unsafe use of such drug under paragraph (1). Safe levels may be established under clause (i) either by regulation or order.

(C) The Secretary may by general regulation provide access to the records of veterinarians to ascertain any use or intended use authorized under subparagraph (A) that the Secretary has determined may present a risk to the public health.

(D) If the Secretary finds, after affording an opportunity for public comment, that a use of an animal drug authorized under subparagraph (A) presents a risk to the public health or that an analytical method required under subparagraph (B) has not been developed and submitted to the Secretary, the Secretary may, by order, prohibit any such use.

(5) If the approval of an application filed under section 355 of this title is in effect, the drug under such application shall not be deemed unsafe for purposes of paragraph (1) and shall be exempt from the requirements of section 352(f) of this title with respect to a use or intended use of the drug in animals if such use or intended use—

(A) is by or on the lawful written or oral order of a licensed veterinarian within the context of a veterinarian-client-patient relationship, as defined by the Secretary; and

(B) is in compliance with regulations promulgated by the Secretary that establish the conditions for the use or intended use of the drug in animals.

(6) For purposes of section 342(a)(2)(D) [1] of this title, a use or intended use of a new animal drug shall not be deemed unsafe under this section if the Secretary establishes a tolerance for such drug and any edible portion of any animal imported into the United States does not contain residues exceeding such tolerance. In establishing such tolerance, the Secretary shall rely on data sufficient to demonstrate that a proposed tolerance is safe based on similar food safety criteria used by the Secretary to establish tolerances for applications for new animal drugs filed under subsection (b)(1). The Secretary may consider and rely on data submitted by the drug manufacturer, including data submitted to appropriate regulatory authorities in any country where the new animal drug is lawfully used or data available from a relevant international organization, to the extent such data are not inconsistent with the criteria used by the Secretary to establish a tolerance for applications for new animal drugs filed under subsection (b)(1). For purposes of this paragraph, "relevant international organization" means the Codex Alimenterius [2] Commission or other international organization deemed appropriate by the Secretary. The Secretary may, under procedures specified by regulation, revoke a tolerance established under this paragraph if information demonstrates that the use of the new animal drug under actual use conditions results in food being imported into the United States with residues exceeding the tolerance or if scientific evidence shows the tolerance to be unsafe.

(b) Filing application for uses of new animal drug; contents; patent information; abbreviated application; presubmission conference

(1) Any person may file with the Secretary an application with respect to any intended use or uses of a new animal drug. Such person shall submit to the Secretary as a part of the application (A) full reports of investigations which have been made to show whether or not such drug is safe and effective for use; (B) a full list of the articles used as components of such drug; (C) a full statement of the composition of such drug; (D) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug; (E) such samples of such drug and of the articles used as components thereof, of any animal feed for use in or on which such drug is intended, and of the edible portions or products (before or after slaughter) of animals to which such drug (directly or in or on animal feed) is intended to be administered, as the Secretary may require; (F) specimens of the labeling proposed to be used for such drug, or in case such drug is intended for use in animal feed, proposed labeling appropriate for such use, and specimens of the labeling for the drug to be manufactured, packed, or distributed by the applicant; (G) a description of practicable methods for determining the quantity, if any,

of such drug in or on food, and any substance formed in or on food, because of its use; and (H) the proposed tolerance or withdrawal period or other use restrictions for such drug if any tolerance or withdrawal period or other use restrictions are required in order to assure that the proposed use of such drug will be safe. The applicant shall file with the application the patent number and the expiration date of any patent which claims the new animal drug for which the applicant filed the application or which claims a method of using such drug and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug. If an application is filed under this subsection for a drug and a patent which claims such drug or a method of using such drug is issued after the filing date but before approval of the application, the applicant shall amend the application to include the information required by the preceding sentence. Upon approval of the application, the Secretary shall publish information submitted under the two preceding sentences.

(2) Any person may file with the Secretary an abbreviated application for the approval of a new animal drug. An abbreviated application shall contain the information required by subsection (n).

(3) Any person intending to file an application under paragraph (1), section 360ccc of this title, or a request for an investigational exemption under subsection (j) shall be entitled to one or more conferences prior to such submission to reach an agreement acceptable to the Secretary establishing a submission or an investigational requirement, which may include a requirement for a field investigation. A decision establishing a submission or an investigational requirement shall bind the Secretary and the applicant or requestor unless (A) the Secretary and the applicant or requestor mutually agree to modify the requirement, or (B) the Secretary by written order determines that a substantiated scientific requirement essential to the determination of safety or effectiveness of the animal drug involved has appeared after the conference. No later than 25 calendar days after each such conference, the Secretary shall provide a written order setting forth a scientific justification specific to the animal drug and intended uses under consideration if the agreement referred to in the first sentence requires more than one field investigation as being essential to provide substantial evidence of effectiveness for the intended uses of the drug. Nothing in this paragraph shall be construed as compelling the Secretary to require a field investigation.

(4) Beginning on October 1, 2018, all applications or submissions pursuant to this subsection shall be submitted by electronic means in such format as the Secretary may require.

(c) Period for submission and approval of application; period for notice and expedition of hearing; period for issuance of order; abbreviated applications; withdrawal periods; effective date of approval; relationship to other applications; withdrawal or suspension of approval; bioequivalence; filing of additional patent information

(1) Within one hundred and eighty days after the filing of an application pursuant to subsection (b), or such additional period as may be agreed upon by the Secretary and the applicant, the Secretary shall either (A) issue an order approving the application if he then finds that none of the grounds for denying approval specified in subsection (d) applies, or (B) give the applicant notice of an opportunity for a hearing before the Secretary under subsection (d) on the question whether such application is approvable. If the applicant elects to accept the opportunity for a hearing by written request within thirty days after such notice, such hearing shall commence not more than ninety days after the expiration of such thirty days unless the Secretary and the applicant otherwise agree. Any such hearing shall thereafter be conducted on an expedited basis and the Secretary's order thereon shall be issued within ninety days after the date fixed by the Secretary for filing final briefs.

(2)(A) Subject to subparagraph (C), the Secretary shall approve an abbreviated application for a drug unless the Secretary finds—

(i) the methods used in, or the facilities and controls used for, the manufacture, processing, and packing of the drug are inadequate to assure and preserve its identity, strength, quality, and purity;

(ii) the conditions of use prescribed, recommended, or suggested in the proposed labeling are not reasonably certain to be followed in practice or, except as provided in subparagraph (B), information submitted with the application is insufficient to show that each of the proposed conditions of use or similar limitations (whether in the labeling or published pursuant to subsection (i)) have been previously approved for the approved new animal drug referred to in the application;

(iii) information submitted with the application is insufficient to show that the active ingredients are the same as those of the approved new animal drug referred to in the application;

(iv)(I) if the application is for a drug whose active ingredients, route of administration, dosage form, strength, or use with other animal drugs in animal feed is the same as the active ingredients, route of administration, dosage form, strength, or use with other animal drugs in animal feed of the approved new animal drug referred to in the application, information submitted in the application is insufficient to show that the active ingredients, route of administration, dosage form, strength, or use with other animal drugs in animal feed is the same as that of the approved new animal drug, or

(II) if the application is for a drug whose active ingredients, route of administration, dosage form, strength, or use with other animal drugs in animal feed is different from that of the approved new animal drug referred to in the application, no petition to file an application for the drug with the different active ingredients, route of administration, dosage form, strength, or use with other animal drugs in animal feed was approved under subsection (n)(3);

(v) if the application was filed pursuant to the approval of a petition under subsection (n)(3), the application did not contain the information required by the Secretary respecting the active ingredients, route of administration, dosage form, strength, or use with other animal drugs in animal feed which is not the same;

(vi) information submitted in the application is insufficient to show that the drug is bioequivalent to the approved new animal drug referred to in the application, or if the application is filed under a petition approved pursuant to subsection (n)(3), information submitted in the application is insufficient to show that the active ingredients of the new animal drug are of the same pharmacological or therapeutic class as the pharmacological or therapeutic class of the approved new animal drug and that the new animal drug can be expected to have the same therapeutic effect as the approved new animal drug when used in accordance with the labeling;

(vii) information submitted in the application is insufficient to show that the labeling proposed for the drug is the same as the labeling approved for the approved new animal drug referred to in the application except for changes required because of differences approved under a petition filed under subsection (n)(3), because of a different withdrawal period, or because the drug and the approved new animal drug are produced or distributed by different manufacturers;

(viii) information submitted in the application or any other information available to the Secretary shows that (I) the inactive ingredients of the drug are unsafe for use under the conditions prescribed, recommended, or suggested in the labeling proposed for the drug, (II) the composition of the drug is unsafe under such conditions because of the type or quantity of inactive ingredients included or the manner in which the inactive ingredients are included, or (III) in the case of a drug for food producing animals, the inactive ingredients of the drug or its composition may be unsafe with respect to human food safety;

(ix) the approval under subsection (b)(1) of the approved new animal drug referred to in the application filed under subsection (b)(2) has been withdrawn or suspended for grounds described in paragraph (1) of subsection (e), the Secretary has published a notice of a hearing to withdraw approval of the approved new animal drug for such grounds, the approval under this paragraph of the new animal drug for which the application under subsection (b)(2) was filed has been withdrawn or suspended under subparagraph (G) for such grounds, or the Secretary has determined that the approved new animal drug has been withdrawn from sale for safety or effectiveness reasons;

(x) the application does not meet any other requirement of subsection (n); or

(xi) the application contains an untrue statement of material fact.

(B) If the Secretary finds that a new animal drug for which an application is submitted under subsection (b)(2) is bioequivalent to the approved new animal drug referred to in such application and that residues of the new animal drug are consistent with the tolerances established for such approved new animal drug but at a withdrawal period which is different than the withdrawal period approved for such approved new animal drug, the Secretary may establish, on the basis of information submitted, such different withdrawal period as the withdrawal period for the new animal drug for purposes of the approval of such application for such drug.

(C) Within 180 days of the initial receipt of an application under subsection (b)(2) or within such additional period as may be agreed upon by the Secretary and the applicant, the Secretary shall approve or disapprove the application.

(D) The approval of an application filed under subsection (b)(2) shall be made effective on the last applicable date determined under the following:

(i) If the applicant only made a certification described in clause (i) or (ii) of subsection (n)(1)(G) or in both such clauses, the approval may be made effective immediately.

(ii) If the applicant made a certification described in clause (iii) of subsection (n)(1)(G), the approval may be made effective on the date certified under clause (iii).

(iii) If the applicant made a certification described in clause (iv) of subsection (n)(1)(G), the approval shall be made effective immediately unless an action is brought for infringement of a patent which is the subject of the certification before the expiration of 45 days from the date the notice provided under subsection (n)(2)(B)(i) is received. If such an action is brought before the expiration of such days, the approval shall be made effective upon the expiration of the 30 month period beginning on the date of the receipt of the notice provided under subsection (n)(2)(B) or such shorter or longer period as the court may order because either party to the action failed to reasonably cooperate in expediting the action, except that if before the expiration of such period—

(I) the court decides that such patent is invalid or not infringed, the approval shall be made effective on the date of the court decision,

(II) the court decides that such patent has been infringed, the approval shall be made effective on such date as the court orders under section 271(e)(4)(A) of title 35, or

(III) the court grants a preliminary injunction prohibiting the applicant from engaging in the commercial manufacture or sale of the drug until the court decides the issues of patent validity and infringement and if the court decides that such patent is invalid or not infringed, the approval shall be made effective on the date of such court decision.

In such an action, each of the parties shall reasonably cooperate in expediting the action. Until the expiration of 45 days from the date the notice made under subsection (n)(2)(B) is received, no action may be brought under section 2201 of title 28 for a declaratory judgment with respect to the patent. Any action brought under section 2201 of title 28 shall be brought in the judicial district where the defendant has its principal place of business or a regular and established place of business.

(iv) If the application contains a certification described in clause (iv) of subsection (n)(1)(G) and is for a drug for which a previous application has been filed under this subsection containing such a certification, the application shall be made effective not earlier than 180 days after—

(I) the date the Secretary receives notice from the applicant under the previous application of the first commercial marketing of the drug under the previous application, or

(II) the date of a decision of a court in an action described in subclause (III) [3] holding the patent which is the subject of the certification to be invalid or not infringed,

whichever is earlier.

(E) If the Secretary decides to disapprove an application, the Secretary shall give the applicant notice of an opportunity for a hearing before the Secretary on the question of whether such application is approvable. If the applicant elects to accept the opportunity for hearing by written request within 30 days after such notice, such hearing shall commence not more than 90 days after the expiration of such 30 days unless the Secretary and the applicant otherwise agree. Any such hearing shall thereafter be conducted on an expedited basis and the Secretary's order thereon shall be issued within 90 days after the date fixed by the Secretary for filing final briefs.

(F)(i) If an application submitted under subsection (b)(1) for a drug, no active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations)) of which has been approved in any other application under subsection (b)(1), is approved after November 16, 1988, no application may be submitted under subsection (b)(2) which refers to the drug for which the subsection (b)(1) application was submitted before the expiration of 5 years from the date of the approval of the application under subsection (b)(1), except that such an application may be submitted under subsection (b)(2) after the expiration of 4 years from the date of the approval of the subsection (b)(1) application if it contains a certification of patent invalidity or noninfringement described in clause (iv) of subsection (n)(1)(G). The approval of such an application shall be made effective in accordance with

subparagraph (B) except that, if an action for patent infringement is commenced during the one-year period beginning 48 months after the date of the approval of the subsection (b) application, the 30 month period referred to in subparagraph (D)(iii) shall be extended by such amount of time (if any) which is required for seven and one-half years to have elapsed from the date of approval of the subsection (b) application.

(ii) If an application submitted under subsection (b)(1) for a drug, which includes an active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations)) that has been approved in another application approved under such subsection, is approved after November 16, 1988, and if such application contains substantial evidence of the effectiveness of the drug involved, any studies of animal safety, or, in the case of food producing animals, human food safety studies (other than bioequivalence studies or residue depletion studies, except residue depletion studies for minor uses or minor species) required for the approval of the application and conducted or sponsored by the applicant, the Secretary may not make the approval of an application submitted under subsection (b)(2) for the conditions of approval of such drug in the subsection (b)(1) application effective before the expiration of 3 years from the date of the approval of the application under subsection (b)(1) for such drug.

(iii) If a supplement to an application approved under subsection (b)(1) is approved after November 16, 1988, and the supplement contains substantial evidence of the effectiveness of the drug involved, any studies of animal safety, or, in the case of food producing animals, human food safety studies (other than bioequivalence studies or residue depletion studies, except residue depletion studies for minor uses or minor species) required for the approval of the supplement and conducted or sponsored by the person submitting the supplement, the Secretary may not make the approval of an application submitted under subsection (b)(2) for a change approved in the supplement effective before the expiration of 3 years from the date of the approval of the supplement.

(iv) An applicant under subsection (b)(1) who comes within the provisions of clause (i) of this subparagraph as a result of an application which seeks approval for a use solely in non-food producing animals, may elect, within 10 days of receiving such approval, to waive clause (i) of this subparagraph, in which event the limitation on approval of applications submitted under subsection (b)(2) set forth in clause (ii) of this subparagraph shall be applicable to the subsection (b)(1) application.

(v) If an application (including any supplement to a new animal drug application) submitted under subsection (b)(1) for a new animal drug for a food-producing animal use, which includes an active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations)) which has been the subject of a waiver under clause (iv) is approved after November 16, 1988, and if the application contains substantial evidence of the effectiveness of the drug involved, any studies of animal safety, or human food safety studies (other than bioequivalence studies or residue depletion studies, except residue depletion studies for minor uses or minor species) required for the new approval of the application and conducted or sponsored by the applicant, the Secretary may not make the approval of an application (including any supplement to such application) submitted under subsection (b)(2) for the new conditions of approval of such drug in the subsection (b)(1) application effective before the expiration of five years from the date of approval of the application under subsection (b)(1) for such drug. The provisions of this paragraph shall apply only to the first approval for a food-producing animal use for the same applicant after the waiver under clause (iv).

(G) If an approved application submitted under subsection (b)(2) for a new animal drug refers to a drug the approval of which was withdrawn or suspended for grounds described in paragraph (1) or (2) of subsection (e) or was withdrawn or suspended under this subparagraph or which, as determined by the Secretary, has been withdrawn from sale for safety or effectiveness reasons, the approval of the drug under this paragraph shall be withdrawn or suspended—

(i) for the same period as the withdrawal or suspension under subsection (e) or this subparagraph, or

(ii) if the approved new animal drug has been withdrawn from sale, for the period of withdrawal from sale or, if earlier, the period ending on the date the Secretary determines that the withdrawal from sale is not for safety or effectiveness reasons.

(H) For purposes of this paragraph:

(i) The term "bioequivalence" means the rate and extent to which the active ingredient or therapeutic ingredient is absorbed from a new animal drug and becomes available at the site of drug action.

(ii) A new animal drug shall be considered to be bioequivalent to the approved new animal drug referred to in its application under subsection (n) if—

(I) the rate and extent of absorption of the drug do not show a significant difference from the rate and extent of absorption of the approved new animal drug referred to in the application when administered at the same dose of the active ingredient under similar experimental conditions in either a single dose or multiple doses;

(II) the extent of absorption of the drug does not show a significant difference from the extent of absorption of the approved new animal drug referred to in the application when administered at the same dose of the active ingredient under similar experimental conditions in either a single dose or multiple doses and the difference from the approved new animal drug in the rate of absorption of the drug is intentional, is reflected in its proposed labeling, is not essential to the attainment of effective drug concentrations in use, and is considered scientifically insignificant for the drug in attaining the intended purposes of its use and preserving human food safety; or

(III) in any case in which the Secretary determines that the measurement of the rate and extent of absorption or excretion of the new animal drug in biological fluids is inappropriate or impractical, an appropriate acute pharmacological effects test or other test of the new animal drug and, when deemed scientifically necessary, of the approved new animal drug referred to in the application in the species to be tested or in an appropriate animal model does not show a significant difference between the new animal drug and such approved new animal drug when administered at the same dose under similar experimental conditions.

If the approved new animal drug referred to in the application for a new animal drug under subsection (n) is approved for use in more than one animal species, the bioequivalency information described in subclauses (I), (II), and (III) shall be obtained for one species, or if the Secretary deems appropriate based on scientific principles, shall be obtained for more than one species. The Secretary may prescribe the dose to be used in determining bioequivalency under subclause (I), (II), or (III). To assure that the residues of the new animal drug will be consistent with the established tolerances for the approved new animal drug referred to in the application under subsection (b)(2) upon the expiration of the withdrawal period contained in the application for the new animal drug, the Secretary shall require bioequivalency data or residue depletion studies of the new animal drug or such other data or studies as the Secretary considers appropriate based on scientific principles. If the Secretary requires one or more residue studies under the preceding sentence, the Secretary may not require that the assay methodology used to determine the withdrawal period of the new animal drug be more rigorous than the methodology used to determine the withdrawal period for the approved new animal drug referred to in the application. If such studies are required and if the approved new animal drug, referred to in the application for the new animal drug for which such studies are required, is approved for use in more than one animal species, such studies shall be conducted for one species, or if the Secretary deems appropriate based on scientific principles, shall be conducted for more than one species.

(3) If the patent information described in subsection (b)(1) could not be filed with the submission of an application under subsection (b)(1) because the application was filed before the patent information was required under subsection (b)(1) or a patent was issued after the application was approved under such subsection, the holder of an approved application shall file with the Secretary the patent number and the expiration date of any patent which claims the new animal drug for which the application was filed or which claims a method of using such drug and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug. If the holder of an approved application could not file patent information under subsection (b)(1) because it was not required at the time the application was approved, the holder shall file such information under this subsection not later than 30 days after November 16, 1988, and if the holder of an approved application could not file patent information under subsection (b)(1) because no patent had been issued when an application was filed or approved, the holder shall file such information under this subsection not

later than 30 days after the date the patent involved is issued. Upon the submission of patent information under this subsection, the Secretary shall publish it.

(4) A drug manufactured in a pilot or other small facility may be used to demonstrate the safety and effectiveness of the drug and to obtain approval for the drug prior to manufacture of the drug in a larger facility, unless the Secretary makes a determination that a full scale production facility is necessary to ensure the safety or effectiveness of the drug.

(d) Grounds for refusing application; approval of application; factors; "substantial evidence" defined; combination drugs

(1) If the Secretary finds, after due notice to the applicant in accordance with subsection (c) and giving him an opportunity for a hearing, in accordance with said subsection, that—

(A) the investigations, reports of which are required to be submitted to the Secretary pursuant to subsection (b), do not include adequate tests by all methods reasonably applicable to show whether or not such drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof;

(B) the results of such tests show that such drug is unsafe for use under such conditions or do not show that such drug is safe for use under such conditions;

(C) the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug are inadequate to preserve its identity, strength, quality, and purity;

(D) upon the basis of the information submitted to him as part of the application, or upon the basis of any other information before him with respect to such drug, he has insufficient information to determine whether such drug is safe for use under such conditions;

(E) evaluated on the basis of the information submitted to him as part of the application and any other information before him with respect to such drug, there is a lack of substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof;

(F) upon the basis of information submitted to the Secretary as part of the application or any other information before the Secretary with respect to such drug, any use prescribed, recommended, or suggested in labeling proposed for such drug will result in a residue of such drug in excess of a tolerance found by the Secretary to be safe for such drug;

(G) the application failed to contain the patent information prescribed by subsection (b)(1);

(H) based on a fair evaluation of all material facts, such labeling is false or misleading in any particular; or

(I) such drug induces cancer when ingested by man or animal or, after tests which are appropriate for the evaluation of the safety of such drug, induces cancer in man or animal, except that the foregoing provisions of this subparagraph shall not apply with respect to such drug if the Secretary finds that, under the conditions of use specified in proposed labeling and reasonably certain to be followed in practice (i) such drug will not adversely affect the animals for which it is intended, and (ii) no residue of such drug will be found (by methods of examination prescribed or approved by the Secretary by regulations, which regulations shall not be subject to subsections (c), (d), and (h)), in any edible portion of such animals after slaughter or in any food yielded by or derived from the living animals;

he shall issue an order refusing to approve the application. If, after such notice and opportunity for hearings, the Secretary finds that subparagraphs (A) through (I) do not apply, he shall issue an order approving the application.

(2) In determining whether such drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof, the Secretary shall consider, among other relevant factors, (A) the probable consumption of such drug and of any substance formed in or on food because of the use of such drug, (B) the cumulative effect on man or animal of such drug, taking into account any chemically or pharmacologically related substance, (C) safety factors which in the opinion of experts, qualified by scientific training and experience to evaluate the safety of such drugs, are appropriate for the use of animal experimentation data, and (D) whether the conditions of use prescribed, recommended, or suggested in the proposed labeling are reasonably certain to be followed in practice. Any order issued under this subsection refusing to approve an application shall state the findings upon which it is based.

(3) As used in this section, the term "substantial evidence" means evidence consisting of one or more adequate and well controlled investigations, such as—

(A) a study in a target species;

(B) a study in laboratory animals;

(C) any field investigation that may be required under this section and that meets the requirements of subsection (b)(3) if a presubmission conference is requested by the applicant;

(D) a bioequivalence study; or

(E) an in vitro study;

by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and reasonably be concluded by such experts that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling or proposed labeling thereof.

(4) In a case in which an animal drug contains more than one active ingredient, or the labeling of the drug prescribes, recommends, or suggests use of the drug in combination with one or more other animal drugs, and the active ingredients or drugs intended for use in the combination have previously been separately approved pursuant to an application submitted under subsection (b)(1) for particular uses and conditions of use for which they are intended for use in the combination—

(A) the Secretary shall not issue an order under paragraph (1)(A), (1)(B), or (1)(D) refusing to approve the application for such combination on human food safety grounds unless the Secretary finds that the application fails to establish that—

(i) none of the active ingredients or drugs intended for use in the combination, respectively, at the longest withdrawal time of any of the active ingredients or drugs in the combination, respectively, exceeds its established tolerance; or

(ii) none of the active ingredients or drugs in the combination interferes with the methods of analysis for another of the active ingredients or drugs in the combination, respectively;

(B) the Secretary shall not issue an order under paragraph (1)(A), (1)(B), or (1)(D) refusing to approve the application for such combination on target animal safety grounds unless the Secretary finds that—

(i)(I) there is a substantiated scientific issue, specific to one or more of the active ingredients or animal drugs in the combination, that cannot adequately be evaluated based on information contained in the application for the combination (including any investigations, studies, or tests for which the applicant has a right of reference or use from the person by or for whom the investigations, studies, or tests were conducted); or

(II) there is a scientific issue raised by target animal observations contained in studies submitted to the Secretary as part of the application; and

(ii) based on the Secretary's evaluation of the information contained in the application with respect to the issues identified in clauses (i)(I) and (II), paragraph (1)(A), (B), or (D) apply;

(C) except in the case of a combination that contains a nontopical antibacterial ingredient or animal drug, the Secretary shall not issue an order under paragraph (1)(E) refusing to approve an application for a combination animal drug intended for use other than in animal feed or drinking water unless the Secretary finds that the application fails to demonstrate that—

(i) there is substantial evidence that any active ingredient or animal drug intended only for the same use as another active ingredient or animal drug in the combination makes a contribution to labeled effectiveness;

(ii) each active ingredient or animal drug intended for at least one use that is different from all other active ingredients or animal drugs used in the combination provides appropriate concurrent use for the intended target population; or

(iii) where based on scientific information the Secretary has reason to believe the active ingredients or animal drugs may be physically incompatible or have disparate dosing regimens, such active ingredients or animal drugs are physically compatible or do not have disparate dosing regimens; and

(D) the Secretary shall not issue an order under paragraph (1)(E) refusing to approve an application for a combination animal drug intended for use in animal feed or drinking water unless the Secretary finds that the application fails to demonstrate that—

(i) there is substantial evidence that any active ingredient or animal drug intended only for the same use as another active ingredient or animal drug in the combination makes a contribution to the labeled effectiveness;

(ii) each of the active ingredients or animal drugs intended for at least one use that is different from all other active ingredients or animal drugs used in the combination provides appropriate concurrent use for the intended target population;

(iii) where a combination contains more than one nontopical antibacterial ingredient or animal drug, there is substantial evidence that each of the nontopical antibacterial ingredients or animal drugs makes a contribution to the labeled effectiveness, except that for purposes of this clause, antibacterial ingredient or animal drug does not include the ionophore or arsenical classes of animal drugs; or

(iv) where based on scientific information the Secretary has reason to believe the active ingredients or animal drugs intended for use in drinking water may be physically incompatible, such active ingredients or animal drugs intended for use in drinking water are physically compatible.

(5) In reviewing an application that proposes a change to add an intended use for a minor use or a minor species to an approved new animal drug application, the Secretary shall reevaluate only the relevant information in the approved application to determine whether the application for the minor use or minor species can be approved. A decision to approve the application for the minor use or minor species is not, implicitly or explicitly, a reaffirmation of the approval of the original application.

(e) Withdrawal of approval; grounds; immediate suspension upon finding imminent hazard to health of man or animals

(1) The Secretary shall, after due notice and opportunity for hearing to the applicant, issue an order withdrawing approval of an application filed pursuant to subsection (b) with respect to any new animal drug if the Secretary finds—

(A) that experience or scientific data show that such drug is unsafe for use under the conditions of use upon the basis of which the application was approved or the condition of use authorized under subsection (a)(4)(A);

(B) that new evidence not contained in such application or not available to the Secretary until after such application was approved, or tests by new methods, or tests by methods not deemed reasonably applicable when such application was approved, evaluated together with the evidence available to the Secretary when the application was approved, shows that such drug is not shown to be safe for use under the conditions of use upon the basis of which the application was approved or that subparagraph (I) of paragraph (1) of subsection (d) applies to such drug;

(C) on the basis of new information before him with respect to such drug, evaluated together with the evidence available to him when the application was approved, that there is a lack of substantial evidence that such drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling thereof;

(D) the patent information prescribed by subsection (c)(3) was not filed within 30 days after the receipt of written notice from the Secretary specifying the failure to file such information;

(E) that the application contains any untrue statement of a material fact; or

(F) that the applicant has made any changes from the standpoint of safety or effectiveness beyond the variations provided for in the application unless he has supplemented the application by filing with the Secretary adequate information respecting all such changes and unless there is in effect an approval of the supplemental application. The supplemental application shall be treated in the same manner as the original application.

If the Secretary (or in his absence the officer acting as Secretary) finds that there is an imminent hazard to the health of man or of the animals for which such drug is intended, he may suspend the approval of

such application immediately, and give the applicant prompt notice of his action and afford the applicant the opportunity for an expedited hearing under this subsection; but the authority conferred by this sentence to suspend the approval of an application shall not be delegated.

(2) The Secretary may also, after due notice and opportunity for hearing to the applicant, issue an order withdrawing the approval of an application with respect to any new animal drug under this section if the Secretary finds—

(A) that the applicant has failed to establish a system for maintaining required records, or has repeatedly or deliberately failed to maintain such records or to make required reports in accordance with a regulation or order under subsection (l), or the applicant has refused to permit access to, or copying or verification of, such records as required by paragraph (2) of such subsection;

(B) that on the basis of new information before him, evaluated together with the evidence before him when the application was approved, the methods used in, or the facilities and controls used for, the manufacture, processing, and packing of such drug are inadequate to assure and preserve its identity, strength, quality, and purity and were not made adequate within a reasonable time after receipt of written notice from the Secretary specifying the matter complained of; or

(C) that on the basis of new information before him, evaluated together with the evidence before him when the application was approved, the labeling of such drug, based on a fair evaluation of all material facts, is false or misleading in any particular and was not corrected within a reasonable time after receipt of written notice from the Secretary specifying the matter complained of.

(3) Any order under this subsection shall state the findings upon which it is based.

(f) Revocation of order refusing, withdrawing or suspending approval of application

Whenever the Secretary finds that the facts so require, he shall revoke any previous order under subsection (d), (e), or (m), or section 360ccc(c), (d), or (e) of this title refusing, withdrawing, or suspending approval of an application and shall approve such application or reinstate such approval, as may be appropriate.

(g) Service of orders

Orders of the Secretary issued under this section, or section 360ccc of this title (other than orders issuing, amending, or repealing regulations) shall be served (1) in person by any officer or employee of the department designated by the Secretary or (2) by mailing the order by registered mail or by certified mail addressed to the applicant or respondent at his last known address in the records of the Secretary.

(h) Appeal from order

An appeal may be taken by the applicant from an order of the Secretary refusing or withdrawing approval of an application filed under subsection (b) or (m) of this section. The provisions of subsection (h) of section 355 of this title shall govern any such appeal.

(i) Publication in Federal Register; effective date and revocation or suspension of regulation

When a new animal drug application filed pursuant to subsection (b) or section 360ccc of this title is approved, the Secretary shall by notice, which upon publication shall be effective as a regulation, publish in the Federal Register the name and address of the applicant and the conditions and indications of use of the new animal drug covered by such application, including any tolerance and withdrawal period or other use restrictions and, if such new animal drug is intended for use in animal feed, appropriate purposes and conditions of use (including special labeling requirements and any requirement that an animal feed bearing or containing the new animal drug be limited to use under the professional supervision of a licensed veterinarian) applicable to any animal feed for use in which such drug is approved, and such other information, upon the basis of which such application was approved, as the Secretary deems necessary to assure the safe and effective use of such drug. Upon withdrawal of approval of such new animal drug application or upon its suspension or upon failure to renew a conditional approval under section 360ccc of this title, the Secretary shall forthwith revoke or suspend, as the case may be, the regulation published pursuant to this subsection (i) insofar as it is based on the approval of such application.

(j) Exemption of drugs for research; discretionary and mandatory conditions

To the extent consistent with the public health, the Secretary shall promulgate regulations for exempting from the operation of this section new animal drugs, and animal feeds bearing or containing new animal drugs, intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety and effectiveness of animal drugs. Such regulations may, in the discretion of the Secretary, among other conditions relating to the protection of the public health, provide for conditioning such exemption upon the establishment and maintenance of such records, and the making of such reports to the Secretary, by the manufacturer or the sponsor of the investigation of such article, of data (including but not limited to analytical reports by investigators) obtained as a result of such investigational use of such article, as the Secretary finds will enable him to evaluate the safety and effectiveness of such article in the event of the filing of an application pursuant to this section. Such regulations, among other things, shall set forth the conditions (if any) upon which animals treated with such articles, and any products of such animals (before or after slaughter), may be marketed for food use.

(k) Food containing new animal drug considered unadulterated while approval of application for such drug is effective

While approval of an application for a new animal drug is effective, a food shall not, by reason of bearing or containing such drug or any substance formed in or on the food because of its use in accordance with such application (including the conditions and indications of use prescribed pursuant to subsection (i)), be considered adulterated within the meaning of clause (1) of section 342(a) of this title.

(l) Records and reports; required information; regulations and orders; examination of data; access to records

(1) In the case of any new animal drug for which an approval of an application filed pursuant to subsection (b) or section 360ccc of this title is in effect, the applicant shall establish and maintain such records, and make such reports to the Secretary, of data relating to experience, including experience with uses authorized under subsection (a)(4)(A), and other data or information, received or otherwise obtained by such applicant with respect to such drug, or with respect to animal feeds bearing or containing such drug, as the Secretary may by general regulation, or by order with respect to such application, prescribe on the basis of a finding that such records and reports are necessary in order to enable the Secretary to determine, or facilitate a determination, whether there is or may be ground for invoking subsection (e) or subsection (m)(4) of this section. Such regulation or order shall provide, where the Secretary deems it to be appropriate, for the examination, upon request, by the persons to whom such regulation or order is applicable, of similar information received or otherwise obtained by the Secretary.

(2) Every person required under this subsection to maintain records, and every person in charge or custody thereof, shall, upon request of an officer or employee designated by the Secretary, permit such officer or employee at all reasonable times to have access to and copy and verify such records.

(3)(A) In the case of each new animal drug described in paragraph (1) that contains an antimicrobial active ingredient, the sponsor of the drug shall submit an annual report to the Secretary on the amount of each antimicrobial active ingredient in the drug that is sold or distributed for use in food-producing animals, including information on any distributor-labeled product.

(B) Each report under this paragraph shall specify the amount of each antimicrobial active ingredient—

(i) by container size, strength, and dosage form;

(ii) by quantities distributed domestically and quantities exported; and

(iii) by dosage form, including, for each such dosage form, a listing of the target animals, indications, and production classes that are specified on the approved label of the product.

(C) Each report under this paragraph shall—

(i) be submitted not later than March 31 each year;

(ii) cover the period of the preceding calendar year; and

(iii) include separate information for each month of such calendar year.

(D) The Secretary may share information reported under this paragraph with the Antimicrobial Resistance Task Force established under section 247d–5 of title 42.

(E) The Secretary shall make summaries of the information reported under this paragraph publicly available, except that—

(i) the summary data shall be reported by antimicrobial class, and no class with fewer than 3 distinct sponsors of approved applications shall be independently reported; and

(ii) the data shall be reported in a manner consistent with protecting both national security and confidential business information.

(m) Feed mill licenses

(1) Any person may file with the Secretary an application for a license to manufacture animal feeds bearing or containing new animal drugs. Such person shall submit to the Secretary as part of the application (A) a full statement of the business name and address of the specific facility at which the manufacturing is to take place and the facility's registration number, (B) the name and signature of the responsible individual or individuals for that facility, (C) a certification that the animal feeds bearing or containing new animal drugs are manufactured and labeled in accordance with the applicable regulations published pursuant to subsection (i) or for indexed new animal drugs in accordance with the index listing published pursuant to section 360ccc–1(e)(2) of this title and the labeling requirements set forth in section 360ccc–1(h) of this title, and (D) a certification that the methods used in, and the facilities and controls used for, manufacturing, processing, packaging, and holding such animal feeds are in conformity with current good manufacturing practice as described in section 351(a)(2)(B) of this title.

(2) Within 90 days after the filing of an application pursuant to paragraph (1), or such additional period as may be agreed upon by the Secretary and the applicant, the Secretary shall (A) issue an order approving the application if the Secretary then finds that none of the grounds for denying approval specified in paragraph (3) applies, or (B) give the applicant notice of an opportunity for a hearing before the Secretary under paragraph (3) on the question whether such application is approvable. The procedure governing such a hearing shall be the procedure set forth in the last two sentences of subsection (c)(1).

(3) If the Secretary, after due notice to the applicant in accordance with paragraph (2) and giving the applicant an opportunity for a hearing in accordance with such paragraph, finds, on the basis of information submitted to the Secretary as part of the application, on the basis of a preapproval inspection, or on the basis of any other information before the Secretary—

(A) that the application is incomplete, false, or misleading in any particular;

(B) that the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such animal feed are inadequate to preserve the identity, strength, quality, and purity of the new animal drug therein; or

(C) that the facility manufactures animal feeds bearing or containing new animal drugs in a manner that does not accord with the specifications for manufacture or labels animal feeds bearing or containing new animal drugs in a manner that does not accord with the conditions or indications of use that are published pursuant to subsection (i) or an index listing pursuant to section 360ccc–1(e) of this title,

the Secretary shall issue an order refusing to approve the application. If, after such notice and opportunity for hearing, the Secretary finds that subparagraphs (A) through (C) do not apply, the Secretary shall issue an order approving the application. An order under this subsection approving an application for a license to manufacture animal feeds bearing or containing new animal drugs shall permit a facility to manufacture only those animal feeds bearing or containing new animal drugs for which there are in effect regulations pursuant to subsection (i) or an index listing pursuant to section 360ccc–1(e) of this title relating to the use of such drugs in or on such animal feed.

(4)(A) The Secretary shall, after due notice and opportunity for hearing to the applicant, revoke a license to manufacture animal feeds bearing or containing new animal drugs under this subsection if the Secretary finds—

(i) that the application for such license contains any untrue statement of a material fact; or

(ii) that the applicant has made changes that would cause the application to contain any untrue statements of material fact or that would affect the safety or effectiveness of the animal feeds manufactured at the facility unless the applicant has supplemented the application by filing with the Secretary adequate information respecting all such changes and unless there is in effect an approval of the supplemental application.

If the Secretary (or in the Secretary's absence the officer acting as the Secretary) finds that there is an imminent hazard to the health of humans or of the animals for which such animal feed is intended, the Secretary may suspend the license immediately, and give the applicant prompt notice of the action and afford the applicant the opportunity for an expedited hearing under this subsection; but the authority conferred by this sentence shall not be delegated.

(B) The Secretary may also, after due notice and opportunity for hearing to the applicant, revoke a license to manufacture animal feed under this subsection if the Secretary finds—

(i) that the applicant has failed to establish a system for maintaining required records, or has repeatedly or deliberately failed to maintain such records or to make required reports in accordance with a regulation or order under paragraph (5)(A) of this subsection or section 354(a)(3)(A) of this title, or the applicant has refused to permit access to, or copying or verification of, such records as required by subparagraph (B) of such paragraph or section 354(a)(3)(B) of this title;

(ii) that on the basis of new information before the Secretary, evaluated together with the evidence before the Secretary when such license was issued, the methods used in, or the facilities and controls used for, the manufacture, processing, packing, and holding of such animal feed are inadequate to assure and preserve the identity, strength, quality, and purity of the new animal drug therein, and were not made adequate within a reasonable time after receipt of written notice from the Secretary, specifying the matter complained of;

(iii) that on the basis of new information before the Secretary, evaluated together with the evidence before the Secretary when such license was issued, the labeling of any animal feeds, based on a fair evaluation of all material facts, is false or misleading in any particular and was not corrected within a reasonable time after receipt of written notice from the Secretary specifying the matter complained of; or

(iv) that on the basis of new information before the Secretary, evaluated together with the evidence before the Secretary when such license was issued, the facility has manufactured, processed, packed, or held animal feed bearing or containing a new animal drug adulterated under section 351(a)(6) of this title and the facility did not discontinue the manufacture, processing, packing, or holding of such animal feed within a reasonable time after receipt of written notice from the Secretary specifying the matter complained of.

(C) The Secretary may also revoke a license to manufacture animal feeds under this subsection if an applicant gives notice to the Secretary of intention to discontinue the manufacture of all animal feed covered under this subsection and waives an opportunity for a hearing on the matter.

(D) Any order under this paragraph shall state the findings upon which it is based.

(5) When a license to manufacture animal feeds bearing or containing new animal drugs has been issued—

(A) the applicant shall establish and maintain such records, and make such reports to the Secretary, or (at the option of the Secretary) to the appropriate person or persons holding an approved application filed under subsection (b), as the Secretary may by general regulation, or by order with respect to such application, prescribe on the basis of a finding that such records and reports are necessary in order to enable the Secretary to determine, or facilitate a determination, whether there is or may be ground for invoking subsection (e) or paragraph (4); and

(B) every person required under this subsection to maintain records, and every person in charge or custody thereof, shall, upon request of an officer or employee designated by the Secretary, permit such officer or employee at all reasonable times to have access to and copy and verify such records.

(6) To the extent consistent with the public health, the Secretary may promulgate regulations for exempting from the operation of this subsection facilities that manufacture, process, pack, or hold animal feeds bearing or containing new animal drugs.

(n) Abbreviated applications for new animal drugs; contents, filing, etc.; lists of approved drugs

(1) An abbreviated application for a new animal drug shall contain—

(A)(i) except as provided in clause (ii), information to show that the conditions of use or similar limitations (whether in the labeling or published pursuant to subsection (i)) prescribed, recommended,

or suggested in the labeling proposed for the new animal drug have been previously approved for a new animal drug listed under paragraph (4) (hereinafter in this subsection referred to as an "approved new animal drug"), and

(ii) information to show that the withdrawal period at which residues of the new animal drug will be consistent with the tolerances established for the approved new animal drug is the same as the withdrawal period previously established for the approved new animal drug or, if the withdrawal period is proposed to be different, information showing that the residues of the new animal drug at the proposed different withdrawal period will be consistent with the tolerances established for the approved new animal drug;

(B)(i) information to show that the active ingredients of the new animal drug are the same as those of the approved new animal drug, and

(ii) if the approved new animal drug has more than one active ingredient, and if one of the active ingredients of the new animal drug is different from one of the active ingredients of the approved new animal drug and the application is filed pursuant to the approval of a petition filed under paragraph (3) —

(I) information to show that the other active ingredients of the new animal drug are the same as the active ingredients of the approved new animal drug,

(II) information to show either that the different active ingredient is an active ingredient of another approved new animal drug or of an animal drug which does not meet the requirements of section 321(v) of this title, and

(III) such other information respecting the different active ingredients as the Secretary may require;

(C)(i) if the approved new animal drug is permitted to be used with one or more animal drugs in animal feed, information to show that the proposed uses of the new animal drug with other animal drugs in animal feed are the same as the uses of the approved new animal drug, and

(ii) if the approved new animal drug is permitted to be used with one or more other animal drugs in animal feed, and one of the other animal drugs proposed for use with the new animal drug in animal feed is different from one of the other animal drugs permitted to be used in animal feed with the approved new animal drug, and the application is filed pursuant to the approval of a petition filed under paragraph (3)—

(I) information to show either that the different animal drug proposed for use with the approved new animal drug in animal feed is an approved new animal drug permitted to be used in animal feed or does not meet the requirements of section 321(v) of this title when used with another animal drug in animal feed,

(II) information to show that other animal drugs proposed for use with the new animal drug in animal feed are the same as the other animal drugs permitted to be used with the approved new animal drug, and

(III) such other information respecting the different animal drug or combination with respect to which the petition was filed as the Secretary may require,

(D) information to show that the route of administration, the dosage form, and the strength of the new animal drug are the same as those of the approved new animal drug or, if the route of administration, the dosage form, or the strength of the new animal drug is different and the application is filed pursuant to the approval of a petition filed under paragraph (3), such information respecting the route of administration, dosage form, or strength with respect to which the petition was filed as the Secretary may require;

(E) information to show that the new animal drug is bioequivalent to the approved new animal drug, except that if the application is filed pursuant to the approval of a petition filed under paragraph (3) for the purposes described in subparagraph (B) or (C), information to show that the active ingredients of the new animal drug are of the same pharmacological or therapeutic class as the pharmacological or therapeutic class of the approved new animal drug and that the new animal drug can be expected to have the same therapeutic effect as the approved new animal drug when used in accordance with the labeling;

(F) information to show that the labeling proposed for the new animal drug is the same as the labeling approved for the approved new animal drug except for changes required because of differences approved under a petition filed under paragraph (3), because of a different withdrawal period, or because the new animal drug and the approved new animal drug are produced or distributed by different manufacturers;

(G) the items specified in clauses (B) through (F) of subsection (b)(1);

(H) a certification, in the opinion of the applicant and to the best of his knowledge, with respect to each patent which claims the approved new animal drug or which claims a use for such approved new animal drug for which the applicant is seeking approval under this subsection and for which information is required to be filed under subsection (b)(1) or (c)(3)—

(i) that such patent information has not been filed,

(ii) that such patent has expired,

(iii) of the date on which such patent will expire, or

(iv) that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new animal drug for which the application is filed; and

(I) if with respect to the approved new animal drug information was filed under subsection (b)(1) or (c)(3) for a method of use patent which does not claim a use for which the applicant is seeking approval of an application under subsection (c)(2), a statement that the method of use patent does not claim such a use.

The Secretary may not require that an abbreviated application contain information in addition to that required by subparagraphs (A) through (I).

(2)(A) An applicant who makes a certification described in paragraph (1)(G)(iv) shall include in the application a statement that the applicant will give the notice required by subparagraph (B) to—

(i) each owner of the patent which is the subject of the certification or the representative of such owner designated to receive such notice, and

(ii) the holder of the approved application under subsection (c)(1) for the drug which is claimed by the patent or a use of which is claimed by the patent or the representative of such holder designated to receive such notice.

(B) The notice referred to in subparagraph (A) shall state that an application, which contains data from bioequivalence studies, has been filed under this subsection for the drug with respect to which the certification is made to obtain approval to engage in the commercial manufacture, use, or sale of such drug before the expiration of the patent referred to in the certification. Such notice shall include a detailed statement of the factual and legal basis of the applicant's opinion that the patent is not valid or will not be infringed.

(C) If an application is amended to include a certification described in paragraph (1)(G)(iv), the notice required by subparagraph (B) shall be given when the amended application is filed.

(3) If a person wants to submit an abbreviated application for a new animal drug—

(A) whose active ingredients, route of administration, dosage form, or strength differ from that of an approved new animal drug, or

(B) whose use with other animal drugs in animal feed differs from that of an approved new animal drug,

such person shall submit a petition to the Secretary seeking permission to file such an application. The Secretary shall approve a petition for a new animal drug unless the Secretary finds that—

(C) investigations must be conducted to show the safety and effectiveness, in animals to be treated with the drug, of the active ingredients, route of administration, dosage form, strength, or use with other animal drugs in animal feed which differ from the approved new animal drug, or

(D) investigations must be conducted to show the safety for human consumption of any residues in food resulting from the proposed active ingredients, route of administration, dosage form, strength, or use with other animal drugs in animal feed for the new animal drug which is different from the active

ingredients, route of administration, dosage form, strength, or use with other animal drugs in animal feed of the approved new animal drug.

The Secretary shall approve or disapprove a petition submitted under this paragraph within 90 days of the date the petition is submitted.

(4)(A)(i) Within 60 days of November 16, 1988, the Secretary shall publish and make available to the public a list in alphabetical order of the official and proprietary name of each new animal drug which has been approved for safety and effectiveness before November 16, 1988.

(ii) Every 30 days after the publication of the first list under clause (i) the Secretary shall revise the list to include each new animal drug which has been approved for safety and effectiveness under subsection (c) during the 30 day period.

(iii) When patent information submitted under subsection (b)(1) or (c)(3) respecting a new animal drug included on the list is to be published by the Secretary, the Secretary shall, in revisions made under clause (ii), include such information for such drug.

(B) A new animal drug approved for safety and effectiveness before November 16, 1988, or approved for safety and effectiveness under subsection (c) shall, for purposes of this subsection, be considered to have been published under subparagraph (A) on the date of its approval or November 16, 1988, whichever is later.

(C) If the approval of a new animal drug was withdrawn or suspended under subsection (c)(2)(G) or for grounds described in subsection (e) or if the Secretary determines that a drug has been withdrawn from sale for safety or effectiveness reasons, it may not be published in the list under subparagraph (A) or, if the withdrawal or suspension occurred after its publication in such list, it shall be immediately removed from such list—

(i) for the same period as the withdrawal or suspension under subsection (c)(2)(G) or (e), or

(ii) if the listed drug has been withdrawn from sale, for the period of withdrawal from sale or, if earlier, the period ending on the date the Secretary determines that the withdrawal from sale is not for safety or effectiveness reasons.

A notice of the removal shall be published in the Federal Register.

(5) If an application contains the information required by clauses (A), (G), and (H) of subsection (b)(1) and such information—

(A) is relied on by the applicant for the approval of the application, and

(B) is not information derived either from investigations, studies, or tests conducted by or for the applicant or for which the applicant had obtained a right of reference or use from the person by or for whom the investigations, studies, or tests were conducted,

such application shall be considered to be an application filed under subsection (b)(2).

(o) "Patent" defined

For purposes of this section, the term "patent" means a patent issued by the United States Patent and Trademark Office.

(p) Safety and effectiveness data

(1) Safety and effectiveness data and information which has been submitted in an application filed under subsection (b)(1) or section 360ccc(a) of this title for a drug and which has not previously been disclosed to the public shall be made available to the public, upon request, unless extraordinary circumstances are shown—

(A) if no work is being or will be undertaken to have the application approved,

(B) if the Secretary has determined that the application is not approvable and all legal appeals have been exhausted,

(C) if approval of the application under subsection (c) is withdrawn and all legal appeals have been exhausted,

(D) if the Secretary has determined that such drug is not a new drug, or

(E) upon the effective date of the approval of the first application filed under subsection (b)(2) which refers to such drug or upon the date upon which the approval of an application filed under subsection

(b)(2) which refers to such drug could be made effective if such an application had been filed.

(2) Any request for data and information pursuant to paragraph (1) shall include a verified statement by the person making the request that any data or information received under such paragraph shall not be disclosed by such person to any other person—

(A) for the purpose of, or as part of a plan, scheme, or device for, obtaining the right to make, use, or market, or making, using, or marketing, outside the United States, the drug identified in the application filed under subsection (b)(1) or section 360ccc(a) of this title, and

(B) without obtaining from any person to whom the data and information are disclosed an identical verified statement, a copy of which is to be provided by such person to the Secretary, which meets the requirements of this paragraph.

(q) Date of approval in the case of recommended controls under the CSA

(1) In general

In the case of an application under subsection (b) with respect to a drug for which the Secretary provides notice to the sponsor that the Secretary intends to issue a scientific and medical evaluation and recommend controls under the Controlled Substances Act [21 U.S.C. 801 et seq.], approval of such application shall not take effect until the interim final rule controlling the drug is issued in accordance with section 201(j) of the Controlled Substances Act [21 U.S.C. 811(j)].

(2) Date of approval

For purposes of this section, with respect to an application described in paragraph (1), the term "date of approval" shall mean the later of—

(A) the date an application under subsection (b) is approved under subsection (c); or

(B) the date of issuance of the interim final rule controlling the drug.

(June 25, 1938, ch. 675, §512, as added Pub. L. 90–399, §101(b), July 13, 1968, 82 Stat. 343; amended Pub. L. 100–670, title I, §§101, 102, 104, 107(a)(2), Nov. 16, 1988, 102 Stat. 3971, 3981, 3982, 3984; Pub. L. 102–108, §2(e), Aug. 17, 1991, 105 Stat. 550; Pub. L. 103–80, §3(r), Aug. 13, 1993, 107 Stat. 777; Pub. L. 103–396, §2(a), (b)(2), (3), Oct. 22, 1994, 108 Stat. 4153, 4154; Pub. L. 104–250, §§2(a)–(d), 3, 4, 5(c), 6(a), (b), Oct. 9, 1996, 110 Stat. 3151–3153, 3155-3157; Pub. L. 105–115, title I, §124(b), Nov. 21, 1997, 111 Stat. 2325; Pub. L. 105–277, div. A, §101(a) [title VII, §737], Oct. 21, 1998, 112 Stat. 2681, 2681-30; Pub. L. 106–113, div. B, §1000(a)(9) [title IV, §4732(b)(11)], Nov. 29, 1999, 113 Stat. 1536, 1501A-584; Pub. L. 108–282, title I, §102(b)(2), (3), (5)(I)–(S), Aug. 2, 2004, 118 Stat. 892, 903, 904; Pub. L. 110–316, title I, §105(a), Aug. 14, 2008, 122 Stat. 3513; Pub. L. 114–89, §2(a)(3)(A), Nov. 25, 2015, 129 Stat. 699; Pub. L. 114–255, div. A, title III, §3088(b), Dec. 13, 2016, 130 Stat. 1149; Pub. L. 115–234, title III, §301(a), Aug. 14, 2018, 132 Stat. 2436; Pub. L. 117–9, §1(a)(2), Apr. 23, 2021, 135 Stat. 257.)

Editorial Notes

References in Text

Section 342(a)(2) of this title, referred to in subsec. (a)(6), was amended by Pub. L. 104–170, title IV, §404, Aug. 3, 1996, 110 Stat. 1514, and, as so amended, no longer contains a subcl. (D). See section 342(a)(2)(C)(ii) of this title.

The Controlled Substances Act, referred to in subsec. (q)(1), is title II of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1242, which is classified principally to subchapter I (§801 et seq.) of chapter 13 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 801 of this title and Tables.

Amendments

2021—Subsec. (c)(2)(F). Pub. L. 117–9 substituted "active moiety (as defined by the Secretary in section 314.3 of title 21, Code of Federal Regulations (or any successor regulations))" for "active ingredient (including any ester or salt of the active ingredient)" in cls. (i), (ii), and (v).

2018—Subsec. (b)(4). Pub. L. 115–234 added par. (4).

2016—Subsec. (a)(1)(D). Pub. L. 114–255 added subpar. (D).

2015—Subsec. (q). Pub. L. 114–89 added subsec. (q).

2008—Subsec. (l)(3). Pub. L. 110–316 added par. (3).

2004—Subsec. (a)(1), (2). Pub. L. 108–282, §102(b)(5)(I), added pars. (1) and (2) and struck out former pars. (1) and (2) which deemed as unsafe new animal drugs and animal feed bearing or containing a new animal drug which did not have in effect certain approvals.

Subsec. (b)(3). Pub. L. 108–282, §102(b)(5)(J), substituted "under paragraph (1), section 360ccc of this title, or a request for an investigational exemption under subsection (j)" for "under paragraph (1) or a request for an investigational exemption under subsection (j)".

Subsec. (c)(2)(F)(ii), (iii), (v). Pub. L. 108–282, §102(b)(2), substituted "(other than bioequivalence studies or residue depletion studies, except residue depletion studies for minor uses or minor species)" for "(other than bioequivalence or residue studies)".

Subsec. (d)(4). Pub. L. 108–282, §102(b)(5)(K), substituted "have previously been separately approved pursuant to an application submitted under subsection (b)(1)" for "have previously been separately approved" in introductory provisions.

Subsec. (d)(5). Pub. L. 108–282, §102(b)(3), added par. (5).

Subsec. (f). Pub. L. 108–282, §102(b)(5)(L), substituted "subsection (d), (e), or (m), or section 360ccc(c), (d), or (e) of this title" for "subsection (d), (e), or (m)".

Subsec. (g). Pub. L. 108–282, §102(b)(5)(M), substituted "this section, or section 360ccc of this title" for "this section".

Subsec. (i). Pub. L. 108–282, §102(b)(5)(N), substituted "subsection (b) or section 360ccc of this title" for "subsection (b)" and inserted "or upon failure to renew a conditional approval under section 360ccc of this title" after "or upon its suspension".

Subsec. (l)(1). Pub. L. 108–282, §102(b)(5)(O), substituted "subsection (b) or section 360ccc of this title" for "subsection (b)".

Subsec. (m)(1)(C). Pub. L. 108–282, §102(b)(5)(P), substituted "applicable regulations published pursuant to subsection (i) or for indexed new animal drugs in accordance with the index listing published pursuant to section 360ccc–1(e)(2) of this title and the labeling requirements set forth in section 360ccc–1(h) of this title" for "applicable regulations published pursuant to subsection (i)".

Subsec. (m)(3). Pub. L. 108–282, §102(b)(5)(Q), inserted "or an index listing pursuant to section 360ccc–1(e) of this title" after "subsection (i)" in subpar. (C) and concluding provisions.

Subsec. (p)(1), (2)(A). Pub. L. 108–282, §102(b)(5)(R), (S), substituted "subsection (b)(1) or section 360ccc(a) of this title" for "subsection (b)(1)".

1999—Subsec. (o). Pub. L. 106–113 substituted "United States Patent and Trademark Office" for "Patent and Trademark Office of the Department of Commerce".

1998—Subsec. (d)(4)(D)(iii). Pub. L. 105–277 inserted before semicolon ", except that for purposes of this clause, antibacterial ingredient or animal drug does not include the ionophore or arsenical classes of animal drugs".

1997—Subsec. (c)(4). Pub. L. 105–115 added par. (4).

1996—Subsec. (a)(1). Pub. L. 104–250, §6(a), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "A new animal drug shall, with respect to any particular use or intended use of such drug, be deemed unsafe for the purposes of section 351(a)(5) and section 342(a)(2)(D) of this title unless—

"(A) there is in effect an approval of an application filed pursuant to subsection (b) of this section with respect to such use or intended use of such drug, and

"(B) such drug, its labeling, and such use conform to such approved application.

A new animal drug shall also be deemed unsafe for such purposes in the event of removal from the establishment of a manufacturer, packer, or distributor of such drug for use in the manufacture of animal feed in any State unless at the time of such removal such manufacturer, packer, or distributor has an unrevoked written statement from the consignee of such drug, or notice from the Secretary, to the effect that, with respect to the use of such drug in animal feed, such consignee—

"(i) is the holder of an approved application under subsection (m) of this section; or

"(ii) will, if the consignee is not a user of the drug, ship such drug only to a holder of an approved application under subsection (m) of this section."

Subsec. (a)(2). Pub. L. 104–250, §6(a), amended par. (2) generally. Prior to amendment, par. (2) read as follows: "An animal feed bearing or containing a new animal drug shall, with respect to any particular use or intended use of such animal feed, be deemed unsafe for the purposes of section 351(a)(6) of this title unless—

"(A) there is in effect an approval of an application filed pursuant to subsection (b) of this section with respect to such drugs, as used in such animal feed,

"(B) there is in effect an approval of an application pursuant to subsection (m)(1) of this section with respect to such animal feed, and

"(C) such animal feed, its labeling, and such use conform to the conditions and indications of use published pursuant to subsection (i) of this section and to the application with respect thereto approved under subsection (m) of this section."

Subsec. (a)(6). Pub. L. 104–250, §4, added par. (6).

Subsec. (b)(3). Pub. L. 104–250, §2(d), added par. (3).

Subsec. (c)(2)(F)(ii), (iii). Pub. L. 104–250, §2(b)(1), substituted "substantial evidence of the effectiveness of the drug involved, any studies of animal safety, or," for "reports of new clinical or field investigations (other than bioequivalence or residue studies) and," and "required for the approval" for "essential to the approval".

Subsec. (c)(2)(F)(v). Pub. L. 104–250, §2(b)(2), substituted "clause (iv)" for "subparagraph (B)(iv)" in two places, "substantial evidence of the effectiveness of the drug involved, any studies of animal safety," for "reports of clinical or field investigations" and "required for the new approval" for "essential to the new approval".

Subsec. (d)(1)(F). Pub. L. 104–250, §3, amended subpar. (F) generally. Prior to amendment, subpar. (F) read as follows: "upon the basis of the information submitted to him as part of the application or any other information before him with respect to such drug, the tolerance limitation proposed, if any, exceeds that reasonably required to accomplish the physical or other technical effect for which the drug is intended;".

Subsec. (d)(3). Pub. L. 104–250, §2(a), amended par. (3) generally. Prior to amendment, par. (3) read as follows: "As used in this subsection and subsection (e) of this section, the term 'substantial evidence' means evidence consisting of adequate and well-controlled investigations, including field investigation, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and reasonably be concluded by such experts that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling or proposed labeling thereof."

Subsec. (d)(4). Pub. L. 104–250, §2(c), added par. (4).

Subsec. (i). Pub. L. 104–250, §5(c), inserted "and any requirement that an animal feed bearing or containing the new animal drug be limited to use under the professional supervision of a licensed veterinarian" after "(including special labeling requirements".

Subsec. (m). Pub. L. 104–250, §6(b), amended subsec. (m) generally, substituting provisions relating to application for feed mill licenses, including approval, refusal, revocation, and suspension of such licenses, and provisions for record and reporting requirements for, as well as exemption from, such licenses, for provisions relating to application for uses of animal feed containing new animal drug, including required contents, approval, refusal, and withdrawal of approval or suspension of such usage applications, and provisions for record and reporting requirements of such usage applications.

1994—Subsec. (a)(4), (5). Pub. L. 103–396, §2(a), added pars. (4) and (5).

Subsec. (e)(1)(A). Pub. L. 103–396, §2(b)(2), inserted before semicolon at end "or the condition of use authorized under subsection (a)(4)(A)".

Subsec. (l)(1). Pub. L. 103–396, §2(b)(3), substituted "relating to experience, including experience with uses authorized under subsection (a)(4)(A)," for "relating to experience".

1993—Subsec. (c)(2)(A)(ii). Pub. L. 103–80, §3(r)(1), inserted "in" after "except as provided".

Subsec. (c)(2)(F)(i). Pub. L. 103–80, §3(r)(2), substituted "subparagraph (D)(iii)" for "subparagraph (C)(iii)".

Subsec. (c)(2)(H)(ii). Pub. L. 103–80, §3(r)(3), substituted "subclauses" for "subclause" after "bioequivalency information described in" in concluding provisions.

Subsec. (d)(1). Pub. L. 103–80, §3(r)(4), substituted "subparagraphs (A) through (I)" for "subparagraphs (A) through (G)" in concluding provisions.

Subsec. (n)(1). Pub. L. 103–80, §3(r)(5), substituted "section 321(v) of this title" for "section 321(w) of this title" in subpars. (B)(ii)(II) and (C)(ii)(I) and substituted "through (I)" for "through (H)" in concluding provisions.

1991—Subsec. (e)(1)(B). Pub. L. 102–108 substituted "(I)" for "(H)".

1988—Subsec. (a)(1)(C). Pub. L. 100–670, §107(a)(2), struck out subpar. (C) which read as follows: "in the case of a new animal drug subject to subsection (n) of this section and not exempted therefrom by regulations it is from a batch with respect to which a certificate or release issued pursuant to subsection (n) of this section is in effect with respect to such drug."

Subsec. (b). Pub. L. 100–670, §§101(a), 102(a), designated existing provisions as par. (1), redesignated cls. (1) to (8) as cls. (A) to (H), respectively, added par. (2), and inserted provisions at end of par. (1) which require applicant to file with application, patent number and expiration date of any patent which claims new animal drug, to amend application to include such information if patent which claims such drug or method of using such drug is issued after filing date but before approval of application, and to publish such information upon approval.

Subsec. (c). Pub. L. 100–670, §§101(c), 102(b)(1), designated existing provisions as par. (1), redesignated cls. (1) and (2) as cls. (A) and (B), respectively, and added pars. (2) and (3).

Subsec. (d)(1). Pub. L. 100–670, §102(b)(3), substituted "(G)" for "(H)" in last sentence.

Subsec. (d)(1)(G) to (I). Pub. L. 100–670, §102(b)(2), added subpar. (G) and redesignated former subpars. (G) and (H) as (H) and (I), respectively.

Subsec. (e)(1)(D) to (F). Pub. L. 100–670, §102(b)(4), added subpar. (D) and redesignated former subpars. (D) and (E) as (E) and (F), respectively.

Subsecs. (n), (o). Pub. L. 100–670, §101(b), added subsecs. (n) and (o) and struck out former subsec. (n) which related to certification of new drugs containing penicillin, streptomycin, chlortetracycline, chloramphenicol, or bacitracin, and release prior to certification.

Subsec. (p). Pub. L. 100–670, §104, added subsec. (p).

Statutory Notes and Related Subsidiaries

Effective Date of 1999 Amendment

Amendment by Pub. L. 106–113 effective 4 months after Nov. 29, 1999, see section 1000(a)(9) [title IV, §4731] of Pub. L. 106–113, set out as a note under section 1 of Title 35, Patents.

Effective Date of 1997 Amendment

Amendment by Pub. L. 105–115 effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as a note under section 321 of this title.

Effective Date of 1994 Amendment

Pub. L. 103–396, §2(d), Oct. 22, 1994, 108 Stat. 4154, provided that: "The amendments made by this section [amending this section and section 331 of this title] shall take effect upon the adoption of the final regulations under subsection (c) [set out below]." [Final regulations were dated Oct. 22, 1996, filed Nov. 6, 1996, published Nov. 7, 1996, 61 F.R. 57732, and effective Dec. 9, 1996.]

Effective Date of 1988 Amendment

Pub. L. 100–670, title I, §108, Nov. 16, 1988, 102 Stat. 3984, provided that: "The Secretary of Health and Human Services may not make an approval of an application submitted under section 512(b)(2) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(b)(2)) effective before January 1, 1991."

Effective Date and Transitional Provisions

Pub. L. 90–399, §108, July 13, 1968, 82 Stat. 353, as amended by Pub. L. 108–282, title I, §102(b)(5)(T), Aug. 2, 2004, 118 Stat. 905, provided that:

"(a) Except as otherwise provided in this section, the amendments made by the foregoing sections [see Short Title of 1968 Amendment note set out under section 301 of this title] shall take effect on the first day of the thirteenth calendar month which begins after the date of enactment of this Act [July 13, 1968].

"(b)(1) As used in this subsection, the term 'effective date' means the effective date specified in subsection (a) of this section; the term 'basic Act' means the Federal Food, Drug, and Cosmetic Act [this chapter]; and other terms used both in this section and the basic Act shall have the same meaning as they have, or had, at the time referred to in the context, under the basic Act.

"(2) Any approval, prior to the effective date, of a new animal drug or of an animal feed bearing or containing a new animal drug, whether granted by approval of a new-drug application, master file, antibiotic regulation, or food additive regulations, shall continue in effect, and shall be subject to change in accordance with the provisions of the basic Act as amended by this Act [see Short Title of 1968 Amendment note set out under section 301 of this title].

"(3) In the case of any drug (other than a drug subject to section 512(n) of the basic Act as amended by this Act) [subsection (n) of this section] intended for use in animals other than man which, on October 9, 1962, (A) was commercially used or sold in the United States, (B) was not a new drug as defined by section 201(p) of the basic Act [section 321(p) of this title] as then in force, and (C) was not covered by an effective application under section 505 of that Act [section 355 of this title], the words 'effectiveness' and 'effective' contained in section 201(v) to the basic Act [sic] [section 321(v) of this title] shall not apply to such drug when intended solely for use under conditions prescribed, recommended, or suggested in labeling with respect to such drug on that day.

"(4) Regulations providing for fees (and advance deposits to cover fees) which on the day preceding the effective date applicable under subsection (a) of this section were in effect pursuant to section 507 of the basic Act [section 357 of this title] shall, except as the Secretary may otherwise prescribe, be deemed to apply also under section 512(n) of the basic Act [subsection (n) of this section], and appropriations of fees (and of advance deposits to cover fees) available for the purposes specified in such section 507 [section 357 of this title] as in effect prior to the

effective date shall also be available for the purposes specified in section 512(n) [subsection (n) of this section], including preparatory work or proceedings prior to that date."

Regulations

Pub. L. 104–250, §2(e), Oct. 9, 1996, 110 Stat. 3154, provided that:

"(1) In general.—Not later than 6 months after the date of enactment of this Act [Oct. 9, 1996], the Secretary of Health and Human Services shall issue proposed regulations implementing the amendments made by this Act as described in paragraph (2)(A) of this subsection, and not later than 18 months after the date of enactment of this Act, the Secretary shall issue final regulations implementing such amendments. Not later than 12 months after the date of enactment of this Act, the Secretary shall issue proposed regulations implementing the other amendments made by this Act as described in paragraphs (2)(B) and (2)(C) of this subsection, and not later than 24 months after the date of enactment of this Act, the Secretary shall issue final regulations implementing such amendments.

"(2) Contents.—In issuing regulations implementing the amendments made by this Act [see Short Title of 1996 Amendments note set out under section 301 of this title], and in taking an action to review an application for approval of a new animal drug under section 512 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b), or a request for an investigational exemption for a new animal drug under subsection (j) of such section, that is pending or has been submitted prior to the effective date of the regulations, the Secretary shall—

"(A) further define the term 'adequate and well controlled', as used in subsection (d)(3) of section 512 of such Act, to require that field investigations be designed and conducted in a scientifically sound manner, taking into account practical conditions in the field and differences between field conditions and laboratory conditions;

"(B) further define the term 'substantial evidence', as defined in subsection (d)(3) of such section, in a manner that encourages the submission of applications and supplemental applications; and

"(C) take into account the proposals contained in the citizen petition (FDA Docket No. 91P–0434/CP) jointly submitted by the American Veterinary Medical Association and the Animal Health Institute, dated October 21, 1991.

Until the regulations required by subparagraph (A) are issued, nothing in the regulations published at 21 C.F.R. 514.111(a)(5) (April 1, 1996) shall be construed to compel the Secretary of Health and Human Services to require a field investigation under section 512(d)(1)(E) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(d)(1)(E)) or to apply any of its provisions in a manner inconsistent with the considerations for scientifically sound field investigations set forth in subparagraph (A)."

Pub. L. 103–396, §2(c), Oct. 22, 1994, 108 Stat. 4154, provided that: "Not later than 2 years after the date of the enactment of this Act [Oct. 22, 1994], the Secretary of Health and Human Services shall promulgate regulations to implement paragraphs (4)(A) and (5) of section 512(a) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 360b(a)(4)(A), (5)] (as amended by subsection (a))."

Pub. L. 100–670, title I, §103, Nov. 16, 1988, 102 Stat. 3982, provided that:

"(a) General Rule.—The Secretary of Health and Human Services shall promulgate, in accordance with the notice and comment requirements of section 553 of title 5, United States Code, such regulations as may be necessary for the administration of section 512 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 360b], as amended by sections 101 through 103 of this title, within one year of the date of enactment of this Act [Nov. 16, 1988].

"(b) Transition.—During the period beginning 60 days after the date of enactment of this Act [Nov. 16, 1988] and ending on the date regulations promulgated under subsection (a) take effect, abbreviated new animal drug applications may be submitted in accordance with the provisions of section 314.55 and part 320 of title 21 of the Code of Federal Regulations and shall be considered as suitable for any drug which has been approved for safety and effectiveness under section 512(c) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 360b(c)] before the date of enactment of this Act. If any such provision of section 314.55 or part 320 is inconsistent with the requirements of section 512 of the Federal Food, Drug, and Cosmetic Act (as amended by this title), the Secretary shall consider the application under the applicable requirements of section 512 (as so amended)."

Guidance Addressing Investigation Designs

Pub. L. 115–234, title III, §305, Aug. 14, 2018, 132 Stat. 2440, provided that:

"(a) In General.—For purposes of assisting sponsors in incorporating complex adaptive and other novel investigation designs, data from foreign countries, real world evidence (including ongoing surveillance activities, observational studies, and registry data), biomarkers, and surrogate endpoints (referred to in this section as 'elements of investigations') into proposed clinical investigation protocols and applications for new animal drugs under sections 512 and 571 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b; 360ccc), the Secretary of

Health and Human Services (referred to in this section as the 'Secretary') shall issue guidance addressing the use of such elements of investigations in the development and regulatory review of such new animal drugs.

"(b) CONTENTS.—The guidance under subsection (a) shall address how the Secretary will evaluate the elements of investigations proposed or submitted pursuant to section 512(b)(1)(A) of the Federal Food, Drug, and Cosmetic Act or to meet the commitment under section 571(a)(2)(F) of such Act, and how sponsors of such applications may obtain feedback from the Secretary on technical issues related to such investigations prior to the submission of an application to the Secretary.

"(c) MEETING.—Prior to issuing the guidance under subsection (a), the Secretary shall consult with stakeholders, including representatives of regulated industry, consumer groups, academia, veterinarians, and food producers, through a public meeting to be held not later than 1 year after the date of enactment of this Act [Aug. 14, 2018].

"(d) TIMING.—The Secretary shall issue a draft guidance under subsection (a) not later than 1 year after the date of the public meeting under subsection (c), and shall finalize such guidance not later than 1 year after the date on which the public comment period on such draft guidance ends."

ANTIMICROBIAL ANIMAL DRUG DISTRIBUTION REPORTS

Pub. L. 110–316, title I, §105(b), (c), Aug. 14, 2008, 122 Stat. 3514, provided that:

"(b) FIRST REPORT.—For each new animal drug that is subject to the reporting requirement under section 512(l)(3) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 360b(l)(3)], as added by subsection (a), and for which an approval of an application filed pursuant to section 512(b) or 571 of such Act [21 U.S.C. 360b(b), 360ccc] is in effect on the date of the enactment of this title [Aug. 14, 2008], the Secretary of Health and Human Services shall require the sponsor of the drug to submit the first report under such section 512(l)(3) for the drug not later than March 31, 2010.

"(c) SEPARATE REPORT.—The reports required under section 512(l)(3) of the Federal Food, Drug, and Cosmetic Act, as added by subsection (a), shall be separate from periodic drug experience reports that are required under section 514.80(b)(4) of title 21, Code of Federal Regulations (as in effect on the date of the enactment of this title)."

DRUGS INTENDED FOR MINOR SPECIES AND MINOR USES

Pub. L. 104–250, §2(f), Oct. 9, 1996, 110 Stat. 3154, provided that: "The Secretary of Health and Human Services shall consider legislative and regulatory options for facilitating the approval under section 512 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 360b] of animal drugs intended for minor species and for minor uses and, within 18 months after the date of enactment of this Act [Oct. 9, 1996], announce proposals for legislative or regulatory change to the approval process under such section for animal drugs intended for use in minor species or for minor uses."

TRANSITIONAL PROVISION REGARDING IMPLEMENTATION OF PUB. L. 104–250; APPROVED MEDICATED FEED APPLICATION DEEMED LICENSE

Pub. L. 104–250, §6(c), Oct. 9, 1996, 110 Stat. 3160, provided that: "A person engaged in the manufacture of animal feeds bearing or containing new animal drugs who holds at least one approved medicated feed application for an animal feed bearing or containing new animal drugs, the manufacture of which was not otherwise exempt from the requirement for an approved medicated feed application on the date of the enactment of this Act [Oct. 9, 1996], shall be deemed to hold a license for the manufacturing site identified in the approved medicated feed application. The revocation of license provisions of section 512(m)(4) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 360b(m)(4)], as amended by this Act, shall apply to such licenses. Such license shall expire within 18 months from the date of enactment of this Act unless the person submits to the Secretary a completed license application for the manufacturing site accompanied by a copy of an approved medicated feed application for such site, which license application shall be deemed to be approved upon receipt by the Secretary."

DRUGS PRIMARILY MANUFACTURED USING BIOTECHNOLOGY

Pub. L. 100–670, title I, §106, Nov. 16, 1988, 102 Stat. 3984, provided that: "Notwithstanding section 512(b)(2) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 360b(b)(2)], the Secretary of Health and Human Services may not approve an abbreviated application submitted under such section for a new animal drug which is primarily manufactured using recombinant DNA, recombinant RNA, hybridoma technology, or other processes involving site specific genetic manipulation techniques."

[1] *See References in Text note below.*

[2] *So in original. Probably should be "Alimentarius".*

[3] *So in original. Probably should be "clause (iii)(III)".*

§360b–1. Priority zoonotic animal drugs

(a) In general

The Secretary shall, at the request of the sponsor intending to submit an application for approval of a new animal drug under section 360b(b)(1) of this title or an application for conditional approval of a new animal drug under section 360ccc of this title, expedite the development and review of such new animal drug if preliminary clinical evidence indicates that the new animal drug, alone or in combination with 1 or more other animal drugs, has the potential to prevent or treat a zoonotic disease in animals, including a vector borne-disease, that has the potential to cause serious adverse health consequences for, or serious or life-threatening diseases in, humans.

(b) Request for designation

The sponsor of a new animal drug may request the Secretary to designate a new animal drug described in subsection (a) as a priority zoonotic animal drug. A request for the designation may be made concurrently with, or at any time after, the opening of an investigational new animal drug file under section 360b(j) of this title or the filing of an application under section 360b(b)(1) or 360ccc of this title.

(c) Designation

(1) In general

Not later than 60 calendar days after the receipt of a request under subsection (b), the Secretary shall determine whether the new animal drug that is the subject of the request meets the criteria described in subsection (a). If the Secretary determines that the new animal drug meets the criteria, the Secretary shall designate the new animal drug as a priority zoonotic animal drug and shall take such actions as are appropriate to expedite the development and review of the application for approval or conditional approval of such new animal drug.

(2) Actions

The actions to expedite the development and review of an application under paragraph (1) may include, as appropriate—

(A) taking steps to ensure that the design of clinical trials is as efficient as practicable, when scientifically appropriate, such as by utilizing novel trial designs or drug development tools (including biomarkers) that may reduce the number of animals needed for studies;

(B) providing timely advice to, and interactive communication with, the sponsor (which may include meetings with the sponsor and review team) regarding the development of the new animal drug to ensure that the development program to gather the nonclinical and clinical data necessary for approval is as efficient as practicable;

(C) involving senior managers and review staff with experience in zoonotic or vector-borne disease to facilitate collaborative, cross-disciplinary review, including, as appropriate, across agency centers; and

(D) implementing additional administrative or process enhancements, as necessary, to facilitate an efficient review and development program.

(June 25, 1938, ch. 675, §512A, as added Pub. L. 116–136, div. A, title III, §3302, Mar. 27, 2020, 134 Stat. 384.)

§360c. Classification of devices intended for human use

(a) Classes of devices

(1) There are established the following classes of devices intended for human use:

(A) Class I, General Controls.—

(i) A device for which the controls authorized by or under section 351, 352, 360, 360f, 360h, 360i, or 360j of this title or any combination of such sections are sufficient to provide reasonable assurance

of the safety and effectiveness of the device.

(ii) A device for which insufficient information exists to determine that the controls referred to in clause (i) are sufficient to provide reasonable assurance of the safety and effectiveness of the device or to establish special controls to provide such assurance, but because it—

(I) is not purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, and

(II) does not present a potential unreasonable risk of illness or injury,

is to be regulated by the controls referred to in clause (i).

(B) Class II, Special Controls.—A device which cannot be classified as a class I device because the general controls by themselves are insufficient to provide reasonable assurance of the safety and effectiveness of the device, and for which there is sufficient information to establish special controls to provide such assurance, including the promulgation of performance standards, postmarket surveillance, patient registries, development and dissemination of guidelines (including guidelines for the submission of clinical data in premarket notification submissions in accordance with section 360(k) of this title), recommendations, and other appropriate actions as the Secretary deems necessary to provide such assurance. For a device that is purported or represented to be for a use in supporting or sustaining human life, the Secretary shall examine and identify the special controls, if any, that are necessary to provide adequate assurance of safety and effectiveness and describe how such controls provide such assurance.

(C) Class III, Premarket Approval.—A device which because—

(i) it (I) cannot be classified as a class I device because insufficient information exists to determine that the application of general controls are sufficient to provide reasonable assurance of the safety and effectiveness of the device, and (II) cannot be classified as a class II device because insufficient information exists to determine that the special controls described in subparagraph (B) would provide reasonable assurance of its safety and effectiveness, and

(ii)(I) is purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, or

(II) presents a potential unreasonable risk of illness or injury,

is to be subject, in accordance with section 360e of this title, to premarket approval to provide reasonable assurance of its safety and effectiveness.

If there is not sufficient information to establish a performance standard for a device to provide reasonable assurance of its safety and effectiveness, the Secretary may conduct such activities as may be necessary to develop or obtain such information.

(2) For purposes of this section and sections 360d and 360e of this title, the safety and effectiveness of a device are to be determined—

(A) with respect to the persons for whose use the device is represented or intended,

(B) with respect to the conditions of use prescribed, recommended, or suggested in the labeling of the device, and

(C) weighing any probable benefit to health from the use of the device against any probable risk of injury or illness from such use.

(3)(A) Except as authorized by subparagraph (B), the effectiveness of a device is, for purposes of this section and sections 360d and 360e of this title, to be determined, in accordance with regulations promulgated by the Secretary, on the basis of well-controlled investigations, including 1 or more clinical investigations where appropriate, by experts qualified by training and experience to evaluate the effectiveness of the device, from which investigations it can fairly and responsibly be concluded by qualified experts that the device will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling of the device.

(B) If the Secretary determines that there exists valid scientific evidence (other than evidence derived from investigations described in subparagraph (A))—

(i) which is sufficient to determine the effectiveness of a device, and

(ii) from which it can fairly and responsibly be concluded by qualified experts that the device will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling of the device,

then, for purposes of this section and sections 360d and 360e of this title, the Secretary may authorize the effectiveness of the device to be determined on the basis of such evidence.

(C) In making a determination of a reasonable assurance of the effectiveness of a device for which an application under section 360e of this title has been submitted, the Secretary shall consider whether the extent of data that otherwise would be required for approval of the application with respect to effectiveness can be reduced through reliance on postmarket controls.

(D)(i) The Secretary, upon the written request of any person intending to submit an application under section 360e of this title, shall meet with such person to determine the type of valid scientific evidence (within the meaning of subparagraphs (A) and (B)) that will be necessary to demonstrate for purposes of approval of an application the effectiveness of a device for the conditions of use proposed by such person. The written request shall include a detailed description of the device, a detailed description of the proposed conditions of use of the device, a proposed plan for determining whether there is a reasonable assurance of effectiveness, and, if available, information regarding the expected performance from the device. Within 30 days after such meeting, the Secretary shall specify in writing the type of valid scientific evidence that will provide a reasonable assurance that a device is effective under the conditions of use proposed by such person.

(ii) Any clinical data, including one or more well-controlled investigations, specified in writing by the Secretary for demonstrating a reasonable assurance of device effectiveness shall be specified as result of a determination by the Secretary that such data are necessary to establish device effectiveness. The Secretary shall consider, in consultation with the applicant, the least burdensome appropriate means of evaluating device effectiveness that would have a reasonable likelihood of resulting in approval.

(iii) For purposes of clause (ii), the term "necessary" means the minimum required information that would support a determination by the Secretary that an application provides reasonable assurance of the effectiveness of the device.

(iv) Nothing in this subparagraph shall alter the criteria for evaluating an application for premarket approval of a device.

(v) The determination of the Secretary with respect to the specification of valid scientific evidence under clauses (i) and (ii) shall be binding upon the Secretary, unless such determination by the Secretary could be contrary to the public health.

(b) Classification panels

(1) For purposes of—

(A) determining which devices intended for human use should be subject to the requirements of general controls, performance standards, or premarket approval, and

(B) providing notice to the manufacturers and importers of such devices to enable them to prepare for the application of such requirements to devices manufactured or imported by them,

the Secretary shall classify all such devices (other than devices classified by subsection (f)) into the classes established by subsection (a). For the purpose of securing recommendations with respect to the classification of devices, the Secretary shall establish panels of experts or use panels of experts established before May 28, 1976, or both. Section 14 of the Federal Advisory Committee Act shall not apply to the duration of a panel established under this paragraph.

(2) The Secretary shall appoint to each panel established under paragraph (1) persons who are qualified by training and experience to evaluate the safety and effectiveness of the devices to be referred to the panel and who, to the extent feasible, possess skill in the use of, or experience in the development, manufacture, or utilization of, such devices. The Secretary shall make appointments to each panel so that each panel shall consist of members with adequately diversified expertise in such fields as clinical and administrative medicine, engineering, biological and physical sciences, and other related professions. In addition, each panel shall include as nonvoting members a representative of consumer interests and a

representative of interests of the device manufacturing industry. Scientific, trade, and consumer organizations shall be afforded an opportunity to nominate individuals for appointment to the panels. No individual who is in the regular full-time employ of the United States and engaged in the administration of this chapter may be a member of any panel. The Secretary shall designate one of the members of each panel to serve as chairman thereof.

(3) Panel members (other than officers or employees of the United States), while attending meetings or conferences of a panel or otherwise engaged in its business, shall be entitled to receive compensation at rates to be fixed by the Secretary, but not at rates exceeding the daily equivalent of the rate in effect for grade GS–18 of the General Schedule, for each day so engaged, including traveltime; and while so serving away from their homes or regular places of business each member may be allowed travel expenses (including per diem in lieu of subsistence) as authorized by section 5703 of title 5, for persons in the Government service employed intermittently.

(4) The Secretary shall furnish each panel with adequate clerical and other necessary assistance.

(5)(A) Classification panels covering each type of device shall be scheduled to meet at such times as may be appropriate for the Secretary to meet applicable statutory deadlines.

(B) When a device is specifically the subject of review by a classification panel, the Secretary shall—

(i) ensure that adequate expertise is represented on the classification panel to assess—

(I) the disease or condition which the device is intended to cure, treat, mitigate, prevent, or diagnose; and

(II) the technology of the device; and

(ii) provide an opportunity for the person whose device is specifically the subject of panel review to provide recommendations on the expertise needed among the voting members of the panel.

(C) For purposes of subparagraph (B)(i), the term "adequate expertise" means that the membership of the classification panel includes—

(i) two or more voting members, with a specialty or other expertise clinically relevant to the device under review; and

(ii) at least one voting member who is knowledgeable about the technology of the device.

(D) The Secretary shall provide an annual opportunity for patients, representatives of patients, and sponsors of medical devices that may be specifically the subject of a review by a classification panel to provide recommendations for individuals with appropriate expertise to fill voting member positions on classification panels.

(6)(A) Any person whose device is specifically the subject of review by a classification panel shall have—

(i) the same access to data and information submitted to a classification panel (except for data and information that are not available for public disclosure under section 552 of title 5) as the Secretary;

(ii) the opportunity to submit, for review by a classification panel, information that is based on the data or information provided in the application submitted under section 360e of this title by the person, which information shall be submitted to the Secretary for prompt transmittal to the classification panel; and

(iii) the same opportunity as the Secretary to participate in meetings of the panel, including, subject to the discretion of the panel chairperson, by designating a representative who will be provided a time during the panel meeting to address the panel for the purpose of correcting misstatements of fact or providing clarifying information, and permitting the person or representative to call on experts within the person's organization to address such specific issues in the time provided.

(B)(i) Any meeting of a classification panel with respect to the review of a device shall—

(I) provide adequate time for initial presentations by the person whose device is specifically the subject of such review and by the Secretary; and

(II) encourage free and open participation by all interested persons.

(ii) Following the initial presentations described in clause (i), the panel may—

(I) pose questions to a designated representative described in subparagraph (A)(iii); and
(II) consider the responses to such questions in the panel's review of the device.

(7) After receiving from a classification panel the conclusions and recommendations of the panel on a matter that the panel has reviewed, the Secretary shall review the conclusions and recommendations, shall make a final decision on the matter in accordance with section 360e(d)(2) of this title, and shall notify the affected persons of the decision in writing and, if the decision differs from the conclusions and recommendations of the panel, shall include the reasons for the difference.

(8) A classification panel under this subsection shall not be subject to the annual chartering and annual report requirements of the Federal Advisory Committee Act.

(c) Classification panel organization and operation

(1) The Secretary shall organize the panels according to the various fields of clinical medicine and fundamental sciences in which devices intended for human use are used. The Secretary shall refer a device to be classified under this section to an appropriate panel established or authorized to be used under subsection (b) for its review and for its recommendation respecting the classification of the device. The Secretary shall by regulation prescribe the procedure to be followed by the panels in making their reviews and recommendations. In making their reviews of devices, the panels, to the maximum extent practicable, shall provide an opportunity for interested persons to submit data and views on the classification of the devices.

(2)(A) Upon completion of a panel's review of a device referred to it under paragraph (1), the panel shall, subject to subparagraphs (B) and (C), submit to the Secretary its recommendation for the classification of the device. Any such recommendation shall (i) contain (I) a summary of the reasons for the recommendation, (II) a summary of the data upon which the recommendation is based, and (III) an identification of the risks to health (if any) presented by the device with respect to which the recommendation is made, and (ii) to the extent practicable, include a recommendation for the assignment of a priority for the application of the requirements of section 360d or 360e of this title to a device recommended to be classified in class II or class III.

(B) A recommendation of a panel for the classification of a device in class I shall include a recommendation as to whether the device should be exempted from the requirements of section 360, 360i, or 360j(f) of this title.

(C) In the case of a device which has been referred under paragraph (1) to a panel, and which—

(i) is intended to be implanted in the human body or is purported or represented to be for a use in supporting or sustaining human life, and

(ii)(I) has been introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, or

(II) is within a type of device which was so introduced or delivered before such date and is substantially equivalent to another device within that type,

such panel shall recommend to the Secretary that the device be classified in class III unless the panel determines that classification of the device in such class is not necessary to provide reasonable assurance of its safety and effectiveness. If a panel does not recommend that such a device be classified in class III, it shall in its recommendation to the Secretary for the classification of the device set forth the reasons for not recommending classification of the device in such class.

(3) The panels shall submit to the Secretary within one year of the date funds are first appropriated for the implementation of this section their recommendations respecting all devices of a type introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976.

(d) Panel recommendation; publication; priorities

(1) Upon receipt of a recommendation from a panel respecting a device, the Secretary shall publish in the Federal Register the panel's recommendation and a proposed regulation classifying such device and shall provide interested persons an opportunity to submit comments on such recommendation and the proposed regulation. After reviewing such comments, the Secretary shall, subject to paragraph (2), by regulation classify such device.

(2)(A) A regulation under paragraph (1) classifying a device in class I shall prescribe which, if any, of the requirements of section 360, 360i, or 360j(f) of this title shall not apply to the device. A regulation which makes a requirement of section 360, 360i, or 360j(f) of this title inapplicable to a device shall be accompanied by a statement of the reasons of the Secretary for making such requirement inapplicable.

(B) A device described in subsection (c)(2)(C) shall be classified in class III unless the Secretary determines that classification of the device in such class is not necessary to provide reasonable assurance of its safety and effectiveness. A proposed regulation under paragraph (1) classifying such a device in a class other than class III shall be accompanied by a full statement of the reasons of the Secretary (and supporting documentation and data) for not classifying such device in such class and an identification of the risks to health (if any) presented by such device.

(3) In the case of devices classified in class II and devices classified under this subsection in class III and described in section 360e(b)(1) of this title the Secretary may establish priorities which, in his discretion, shall be used in applying sections 360d and 360e of this title, as appropriate, to such devices.

(e) Classification changes

(1)(A)(i) Based on new information respecting a device, the Secretary may, upon the initiative of the Secretary or upon petition of an interested person, change the classification of such device, and revoke, on account of the change in classification, any regulation or requirement in effect under section 360d or 360e of this title with respect to such device, by administrative order published in the Federal Register following publication of a proposed reclassification order in the Federal Register, a meeting of a device classification panel described in subsection (b), and consideration of comments to a public docket, notwithstanding subchapter II of chapter 5 of title 5. The proposed reclassification order published in the Federal Register shall set forth the proposed reclassification, and a substantive summary of the valid scientific evidence concerning the proposed reclassification, including—

(I) the public health benefit of the use of the device, and the nature and, if known, incidence of the risk of the device;

(II) in the case of a reclassification from class II to class III, why general controls pursuant to subsection (a)(1)(A) and special controls pursuant to subsection (a)(1)(B) together are not sufficient to provide a reasonable assurance of safety and effectiveness for such device; and

(III) in the case of reclassification from class III to class II, why general controls pursuant to subsection (a)(1)(A) and special controls pursuant to subsection (a)(1)(B) together are sufficient to provide a reasonable assurance of safety and effectiveness for such device.

(ii) An order under this subsection changing the classification of a device from class III to class II may provide that such classification shall not take effect until the effective date of a performance standard established under section 360d of this title for such device.

(B) Authority to issue such administrative order shall not be delegated below the Director of the Center for Devices and Radiological Health, acting in consultation with the Commissioner.

(2) By an order issued under paragraph (1), the Secretary may change the classification of a device from class III—

(A) to class II if the Secretary determines that special controls would provide reasonable assurance of the safety and effectiveness of the device and that general controls would not provide reasonable assurance of the safety and effectiveness of the device, or

(B) to class I if the Secretary determines that general controls would provide reasonable assurance of the safety and effectiveness of the device.

(f) Initial classification and reclassification of certain devices

(1) Any device intended for human use which was not introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, is classified in class III unless—

(A) the device—

(i) is within a type of device (I) which was introduced or delivered for introduction into interstate commerce for commercial distribution before such date and which is to be classified pursuant to subsection (b), or (II) which was not so introduced or delivered before such date and has been classified in class I or II, and

(ii) is substantially equivalent to another device within such type;

(B) the Secretary in response to a petition submitted under paragraph (3) has classified such device in class I or II; or

(C) the device is classified pursuant to a request submitted under paragraph (2).

A device classified in class III under this paragraph shall be classified in that class until the effective date of an order of the Secretary under paragraph (2) or (3) classifying the device in class I or II.

(2)(A)(i) Any person who submits a report under section 360(k) of this title for a type of device that has not been previously classified under this chapter, and that is classified into class III under paragraph (1), may request, after receiving written notice of such a classification, the Secretary to classify the device.

(ii) In lieu of submitting a report under section 360(k) of this title and submitting a request for classification under clause (i) for a device, if a person determines there is no legally marketed device upon which to base a determination of substantial equivalence (as defined in subsection (i)), a person may submit a request under this clause for the Secretary to classify the device.

(iii) Upon receipt of a request under clause (i) or (ii), the Secretary shall classify the device subject to the request under the criteria set forth in subparagraphs (A) through (C) of subsection (a)(1) within 120 days.

(iv) Notwithstanding clause (iii), the Secretary may decline to undertake a classification request submitted under clause (ii) if the Secretary identifies a legally marketed device that could provide a reasonable basis for review of substantial equivalence under paragraph (1), or when the Secretary determines that the device submitted is not of low to moderate risk or that general controls would be inadequate to control the risks and special controls to mitigate the risks cannot be developed.

(v) The person submitting the request for classification under this subparagraph may recommend to the Secretary a classification for the device and shall, if recommending classification in class II, include in the request an initial draft proposal for applicable special controls, as described in subsection (a)(1)(B), that are necessary, in conjunction with general controls, to provide reasonable assurance of safety and effectiveness and a description of how the special controls provide such assurance. Any such request shall describe the device and provide detailed information and reasons for the recommended classification.

(B)(i) The Secretary shall by written order classify the device involved. Such classification shall be the initial classification of the device for purposes of paragraph (1) and any device classified under this paragraph shall be a predicate device for determining substantial equivalence under paragraph (1).

(ii) A device that remains in class III under this subparagraph shall be deemed to be adulterated within the meaning of section 351(f)(1)(B) of this title until approved under section 360e of this title or exempted from such approval under section 360j(g) of this title.

(C) Within 30 days after the issuance of an order classifying a device under this paragraph, the Secretary shall publish a notice in the Federal Register announcing such classification.

(3)(A) The Secretary may initiate the reclassification of a device classified into class III under paragraph (1) of this subsection or the manufacturer or importer of a device classified under paragraph (1) may petition the Secretary (in such form and manner as he shall prescribe) for the issuance of an order classifying the device in class I or class II. Within thirty days of the filing of such a petition, the Secretary shall notify the petitioner of any deficiencies in the petition which prevent the Secretary from making a decision on the petition.

(B)(i) Upon determining that a petition does not contain any deficiency which prevents the Secretary from making a decision on the petition, the Secretary may for good cause shown refer the petition to an appropriate panel established or authorized to be used under subsection (b). A panel to which such a petition has been referred shall not later than ninety days after the referral of the petition make a recommendation to the Secretary respecting approval or denial of the petition. Any such recommendation shall contain (I) a summary of the reasons for the recommendation, (II) a summary of the data upon which the recommendation is based, and (III) an identification of the risks to health (if any) presented by the device with respect to which the petition was filed. In the case of a petition for a device which is intended to be implanted in the human body or which is purported or represented to be for a use in supporting or sustaining human life, the panel shall recommend that the petition be denied unless the panel determines that the classification in class III of the device is not necessary to provide reasonable assurance of its

safety and effectiveness. If the panel recommends that such petition be approved, it shall in its recommendation to the Secretary set forth its reasons for such recommendation.

(ii) The requirements of paragraphs (1) and (2) of subsection (c) (relating to opportunities for submission of data and views and recommendations respecting priorities and exemptions from sections 360, 360i, and 360j(f) of this title) shall apply with respect to consideration by panels of petitions submitted under subparagraph (A).

(C)(i) Within ninety days from the date the Secretary receives the recommendation of a panel respecting a petition (but not later than 210 days after the filing of such petition) the Secretary shall by order deny or approve the petition. If the Secretary approves the petition, the Secretary shall order the classification of the device into class I or class II in accordance with the criteria prescribed by subsection (a)(1)(A) or (a)(1)(B). In the case of a petition for a device which is intended to be implanted in the human body or which is purported or represented to be for a use in supporting or sustaining human life, the Secretary shall deny the petition unless the Secretary determines that the classification in class III of the device is not necessary to provide reasonable assurance of its safety and effectiveness. An order approving such petition shall be accompanied by a full statement of the reasons of the Secretary (and supporting documentation and data) for approving the petition and an identification of the risks to health (if any) presented by the device to which such order applies.

(ii) The requirements of paragraphs (1) and (2)(A) of subsection (d) (relating to publication of recommendations, opportunity for submission of comments, and exemption from sections 360, 360i, and 360j(f) of this title) shall apply with respect to action by the Secretary on petitions submitted under subparagraph (A).

(4) If a manufacturer reports to the Secretary under section 360(k) of this title that a device is substantially equivalent to another device—

(A) which the Secretary has classified as a class III device under subsection (b),

(B) which was introduced or delivered for introduction into interstate commerce for commercial distribution before December 1, 1990, and

(C) for which no final regulation requiring premarket approval has been promulgated under section 360e(b) of this title,

the manufacturer shall certify to the Secretary that the manufacturer has conducted a reasonable search of all information known or otherwise available to the manufacturer respecting such other device and has included in the report under section 360(k) of this title a summary of and a citation to all adverse safety and effectiveness data respecting such other device and respecting the device for which the section 360(k) report is being made and which has not been submitted to the Secretary under section 360i of this title. The Secretary may require the manufacturer to submit the adverse safety and effectiveness data described in the report.

(5) The Secretary may not withhold a determination of the initial classification of a device under paragraph (1) because of a failure to comply with any provision of this chapter unrelated to a substantial equivalence decision, including a finding that the facility in which the device is manufactured is not in compliance with good manufacturing requirements as set forth in regulations of the Secretary under section 360j(f) of this title (other than a finding that there is a substantial likelihood that the failure to comply with such regulations will potentially present a serious risk to human health).

(6)(A) Subject to the succeeding subparagraphs of this paragraph, the Secretary shall, by written order, classify an accessory under this section based on the risks of the accessory when used as intended and the level of regulatory controls necessary to provide a reasonable assurance of safety and effectiveness of the accessory, notwithstanding the classification of any other device with which such accessory is intended to be used.

(B) The classification of any accessory distinct from another device by regulation or written order issued prior to December 13, 2016, shall continue to apply unless and until the accessory is reclassified by the Secretary, notwithstanding the classification of any other device with which such accessory is intended to be used. Nothing in this paragraph shall preclude the Secretary's authority to initiate the classification of an accessory through regulation or written order, as appropriate.

(C)(i) In the case of a device intended to be used with an accessory, where the accessory has been included in an application for premarket approval of such device under section 360e of this title or a report

under section 360(k) of this title for clearance of such device and the Secretary has not classified such accessory distinctly from another device in accordance with subparagraph (A), the person filing the application or report (as applicable) at the time such application or report is filed—

(I) may include a written request for the proper classification of the accessory pursuant to subparagraph (A);

(II) shall include in any such request such information as may be necessary for the Secretary to evaluate, based on the least burdensome approach, the appropriate class for the accessory under subsection (a); and

(III) shall, if the request under subclause (I) is requesting classification of the accessory in class II, include in the application an initial draft proposal for special controls, if special controls would be required pursuant to subsection (a)(1)(B).

(ii) The Secretary's response under section 360e(d) or section 360(n) of this title (as applicable) to an application or report described in clause (i) shall also contain the Secretary's granting or denial of the request for classification of the accessory involved.

(iii) The Secretary's evaluation of an accessory under clause (i) shall constitute an order establishing a new classification for such accessory for the specified intended use or uses of such accessory and for any accessory with the same intended use or uses as such accessory.

(D) For accessories that have been granted marketing authorization as part of a submission for another device with which the accessory involved is intended to be used, through an application for such other device under section 360e(c) of this title, a report under section 360(k) of this title, or a request for classification under paragraph (2) of this subsection, the following shall apply:

(i) Not later than the date that is one year after August 18, 2017, and at least once every 5 years thereafter, and as the Secretary otherwise determines appropriate, pursuant to this paragraph, the Secretary shall publish in the Federal Register a notice proposing a list of such accessories that the Secretary determines may be suitable for a distinct classification in class I and the proposed regulations for such classifications. In developing such list, the Secretary shall consider recommendations from sponsors of device submissions and other stakeholders for accessories to be included on such list. The notices shall provide for a period of not less than 60 calendar days for public comment. Within 180 days after the end of the comment period, the Secretary shall publish in the Federal Register a final action classifying such suitable accessories into class I.

(ii) A manufacturer or importer of an accessory that has been granted such marketing authorization may submit to the Secretary a written request for the appropriate classification of the accessory based on the risks and appropriate level of regulatory controls as described in subparagraph (A), and shall, if the request is requesting classification of the accessory in class II, include in the submission an initial draft proposal for special controls, if special controls would be required pursuant to subsection (a)(1)(B). Such request shall include such information as may be necessary for the Secretary to evaluate, based on the least burdensome approach, the appropriate class for the accessory under subsection (a). The Secretary shall provide an opportunity for a manufacturer or importer to meet with appropriate personnel of the Food and Drug Administration to discuss the appropriate classification of such accessory prior to submitting a written request under this clause for classification of the accessory.

(iii) The Secretary shall respond to a request made under clause (ii) not later than 85 calendar days after receiving such request by issuing a written order classifying the accessory or denying the request. If the Secretary does not agree with the recommendation for classification submitted by the manufacturer or importer, the response shall include a detailed description and justification for such determination. Within 30 calendar days after granting such a request, the Secretary shall publish a notice in the Federal Register announcing such response.

(E) Nothing in this paragraph may be construed as precluding a manufacturer of an accessory of a new type from using the classification process described in subsection (f)(2) to obtain classification of such accessory in accordance with the criteria and requirements set forth in that subsection.

(g) Information

Within sixty days of the receipt of a written request of any person for information respecting the class in which a device has been classified or the requirements applicable to a device under this chapter, the Secretary shall provide such person a written statement of the classification (if any) of such device and the requirements of this chapter applicable to the device.

(h) Definitions

For purposes of this section and sections 351, 360, 360d, 360e, 360f, 360i, and 360j of this title

(1) a reference to "general controls" is a reference to the controls authorized by or under sections 351, 352, 360, 360f, 360h, 360i, and 360j of this title,

(2) a reference to "class I", "class II", or "class III" is a reference to a class of medical devices described in subparagraph (A), (B), or (C) of subsection (a)(1), and

(3) a reference to a "panel under section 360c of this title" is a reference to a panel established or authorized to be used under this section.

(i) Substantial equivalence

(1)(A) For purposes of determinations of substantial equivalence under subsection (f) and section 360j(l) of this title, the term "substantially equivalent" or "substantial equivalence" means, with respect to a device being compared to a predicate device, that the device has the same intended use as the predicate device and that the Secretary by order has found that the device—

(i) has the same technological characteristics as the predicate device, or

(ii)(I) has different technological characteristics and the information submitted that the device is substantially equivalent to the predicate device contains information, including appropriate clinical or scientific data if deemed necessary by the Secretary or a person accredited under section 360m of this title, that demonstrates that the device is as safe and effective as a legally marketed device, and (II) does not raise different questions of safety and effectiveness than the predicate device.

(B) For purposes of subparagraph (A), the term "different technological characteristics" means, with respect to a device being compared to a predicate device, that there is a significant change in the materials, design, energy source, or other features of the device from those of the predicate device.

(C) To facilitate reviews of reports submitted to the Secretary under section 360(k) of this title, the Secretary shall consider the extent to which reliance on postmarket controls may expedite the classification of devices under subsection (f)(1) of this section.

(D)(i) Whenever the Secretary requests information to demonstrate that devices with differing technological characteristics are substantially equivalent, the Secretary shall only request information that is necessary to making substantial equivalence determinations. In making such request, the Secretary shall consider the least burdensome means of demonstrating substantial equivalence and request information accordingly.

(ii) For purposes of clause (i), the term "necessary" means the minimum required information that would support a determination of substantial equivalence between a new device and a predicate device.

(iii) Nothing in this subparagraph shall alter the standard for determining substantial equivalence between a new device and a predicate device.

(E)(i) Any determination by the Secretary of the intended use of a device shall be based upon the proposed labeling submitted in a report for the device under section 360(k) of this title. However, when determining that a device can be found substantially equivalent to a legally marketed device, the director of the organizational unit responsible for regulating devices (in this subparagraph referred to as the "Director") may require a statement in labeling that provides appropriate information regarding a use of the device not identified in the proposed labeling if, after providing an opportunity for consultation with the person who submitted such report, the Director determines and states in writing—

(I) that there is a reasonable likelihood that the device will be used for an intended use not identified in the proposed labeling for the device; and

(II) that such use could cause harm.

(ii) Such determination shall—

(I) be provided to the person who submitted the report within 10 days from the date of the notification of the Director's concerns regarding the proposed labeling;

(II) specify the limitations on the use of the device not included in the proposed labeling; and

(III) find the device substantially equivalent if the requirements of subparagraph (A) are met and if the labeling for such device conforms to the limitations specified in subclause (II).

(iii) The responsibilities of the Director under this subparagraph may not be delegated.

(F) Not later than 270 days after November 21, 1997, the Secretary shall issue guidance specifying the general principles that the Secretary will consider in determining when a specific intended use of a device is not reasonably included within a general use of such device for purposes of a determination of substantial equivalence under subsection (f) or section 360j(l) of this title.

(2) A device may not be found to be substantially equivalent to a predicate device that has been removed from the market at the initiative of the Secretary or that has been determined to be misbranded or adulterated by a judicial order.

(3)(A) As part of a submission under section 360(k) of this title respecting a device, the person required to file a premarket notification under such section shall provide an adequate summary of any information respecting safety and effectiveness or state that such information will be made available upon request by any person.

(B) Any summary under subparagraph (A) respecting a device shall contain detailed information regarding data concerning adverse health effects and shall be made available to the public by the Secretary within 30 days of the issuance of a determination that such device is substantially equivalent to another device.

(j) Training and oversight of least burdensome requirements

(1) The Secretary shall—

(A) ensure that each employee of the Food and Drug Administration who is involved in the review of premarket submissions, including supervisors, receives training regarding the meaning and implementation of the least burdensome requirements under subsections (a)(3)(D) and (i)(1)(D) of this section and section 360e(c)(5) of this title; and

(B) periodically assess the implementation of the least burdensome requirements, including the employee training under subparagraph (A), to ensure that the least burdensome requirements are fully and consistently applied.

(2) Not later than 18 months after December 13, 2016, the ombudsman for any organizational unit of the Food and Drug Administration responsible for the premarket review of devices shall—

(A) conduct an audit of the training described in paragraph (1)(A), including the effectiveness of such training in implementing the least burdensome requirements;

(B) include in such audit interviews of persons who are representatives of the device industry regarding their experiences in the device premarket review process, including with respect to the application of least burdensome concepts to premarket review and decisionmaking;

(C) include in such audit a list of the measurement tools the Secretary uses to assess the implementation of the least burdensome requirements, including under paragraph (1)(B) and section 360g–1(a)(3) of this title, and may also provide feedback on the effectiveness of such tools in the implementation of the least burdensome requirements;

(D) summarize the findings of such audit in a final audit report; and

(E) within 30 calendar days of completion of such final audit report, make such final audit report available—

(i) to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Energy and Commerce of the House of Representatives; and

(ii) on the Internet website of the Food and Drug Administration.

(June 25, 1938, ch. 675, §513, as added Pub. L. 94–295, §2, May 28, 1976, 90 Stat. 540; amended Pub. L. 101–629, §§4(a), 5(a)–(c)(1), (3), 12(a), 18(a), Nov. 28, 1990, 104 Stat. 4515, 4517, 4518, 4523, 4528; Pub. L. 102–300, §6(e), June 16, 1992, 106 Stat. 240; Pub. L. 103–80, §3(s), Aug. 13, 1993, 107 Stat. 778; Pub. L. 105–115, title II, §§205(a), (b), 206(b), (c), 207, 208, 217, Nov. 21, 1997, 111 Stat. 2336, 2337, 2339, 2340, 2350; Pub. L. 107–250, title II, §208, Oct. 26, 2002, 116 Stat. 1613; Pub. L. 112–144, title VI,

§§602, 607–608(a)(2)(A), July 9, 2012, 126 Stat. 1051, 1054-1056; Pub. L. 114–255, div. A, title III, §§3055, 3058(a), 3060(c), 3101(a)(2)(I), Dec. 13, 2016, 130 Stat. 1127, 1128, 1133, 1154; Pub. L. 115–52, title VII, §707(a), (b), title IX, §901(h), Aug. 18, 2017, 131 Stat. 1060, 1062, 1077.)

Editorial Notes

References in Text

The Federal Advisory Committee Act, referred to in subsec. (b)(1), (8), is Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

Amendments

2017—Subsec. (b)(5)(D). Pub. L. 115–52, §901(h), substituted "medical devices that may be specifically the subject of a review by a classification panel" for "medical device submissions".

Subsec. (b)(9). Pub. L. 115–52, §707(b), struck out par. (9) which read as follows: "The Secretary shall classify an accessory under this section based on the intended use of the accessory, notwithstanding the classification of any other device with which such accessory is intended to be used."

Subsec. (f)(6). Pub. L. 115–52, §707(a), added par. (6).

2016—Subsec. (b)(5). Pub. L. 114–255, §3055(a), designated existing provisions as subpar. (A) and added subpars. (B) to (D).

Subsec. (b)(6)(A)(iii). Pub. L. 114–255, §3055(b)(1), inserted before period at end ", including, subject to the discretion of the panel chairperson, by designating a representative who will be provided a time during the panel meeting to address the panel for the purpose of correcting misstatements of fact or providing clarifying information, and permitting the person or representative to call on experts within the person's organization to address such specific issues in the time provided".

Subsec. (b)(6)(B). Pub. L. 114–255, §3055(b)(2), added subpar. (B) and struck out former subpar. (B) which read as follows: "Any meetings of a classification panel shall provide adequate time for initial presentations and for response to any differing views by persons whose devices are specifically the subject of a classification panel review, and shall encourage free and open participation by all interested persons."

Subsec. (b)(9). Pub. L. 114–255, §3060(c), added par. (9).

Subsec. (f)(2)(A)(i). Pub. L. 114–255, §3101(a)(2)(I)(i), struck out "within 30 days" after "may request,".

Subsec. (f)(2)(A)(iv). Pub. L. 114–255, §3101(a)(2)(I)(ii), substituted "low to moderate" for "low-moderate".

Subsec. (j). Pub. L. 114–255, §3058(a), added subsec. (j).

2012—Subsec. (a)(3)(D)(iii) to (v). Pub. L. 112–144, §602(a), added cls. (iii) and (iv) and redesignated former cl. (iii) as (v).

Subsec. (e)(1). Pub. L. 112–144, §608(a)(1), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "Based on new information respecting a device, the Secretary may, upon his own initiative or upon petition of an interested person, by regulation (A) change such device's classification, and (B) revoke, because of the change in classification, any regulation or requirement in effect under section 360d or 360e of this title with respect to such device. In the promulgation of such a regulation respecting a device's classification, the Secretary may secure from the panel to which the device was last referred pursuant to subsection (c) of this section a recommendation respecting the proposed change in the device's classification and shall publish in the Federal Register any recommendation submitted to the Secretary by the panel respecting such change. A regulation under this subsection changing the classification of a device from class III to class II may provide that such classification shall not take effect until the effective date of a performance standard established under section 360d of this title for such device."

Subsec. (e)(2). Pub. L. 112–144, §608(a)(2)(A), substituted "an order issued" for "regulation promulgated" in introductory provisions.

Subsec. (f)(1)(C). Pub. L. 112–144, §607(b), added subpar. (C).

Subsec. (f)(2)(A). Pub. L. 112–144, §607(a)(1)–(3), designated existing provisions as cl. (i), struck out "under the criteria set forth in subparagraphs (A) through (C) of subsection (a)(1) of this section. The person may, in the request, recommend to the Secretary a classification for the device. Any such request shall describe the device and provide detailed information and reasons for the recommended classification" before period at end, and added cls. (ii) to (v).

Subsec. (f)(2)(B)(i). Pub. L. 112–144, §607(a)(4), substituted "The Secretary" for "Not later than 60 days after the date of the submission of the request under subparagraph (A), the Secretary".

Subsec. (i)(1)(D). Pub. L. 112–144, §602(b), designated existing provisions as cl. (i) and added cls. (ii) and (iii).

2002—Subsec. (i)(1)(E)(iv). Pub. L. 107–250 struck out cl. (iv) which read as follows: "This subparagraph has no legal effect after the expiration of the five-year period beginning on November 21, 1997."

1997—Subsec. (a)(3)(A). Pub. L. 105–115, §217, substituted "1 or more clinical investigations" for "clinical investigations".

Subsec. (a)(3)(C), (D). Pub. L. 105–115, §205(a), added subpars. (C) and (D).

Subsec. (b)(5) to (8). Pub. L. 105–115, §208, added pars. (5) to (8).

Subsec. (f)(1). Pub. L. 105–115, §207(1)(B), substituted "paragraph (2) or (3)" for "paragraph (2)" in closing provisions.

Subsec. (f)(1)(B). Pub. L. 105–115, §207(1)(A), substituted "paragraph (3)" for "paragraph (2)".

Subsec. (f)(2) to (4). Pub. L. 105–115, §207(2), (3), added par. (2) and redesignated former pars. (2) and (3) as (3) and (4), respectively.

Subsec. (f)(5). Pub. L. 105–115, §206(b), added par. (5).

Subsec. (i)(1)(A)(ii). Pub. L. 105–115, §206(c)(1), substituted "appropriate clinical or scientific data" for "clinical data", inserted "or a person accredited under section 360m of this title" after "Secretary", and substituted "effectiveness" for "efficacy".

Subsec. (i)(1)(C) to (E). Pub. L. 105–115, §205(b), added subpars. (C) to (E).

Subsec. (i)(1)(F). Pub. L. 105–115, §206(c)(2), added subpar. (F).

1993—Subsec. (b)(3). Pub. L. 103–80 substituted "5703" for "5703(b)".

1992—Subsec. (f)(3). Pub. L. 102–300 redesignated clauses (i) to (iii) as subpars. (A) to (C), respectively, and substituted "the section 360(k) report" for "the 360(k) report" in closing provisions.

1990—Subsec. (a)(1)(A)(ii). Pub. L. 101–629, §5(a)(1), substituted "or to establish special controls" for "or to establish a performance standard".

Subsec. (a)(1)(B). Pub. L. 101–629, §5(a)(2), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: "CLASS II, PERFORMANCE STANDARDS.—A device which cannot be classified as a class I device because the controls authorized by or under sections 351, 352, 360, 360f, 360h, 360i, and 360j of this title by themselves are insufficient to provide reasonable assurance of the safety and effectiveness of the device, for which there is sufficient information to establish a performance standard to provide such assurance, and for which it is therefore necessary to establish for the device a performance standard under section 360d of this title to provide reasonable assurance of its safety and effectiveness."

Subsec. (a)(1)(C)(i). Pub. L. 101–629, §5(a)(3), amended cl. (i) generally. Prior to amendment, cl. (i) read as follows: "it (I) cannot be classified as a class I device because insufficient information exists to determine that the controls authorized by or under sections 351, 352, 360, 360f, 360h, 360i, and 360j of this title are sufficient to provide reasonable assurance of the safety and effectiveness of the device and (II) cannot be classified as a class II device because insufficient information exists for the establishment of a performance standard to provide reasonable assurance of its safety and effectiveness, and".

Subsec. (e). Pub. L. 101–629, §5(b), designated existing provisions as par. (1), redesignated cls. (1) and (2) as (A) and (B), respectively, and added par. (2).

Subsec. (f). Pub. L. 101–629, §5(c)(3), inserted "and reclassification" before "of" in heading.

Subsec. (f)(2)(A). Pub. L. 101–629, §5(c)(1), substituted "The Secretary may initiate the reclassification of a device classified into class III under paragraph (1) of this subsection or the manufacturer" for "The manufacturer".

Subsec. (f)(2)(B)(i). Pub. L. 101–629, §18(a), substituted "the Secretary may for good cause shown" for "the Secretary shall".

Subsec. (f)(3). Pub. L. 101–629, §4(a), added par. (3).

Subsec. (i). Pub. L. 101–629, §12(a), added subsec. (i).

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE OF 2017 AMENDMENT

Pub. L. 115–52, title VII, §707(c), Aug. 18, 2017, 131 Stat. 1062, provided that: "The amendments made by subsections (a) and (b) [amending this section] shall take effect on the date that is 60 days after the date of enactment of this Act [Aug. 18, 2017]."

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–115 effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as a note under section 321 of this title.

SHORT TITLE OF 1976 AMENDMENT

Pub. L. 94–295, §1(a), May 28, 1976, 90 Stat. 539, provided that: "This Act [enacting sections 360c to 360k, 379, and 379a of this title and section 3512 of Title 42, The Public Health and Welfare, and amending sections 321, 331, 334, 351, 352, 358, 360, 374, 379e, and 381 of this title and section 55 of Title 15, Commerce and Trade] may be cited as the 'Medical Device Amendments of 1976'."

Regulations

Pub. L. 101–629, §12(b), Nov. 28, 1990, 104 Stat. 4524, provided that: "Within 12 months of the date of the enactment of this Act [Nov. 28, 1990], the Secretary of Health and Human Services shall issue regulations establishing the requirements of the summaries under section 513(i)(3) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 360c(i)(3)], as added by the amendment made by subsection (a)."

Devices Reclassified Prior to July 9, 2012

Pub. L. 112–144, title VI, §608(a)(3), July 9, 2012, 126 Stat. 1056, provided that:

"(A) In general.—The amendments made by this subsection [amending this section and sections 360d and 360g of this title] shall have no effect on a regulation promulgated with respect to the classification of a device under section 513(e) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 360c(e)] prior to the date of enactment of this Act [July 9, 2012].

"(B) Applicability of other provisions.—In the case of a device reclassified under section 513(e) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 360c(e)] by regulation prior to the date of enactment of this Act [July 9, 2012], section 517(a)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360g(a)(1)) shall apply to such regulation promulgated under section 513(e) of such Act with respect to such device in the same manner such section 517(a)(1) applies to an administrative order issued with respect to a device reclassified after the date of enactment of this Act."

Daily Wear Soft or Daily Wear Nonhydrophilic Plastic Contact Lenses

Pub. L. 101–629, §4(b)(3), Nov. 28, 1990, 104 Stat. 4517, provided that:

"(A) Notwithstanding section 520(l)(5) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 360j(l)(5)], the Secretary of Health and Human Services shall not retain any daily wear soft or daily wear nonhydrophilic plastic contact lens in class III under such Act [this chapter] unless the Secretary finds that it meets the criteria set forth in section 513(a)(1)(C) of such Act [21 U.S.C. 360c(a)(1)(C)]. The finding and the grounds for the finding shall be published in the Federal Register. For any such lens, the Secretary shall make the determination respecting reclassification required in section 520(l)(5)(B) of such Act within 24 months of the date of the enactment of this paragraph [Nov. 28, 1990].

"(B) The Secretary of Health and Human Services may by notice published in the Federal Register extend the two-year period prescribed by subparagraph (A) for a lens for an additional period not to exceed one year.

"(C)(i) Before classifying a lens in class II pursuant to subparagraph (A), the Secretary of Health and Human Services shall pursuant to section 513(a)(1)(B) of such Act assure that appropriate regulatory safeguards are in effect which provide reasonable assurance of the safety and effectiveness of such lens, including clinical and preclinical data if deemed necessary by the Secretary.

"(ii) Prior to classifying a lens in class I pursuant to subparagraph (A), the Secretary shall assure that appropriate regulatory safeguards are in effect which provide reasonable assurance of the safety and effectiveness of such lens, including clinical and preclinical data if deemed necessary by the Secretary.

"(D) Notwithstanding section 520(l)(5) of such Act, if the Secretary of Health and Human Services has not made the finding and published the finding required by subparagraph (A) within 36 months of the date of the enactment of this subparagraph [Nov. 28, 1990], the Secretary shall issue an order placing the lens in class II.

"(E) Any person adversely affected by a final regulation under this paragraph revising the classification of a lens may challenge the revision of the classification of such lens only by filing a petition under section 513(e) for a classification change."

References in Other Laws to GS–16, 17, or 18 Pay Rates

References in laws to the rates of pay for GS–16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, §101(c)(1)] of Pub. L. 101–509, set out in a note under section 5376 of Title 5.

§360c–1. Reporting

The Secretary of Health and Human Services shall annually post on the Internet Web site of the Food and Drug Administration—

(1) the number and type of class I and class II devices reclassified as class II or class III in the previous calendar year under section 360c(e)(1) of this title;

(2) the number and type of class II and class III devices reclassified as class I or class II in the previous calendar year under such section 360c(e)(1) of this title; and

(3) the number and type of devices reclassified in the previous calendar year under section 360e of this title.

(Pub. L. 112–144, title VI, §608(c), July 9, 2012, 126 Stat. 1059.)

Editorial Notes

Codification

Section was enacted as part of the Food and Drug Administration Safety and Innovation Act, and not as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

§360d. Performance standards

(a) Reasonable assurance of safe and effective performance; periodic evaluation

(1) The special controls required by section 360c(a)(1)(B) of this title shall include performance standards for a class II device if the Secretary determines that a performance standard is necessary to provide reasonable assurance of the safety and effectiveness of the device. A class III device may also be considered a class II device for purposes of establishing a standard for the device under subsection (b) if the device has been reclassified as a class II device under an administrative order under section 360c(e) of this title (or a regulation promulgated under such section prior to July 9, 2012) but such order (or regulation) provides that the reclassification is not to take effect until the effective date of such a standard for the device.

(2) A performance standard established under subsection (b) for a device—

(A) shall include provisions to provide reasonable assurance of its safe and effective performance;

(B) shall, where necessary to provide reasonable assurance of its safe and effective performance, include—

(i) provisions respecting the construction, components, ingredients, and properties of the device and its compatibility with power systems and connections to such systems,

(ii) provisions for the testing (on a sample basis or, if necessary, on an individual basis) of the device or, if it is determined that no other more practicable means are available to the Secretary to assure the conformity of the device to the standard, provisions for the testing (on a sample basis or, if necessary, on an individual basis) by the Secretary or by another person at the direction of the Secretary,

(iii) provisions for the measurement of the performance characteristics of the device,

(iv) provisions requiring that the results of each or of certain of the tests of the device required to be made under clause (ii) show that the device is in conformity with the portions of the standard for which the test or tests were required, and

(v) a provision requiring that the sale and distribution of the device be restricted but only to the extent that the sale and distribution of a device may be restricted under a regulation under section 360j(e) of this title; and

(C) shall, where appropriate, require the use and prescribe the form and content of labeling for the proper installation, maintenance, operation, and use of the device.

(3) The Secretary shall provide for periodic evaluation of performance standards established under subsection (b) to determine if such standards should be changed to reflect new medical, scientific, or other technological data.

(4) In carrying out his duties under this subsection and subsection (b), the Secretary shall, to the maximum extent practicable—

(A) use personnel, facilities, and other technical support available in other Federal agencies,

(B) consult with other Federal agencies concerned with standard-setting and other nationally or internationally recognized standard-setting entities, and

(C) invite appropriate participation, through joint or other conferences, workshops, or other means, by informed persons representative of scientific, professional, industry, or consumer organizations who in his judgment can make a significant contribution.

(b) Establishment of a standard

(1)(A) The Secretary shall publish in the Federal Register a notice of proposed rulemaking for the establishment, amendment, or revocation of any performance standard for a device.

(B) A notice of proposed rulemaking for the establishment or amendment of a performance standard for a device shall—

(i) set forth a finding with supporting justification that the performance standard is appropriate and necessary to provide reasonable assurance of the safety and effectiveness of the device,

(ii) set forth proposed findings with respect to the risk of illness or injury that the performance standard is intended to reduce or eliminate,

(iii) invite interested persons to submit to the Secretary, within 30 days of the publication of the notice, requests for changes in the classification of the device pursuant to section 360c(e) of this title based on new information relevant to the classification, and

(iv) invite interested persons to submit an existing performance standard for the device, including a draft or proposed performance standard, for consideration by the Secretary.

(C) A notice of proposed rulemaking for the revocation of a performance standard shall set forth a finding with supporting justification that the performance standard is no longer necessary to provide reasonable assurance of the safety and effectiveness of a device.

(D) The Secretary shall provide for a comment period of not less than 60 days.

(2) If, after publication of a notice in accordance with paragraph (1), the Secretary receives a request for a change in the classification of the device, the Secretary shall, within 60 days of the publication of the notice, after consultation with the appropriate panel under section 360c of this title, either deny the request or give notice of an intent to initiate such change under section 360c(e) of this title.

(3)(A) After the expiration of the period for comment on a notice of proposed rulemaking published under paragraph (1) respecting a performance standard and after consideration of such comments and any report from an advisory committee under paragraph (5), the Secretary shall (i) promulgate a regulation establishing a performance standard and publish in the Federal Register findings on the matters referred to in paragraph (1), or (ii) publish a notice terminating the proceeding for the development of the standard together with the reasons for such termination. If a notice of termination is published, the Secretary shall (unless such notice is issued because the device is a banned device under section 360f of this title) initiate a proceeding under section 360c(e) of this title to reclassify the device subject to the proceeding terminated by such notice.

(B) A regulation establishing a performance standard shall set forth the date or dates upon which the standard shall take effect, but no such regulation may take effect before one year after the date of its publication unless (i) the Secretary determines that an earlier effective date is necessary for the protection of the public health and safety, or (ii) such standard has been established for a device which, effective upon the effective date of the standard, has been reclassified from class III to class II. Such date or dates shall be established so as to minimize, consistent with the public health and safety, economic loss to, and disruption or dislocation of, domestic and international trade.

(4)(A) The Secretary, upon his own initiative or upon petition of an interested person may by regulation, promulgated in accordance with the requirements of paragraphs (1), (2), and (3)(B) of this subsection, amend or revoke a performance standard.

(B) The Secretary may declare a proposed amendment of a performance standard to be effective on and after its publication in the Federal Register and until the effective date of any final action taken on such amendment if he determines that making it so effective is in the public interest. A proposed amendment of

a performance standard made so effective under the preceding sentence may not prohibit, during the period in which it is so effective, the introduction or delivery for introduction into interstate commerce of a device which conforms to such standard without the change or changes provided by such proposed amendment.

(5)(A) The Secretary—

(i) may on his own initiative refer a proposed regulation for the establishment, amendment, or revocation of a performance standard, or

(ii) shall, upon the request of an interested person which demonstrates good cause for referral and which is made before the expiration of the period for submission of comments on such proposed regulation refer such proposed regulation,

to an advisory committee of experts, established pursuant to subparagraph (B), for a report and recommendation with respect to any matter involved in the proposed regulation which requires the exercise of scientific judgment. If a proposed regulation is referred under this subparagraph to an advisory committee, the Secretary shall provide the advisory committee with the data and information on which such proposed regulation is based. The advisory committee shall, within sixty days of the referral of a proposed regulation and after independent study of the data and information furnished to it by the Secretary and other data and information before it, submit to the Secretary a report and recommendation respecting such regulation, together with all underlying data and information and a statement of the reason or basis for the recommendation. A copy of such report and recommendation shall be made public by the Secretary.

(B) The Secretary shall establish advisory committees (which may not be panels under section 360c of this title) to receive referrals under subparagraph (A). The Secretary shall appoint as members of any such advisory committee persons qualified in the subject matter to be referred to the committee and of appropriately diversified professional background, except that the Secretary may not appoint to such a committee any individual who is in the regular full-time employ of the United States and engaged in the administration of this chapter. Each such committee shall include as nonvoting members a representative of consumer interests and a representative of interests of the device manufacturing industry. Members of an advisory committee who are not officers or employees of the United States, while attending conferences or meetings of their committee or otherwise serving at the request of the Secretary, shall be entitled to receive compensation at rates to be fixed by the Secretary, which rates may not exceed the daily equivalent of the rate in effect for grade GS–18 of the General Schedule, for each day (including traveltime) they are so engaged; and while so serving away from their homes or regular places of business each member may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5 for persons in the Government service employed intermittently. The Secretary shall designate one of the members of each advisory committee to serve as chairman thereof. The Secretary shall furnish each advisory committee with clerical and other assistance, and shall by regulation prescribe the procedures to be followed by each such committee in acting on referrals made under subparagraph (A).

(c) Recognition of standard

(1)(A) In addition to establishing a performance standard under this section, the Secretary shall, by publication in the Federal Register (or, with respect to a susceptibility test interpretive criteria standard under section 360a–2 of this title, by posting on the Interpretive Criteria Website in accordance with such section), recognize all or part of an appropriate standard established by a nationally or internationally recognized standard development organization for which a person may submit a declaration of conformity in order to meet a premarket submission requirement or other requirement under this chapter to which such standard is applicable.

(B) If a person elects to use a standard recognized by the Secretary under subparagraph (A) to meet the requirements described in such subparagraph, the person shall provide a declaration of conformity to the Secretary that certifies that the device is in conformity with such standard. A person may elect to use data, or information, other than data required by a standard recognized under subparagraph (A) to meet any requirement regarding devices under this chapter.

(C)(i) Any person may submit a request for recognition under subparagraph (A) of all or part of an appropriate standard established by a nationally or internationally recognized standard organization.[1]

(ii) Not later than 60 calendar days after the Secretary receives such a request, the Secretary shall—

(I) make a determination to recognize all, part, or none of the standard that is the subject of the request; and

(II) issue to the person who submitted such request a response in writing that states the Secretary's rationale for that determination, including the scientific, technical, regulatory, or other basis for such determination.

(iii) The Secretary shall make a response issued under clause (ii)(II) publicly available, in such a manner as the Secretary determines appropriate.

(iv) The Secretary shall take such actions as may be necessary to implement all or part of a standard recognized under clause (ii)(I), in accordance with subparagraph (A).

(D) The Secretary shall make publicly available, in such manner as the Secretary determines appropriate, the rationale for recognition under subparagraph (A) of all, part, or none of a standard, including the scientific, technical, regulatory, or other basis for the decision regarding such recognition.

(2) The Secretary may withdraw such recognition of a standard through publication of a notice in the Federal Register if the Secretary determines that the standard is no longer appropriate for meeting a requirement regarding devices under this chapter.

(3)(A) Subject to subparagraph (B), the Secretary shall accept a declaration of conformity that a device is in conformity with a standard recognized under paragraph (1) unless the Secretary finds—

(i) that the data or information submitted to support such declaration does not demonstrate that the device is in conformity with the standard identified in the declaration of conformity; or

(ii) that the standard identified in the declaration of conformity is not applicable to the particular device under review.

(B) The Secretary may request, at any time, the data or information relied on by the person to make a declaration of conformity with respect to a standard recognized under paragraph (1).

(C) A person making a declaration of conformity with respect to a standard recognized under paragraph (1) shall maintain the data and information demonstrating conformity of the device to the standard for a period of two years after the date of the classification or approval of the device by the Secretary or a period equal to the expected design life of the device, whichever is longer.

(4) The Secretary shall provide to all employees of the Food and Drug Administration who review premarket submissions for devices periodic training on the concept and use of recognized standards for purposes of meeting a premarket submission requirement or other applicable requirement under this chapter, including standards relevant to an employee's area of device review.

(d) Pilot accreditation scheme for conformity assessment

(1) In general

The Secretary shall establish a pilot program under which—

(A) testing laboratories may be accredited, by accreditation bodies meeting criteria specified by the Secretary, to assess the conformance of a device with certain standards recognized under this section; and

(B) subject to paragraph (2), determinations by testing laboratories so accredited that a device conforms with such standard or standards shall be accepted by the Secretary for purposes of demonstrating such conformity under this section unless the Secretary finds that a particular such determination shall not be so accepted.

(2) Secretarial review of accredited laboratory determinations

The Secretary may—

(A) review determinations by testing laboratories accredited pursuant to this subsection, including by conducting periodic audits of such determinations or processes of accredited bodies or testing laboratories and, following such review, taking additional measures under this chapter, such as suspension or withdrawal of accreditation of such testing laboratory under paragraph (1)(A) or

requesting additional information with respect to such device, as the Secretary determines appropriate; and

(B) if the Secretary becomes aware of information materially bearing on safety or effectiveness of a device assessed for conformity by a testing laboratory so accredited, take such additional measures under this chapter as the Secretary determines appropriate, such as suspension or withdrawal of accreditation of such testing laboratory under paragraph (1)(A), or requesting additional information with regard to such device.

(3) Implementation and reporting

(A) Public meeting

The Secretary shall publish in the Federal Register a notice of a public meeting to be held no later than September 30, 2018, to discuss and obtain input and recommendations from stakeholders regarding the goals and scope of, and a suitable framework and procedures and requirements for, the pilot program under this subsection.

(B) Pilot program guidance

The Secretary shall—

(i) not later than September 30, 2019, issue draft guidance regarding the goals and implementation of the pilot program under this subsection; and

(ii) not later than September 30, 2021, issue final guidance with respect to the implementation of such program.

(C) Pilot program initiation

Not later than September 30, 2020, the Secretary shall initiate the pilot program under this subsection.

(D) Report

The Secretary shall make available on the internet website of the Food and Drug Administration an annual report on the progress of the pilot program under this subsection.

(4) Sunset

As of October 1, 2022—

(A) the authority for accreditation bodies to accredit testing laboratories pursuant to paragraph (1)(A) shall cease to have force or effect;

(B) the Secretary—

(i) may not accept a determination pursuant to paragraph (1)(B) made by a testing laboratory after such date; and

(ii) may accept such a determination made prior to such date;

(C) except for purposes of accepting a determination described in subparagraph (B)(ii), the Secretary shall not continue to recognize the accreditation of testing laboratories accredited under paragraph (1)(A); and

(D) the Secretary may take actions in accordance with paragraph (2) with respect to the determinations made prior to such date and recognition of the accreditation of testing laboratories pursuant to determinations made prior to such date.

(June 25, 1938, ch. 675, §514, as added Pub. L. 94–295, §2, May 28, 1976, 90 Stat. 546; amended Pub. L. 94–460, title III, §304, Oct. 8, 1976, 90 Stat. 1960; Pub. L. 101–629, §§6(a), (b)(1), 18(b), Nov. 28, 1990, 104 Stat. 4519, 4528; Pub. L. 102–300, §6(g), June 16, 1992, 106 Stat. 241; Pub. L. 103–80, §4(a)(1), Aug. 13, 1993, 107 Stat. 779; Pub. L. 105–115, title II, §204(a), (d), Nov. 21, 1997, 111 Stat. 2335, 2336; Pub. L. 112–144, title VI, §608(a)(2)(B), July 9, 2012, 126 Stat. 1056; Pub. L. 114–255, div. A, title III, §§3044(b)(3), 3053(a), Dec. 13, 2016, 130 Stat. 1121, 1125; Pub. L. 115–52, title II, §205(a), Aug. 18, 2017, 131 Stat. 1016.)

Editorial Notes

AMENDMENTS

2017—Subsec. (d). Pub. L. 115–52 added subsec. (d).

2016—Subsec. (c)(1)(A). Pub. L. 114–255, §3044(b)(3), inserted "(or, with respect to a susceptibility test interpretive criteria standard under section 360a–2 of this title, by posting on the Interpretive Criteria Website in accordance with such section)" after "the Secretary shall, by publication in the Federal Register".

Subsec. (c)(1)(C), (D). Pub. L. 114–255, §3053(a)(1), added subpars. (C) and (D).

Subsec. (c)(4). Pub. L. 114–255, §3053(a)(2), added par. (4).

2012—Subsec. (a)(1). Pub. L. 112–144 substituted "under an administrative order under section 360c(e) of this title (or a regulation promulgated under such section prior to July 9, 2012) but such order (or regulation)" for "under a regulation under section 360c(e) of this title but such regulation".

1997—Subsec. (a)(1). Pub. L. 105–115, §204(d)(1), substituted "under subsection (b)" for "under this section".

Subsec. (a)(2). Pub. L. 105–115, §204(d)(2), substituted "under subsection (b)" for "under this section" in introductory provisions.

Subsec. (a)(3). Pub. L. 105–115, §204(d)(3), substituted "under subsection (b)" for "under this section".

Subsec. (a)(4). Pub. L. 105–115, §204(d)(4), substituted "this subsection and subsection (b)" for "this section" in introductory provisions.

Subsec. (c). Pub. L. 105–115, §204(a), added subsec. (c).

1993—Subsec. (b)(4)(B), (5)(A)(ii). Pub. L. 103–80 amended directory language of Pub. L. 101–619, §18(b), identical to amendment by Pub. L. 102–300, §6(g)(1). See 1992 and 1990 Amendment notes below.

1992—Subsec. (b)(4)(B), (5)(A)(ii). Pub. L. 102–300 made technical corrections to directory language of Pub. L. 101–629, §18(b)(1), (2). See 1990 Amendment note below.

1990—Subsec. (a)(1). Pub. L. 101–629, §6(a)(1), substituted "The special controls required by section 360c(a)(1)(B) of this title shall include performance standards for a class II device if the Secretary determines that a performance standard is necessary to provide reasonable assurance of the safety and effectiveness of the device." for "The Secretary may by regulation, promulgated in accordance with this section, establish a performance standard for a class II device."

Subsec. (b). Pub. L. 101–629, §6(a)(2), (3), redesignated subsec. (g) as (b) and struck out former subsec. (b) which read as follows:

"(1) A proceeding for the development of a performance standard for a device shall be initiated by the Secretary by the publication in the Federal Register of notice of the opportunity to submit to the Secretary a request (within fifteen days of the date of the publication of the notice) for a change in the classification of the device based on new information relevant to its classification.

"(2) If, after publication of a notice pursuant to paragraph (1) the Secretary receives a request for a change in the device's classification, he shall, within sixty days of the publication of such notice and after consultation with the appropriate panel under section 360c of this title, by order published in the Federal Register, either deny the request for change in classification or give notice of his intent to initiate such a change under section 360c(e) of this title."

Subsec. (b)(1), (2). Pub. L. 101–629, §6(a)(4), amended pars. (1) and (2) generally. Prior to amendment, pars. (1) and (2) read as follows:

"(1)(A) After publication pursuant to subsection (c) of this section of a notice respecting a performance standard for a device, the Secretary shall either—

"(i) publish, in the Federal Register in a notice of proposed rulemaking, a proposed performance standard for the device (I) developed by an offeror under such notice and accepted by the Secretary, (II) developed under subsection (c)(4) of this section, (III) accepted by the Secretary under subsection (d) of this section, or (IV) developed by him under subsection (f) of this section, or

"(ii) issue a notice in the Federal Register that the proceeding is terminated together with the reasons for such termination.

"(B) If the Secretary issues under subparagraph (A)(ii) a notice of termination of a proceeding to establish a performance standard for a device, he shall (unless such notice is issued because the device is a banned device under section 360f of this title) initiate a proceeding under section 360c(e) of this title to reclassify the device subject to the proceeding terminated by such notice.

"(2) A notice of proposed rulemaking for the establishment of a performance standard for a device published under paragraph (1)(A)(i) shall set forth proposed findings with respect to the degree of the risk of illness or injury designed to be eliminated or reduced by the proposed standard and the benefit to the public from the device."

Subsec. (b)(3)(A)(i). Pub. L. 101–629, §6(b)(1)(A), substituted "paragraph (1)" for "paragraph (2)".

Subsec. (b)(4)(A). Pub. L. 101–629, §6(b)(1)(B), substituted "paragraphs (1), (2), and (3)(B)" for "paragraphs (2) and (3)(B)".

Subsec. (b)(4)(B). Pub. L. 101–629, §18(b)(1), as amended by Pub. L. 102–300, §6(g)(1), (2), and Pub. L. 103–80, §4(a)(1), struck out ", after affording all interested persons an opportunity for an informal hearing," after "if he determines".

Subsec. (b)(5)(A)(ii). Pub. L. 101–629, §18(b)(2), as amended by Pub. L. 102–300, §6(g)(1), (3), and Pub. L. 103–80, §4(a)(1), substituted "which demonstrates good cause for referral and which is made before the expiration of the period for submission of comments on such proposed regulation refer such proposed regulation," for "unless the Secretary finds the request to be without good cause or the request is made after the expiration of the period for submission of comments on such proposed regulation refer such proposed regulation,".

Subsecs. (c) to (f). Pub. L. 101–629, §6(a)(2), struck out subsec. (c) relating to invitations for standards, subsec. (d) relating to acceptance of certain existing standards, subsec. (e) relating to acceptance of offers to develop standards, and subsec. (f) relating to development of standards by the Secretary after publication of notice inviting submissions or offers of standards.

Subsec. (g). Pub. L. 101–629, §6(a)(3), redesignated subsec. (g) as (b).

1976—Subsec. (a). Pub. L. 94–460 redesignated pars. (4) and (5) as (3) and (4), respectively. Section as originally enacted contained no par. (3).

Statutory Notes and Related Subsidiaries

Effective Date of 2017 Amendment

Amendment by Pub. L. 115–52 effective Oct. 1, 2017, with fees under subpart 3 of part C of subchapter VII of this chapter to be assessed for all submissions listed in section 379j(a)(2)(A) of this title received on or after Oct. 1, 2017, see section 209 of Pub. L. 115–52, set out as a note under section 379i of this title.

Effective Date of 1997 Amendment

Amendment by Pub. L. 105–115 effective 90 days after Nov. 21, 1997, except as otherwise provided, see section 501 of Pub. L. 105–115, set out as a note under section 321 of this title.

Construction of 2016 Amendment

Nothing in amendment by section 3044(b)(3) of Pub. L. 114–255 to be construed to restrict the prescribing of antimicrobial drugs or other products, including drugs approved under section 356(h) of this title, by health care professionals, or to limit the practice of health care, see section 3043 of Pub. L. 114–255, set out as a note under section 356 of this title.

Termination of Advisory Committees

Advisory committees in existence on Jan. 5, 1973, to terminate not later than the expiration of the 2-year period following Jan. 5, 1973, and advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by Congress, its duration is otherwise provided by law. See section 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

Guidance

Pub. L. 114–255, div. A, title III, §3053(b), Dec. 13, 2016, 130 Stat. 1125, provided that: "The Secretary of Health and Human Services, acting through the Commissioner of Food and Drugs, shall review and update, if necessary, previously published guidance and standard operating procedures identifying the principles for recognizing standards, and for withdrawing the recognition of standards, under section 514(c) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360d(c)), taking into account the experience with and reliance on a standard by foreign regulatory authorities and the device industry, and whether recognition of a standard will promote harmonization among regulatory authorities in the regulation of devices."

References in Other Laws to GS–16, 17, or 18 Pay Rates

References in laws to the rates of pay for GS–16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, §101(c)(1)] of Pub. L. 101–509, set out in a note under section 5376 of Title 5.

[1] So in original. Probably should be "standard development organization."

§360e. Premarket approval

(a) General requirement

A class III device—

(1) which is subject to an order issued under subsection (b) (or a regulation promulgated under such subsection prior to July 9, 2012); or

(2) which is a class III device because of section 360c(f) of this title,

is required to have, unless exempt under section 360j(g) of this title, an approval under this section of an application for premarket approval or, as applicable, an approval under subsection (c)(2) of a report seeking premarket approval.

(b) Order to require premarket approval

(1) In the case of a class III device which—

(A) was introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976; or

(B) is (i) of a type so introduced or delivered, and (ii) is substantially equivalent to another device within that type,

the Secretary shall by administrative order following publication of a proposed order in the Federal Register, a meeting of a device classification panel described in section 360c(b) of this title, and consideration of comments from all affected stakeholders, including patients, payors, and providers, notwithstanding subchapter II of chapter 5 of title 5, require that such device have an approval under this section of an application for premarket approval. Authority to issue such administrative order shall not be delegated below the Director of the Center for Devices and Radiological Health, acting in consultation with the Commissioner.

(2) A proposed order required under paragraph (1) shall contain—

(A) the proposed order;

(B) proposed findings with respect to the degree of risk of illness or injury designed to be eliminated or reduced by requiring the device to have an approved application for premarket approval and the benefit to the public from use of the device;

(C) opportunity for the submission of comments on the proposed order and the proposed findings; and

(D) opportunity to request a change in the classification of the device based on new information relevant to the classification of the device.

(3) After the expiration of the period for comment on a proposed order and proposed findings published under paragraph (2), consideration of comments submitted on such proposed order and findings, and a meeting of a device classification panel described in section 360c(b) of this title, the Secretary shall (A) issue an administrative order under paragraph (1) and publish in the Federal Register findings on the matters referred to in paragraph (2)(B), or (B) publish a notice terminating the proceeding for the issuance of the administrative order together with the reasons for such termination. If a notice of termination is published, the Secretary shall (unless such notice is issued because the device is a banned device under section 360f of this title) initiate a proceeding under section 360c(e) of this title to reclassify the device subject to the proceeding terminated by such notice.

(c) Application for premarket approval

(1) Any person may file with the Secretary an application for premarket approval for a class III device. Such an application for a device shall contain—

(A) full reports of all information, published or known to or which should reasonably be known to the applicant, concerning investigations which have been made to show whether or not such device is safe and effective;

(B) a full statement of the components, ingredients, and properties and of the principle or principles of operation, of such device;

(C) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and, when relevant, packing and installation of, such device;

(D) an identifying reference to any performance standard under section 360d of this title which would be applicable to any aspect of such device if it were a class II device, and either adequate information to show that such aspect of such device fully meets such performance standard or adequate information to justify any deviation from such standard;

(E) such samples of such device and of components thereof as the Secretary may reasonably require, except that where the submission of such samples is impracticable or unduly burdensome, the requirement of this subparagraph may be met by the submission of complete information concerning the location of one or more such devices readily available for examination and testing;

(F) specimens of the labeling proposed to be used for such device;

(G) the certification required under section 282(j)(5)(B) of title 42 (which shall not be considered an element of such application); and

(H) such other information relevant to the subject matter of the application as the Secretary, with the concurrence of the appropriate panel under section 360c of this title, may require.

(2)(A) Any person may file with the Secretary a report seeking premarket approval for a class III device referred to in subsection (a) that is a reprocessed single-use device. Such a report shall contain the following:

(i) The device name, including both the trade or proprietary name and the common or usual name.

(ii) The establishment registration number of the owner or operator submitting the report.

(iii) Actions taken to comply with performance standards under section 360d of this title.

(iv) Proposed labels, labeling, and advertising sufficient to describe the device, its intended use, and directions for use.

(v) Full reports of all information, published or known to or which should be reasonably known to the applicant, concerning investigations which have been made to show whether or not the device is safe or effective.

(vi) A description of the device's components, ingredients, and properties.

(vii) A full description of the methods used in, and the facilities and controls used for, the reprocessing and packing of the device.

(viii) Such samples of the device that the Secretary may reasonably require.

(ix) A financial certification or disclosure statement or both, as required by part 54 of title 21, Code of Federal Regulations.

(x) A statement that the applicant believes to the best of the applicant's knowledge that all data and information submitted to the Secretary are truthful and accurate and that no material fact has been omitted in the report.

(xi) Any additional data and information, including information of the type required in paragraph (1) for an application under such paragraph, that the Secretary determines is necessary to determine whether there is reasonable assurance of safety and effectiveness for the reprocessed device.

(xii) Validation data described in section 360(o)(1)(A) of this title that demonstrates that the reasonable assurance of the safety or effectiveness of the device will remain after the maximum number of times the device is reprocessed as intended by the person submitting such report.

(B) In the case of a class III device referred to in subsection (a) that is a reprocessed single-use device:

(i) Subparagraph (A) of this paragraph applies in lieu of paragraph (1).

(ii) Subject to clause (i), the provisions of this section apply to a report under subparagraph (A) to the same extent and in the same manner as such provisions apply to an application under paragraph (1).

(iii) Each reference in other sections of this chapter to an application under this section, other than such a reference in section 379i or 379j of this title, shall be considered to be a reference to a report under subparagraph (A).

(iv) Each reference in other sections of this chapter to a device for which an application under this section has been approved, or has been denied, suspended, or withdrawn, other than such a reference in

section 379i or 379j of this title, shall be considered to be a reference to a device for which a report under subparagraph (A) has been approved, or has been denied, suspended, or withdrawn, respectively.

(3) Upon receipt of an application meeting the requirements set forth in paragraph (1), the Secretary—

(A) may on the Secretary's own initiative, or

(B) shall, upon the request of an applicant unless the Secretary finds that the information in the application which would be reviewed by a panel substantially duplicates information which has previously been reviewed by a panel appointed under section 360c of this title,

refer such application to the appropriate panel under section 360c of this title for study and for submission (within such period as he may establish) of a report and recommendation respecting approval of the application, together with all underlying data and the reasons or basis for the recommendation. Where appropriate, the Secretary shall ensure that such panel includes, or consults with, one or more pediatric experts.

(4)(A) Prior to the submission of an application under this subsection, the Secretary shall accept and review any portion of the application that the applicant and the Secretary agree is complete, ready, and appropriate for review, except that such requirement does not apply, and the Secretary has discretion whether to accept and review such portion, during any period in which, under section 379j(g) of this title, the Secretary does not have the authority to collect fees under section 379j(a) of this title.

(B) Each portion of a submission reviewed under subparagraph (A) and found acceptable by the Secretary shall not be further reviewed after receipt of an application that satisfies the requirements of paragraph (1), unless a significant issue of safety or effectiveness provides the Secretary reason to review such accepted portion.

(C) Whenever the Secretary determines that a portion of a submission under subparagraph (A) is unacceptable, the Secretary shall, in writing, provide to the applicant a description of any deficiencies in such portion and identify the information that is required to correct these deficiencies, unless the applicant is no longer pursuing the application.

(5)(A) In requesting additional information with respect to an application under this section, the Secretary shall consider the least burdensome appropriate means necessary to demonstrate a reasonable assurance of device safety and effectiveness.

(B) For purposes of subparagraph (A), the term "necessary" means the minimum required information that would support a determination by the Secretary that an application provides a reasonable assurance of the safety and effectiveness of the device.

(C) For purposes of this paragraph, the Secretary shall consider the role of postmarket information in determining the least burdensome means of demonstrating a reasonable assurance of device safety and effectiveness.

(D) Nothing in this paragraph alters the standards for premarket approval of a device.

(d) Action on application for premarket approval

(1)(A) As promptly as possible, but in no event later than one hundred and eighty days after the receipt of an application under subsection (c) (except as provided in section 360j(l)(3)(D)(ii) of this title or unless, in accordance with subparagraph (B)(i), an additional period as agreed upon by the Secretary and the applicant), the Secretary, after considering the report and recommendation submitted under paragraph (2) of such subsection, shall—

(i) issue an order approving the application if he finds that none of the grounds for denying approval specified in paragraph (2) of this subsection applies; or

(ii) deny approval of the application if he finds (and sets forth the basis for such finding as part of or accompanying such denial) that one or more grounds for denial specified in paragraph (2) of this subsection apply.

In making the determination whether to approve or deny the application, the Secretary shall rely on the conditions of use included in the proposed labeling as the basis for determining whether or not there is a reasonable assurance of safety and effectiveness, if the proposed labeling is neither false nor misleading. In determining whether or not such labeling is false or misleading, the Secretary shall fairly evaluate all material facts pertinent to the proposed labeling.

(B)(i) The Secretary may not enter into an agreement to extend the period in which to take action with respect to an application submitted for a device subject to a regulation promulgated under subsection (b) unless he finds that the continued availability of the device is necessary for the public health.

(ii) An order approving an application for a device may require as a condition to such approval that the sale and distribution of the device be restricted but only to the extent that the sale and distribution of a device may be restricted under a regulation under section 360j(e) of this title.

(iii) The Secretary shall accept and review statistically valid and reliable data and any other information from investigations conducted under the authority of regulations required by section 360j(g) of this title to make a determination of whether there is a reasonable assurance of safety and effectiveness of a device subject to a pending application under this section if—

(I) the data or information is derived from investigations of an earlier version of the device, the device has been modified during or after the investigations (but prior to submission of an application under subsection (c)) and such a modification of the device does not constitute a significant change in the design or in the basic principles of operation of the device that would invalidate the data or information; or

(II) the data or information relates to a device approved under this section, is available for use under this chapter, and is relevant to the design and intended use of the device for which the application is pending.

(2) The Secretary shall deny approval of an application for a device if, upon the basis of the information submitted to the Secretary as part of the application and any other information before him with respect to such device, the Secretary finds that—

(A) there is a lack of a showing of reasonable assurance that such device is safe under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof;

(B) there is a lack of a showing of reasonable assurance that the device is effective under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof;

(C) the methods used in, or the facilities or controls used for, the manufacture, processing, packing, or installation of such device do not conform to the requirements of section 360j(f) of this title;

(D) based on a fair evaluation of all material facts, the proposed labeling is false or misleading in any particular; or

(E) such device is not shown to conform in all respects to a performance standard in effect under section 360d of this title compliance with which is a condition to approval of the application and there is a lack of adequate information to justify the deviation from such standard.

Any denial of an application shall, insofar as the Secretary determines to be practicable, be accompanied by a statement informing the applicant of the measures required to place such application in approvable form (which measures may include further research by the applicant in accordance with one or more protocols prescribed by the Secretary).

(3)(A)(i) The Secretary shall, upon the written request of an applicant, meet with the applicant, not later than 100 days after the receipt of an application that has been filed as complete under subsection (c), to discuss the review status of the application.

(ii) The Secretary shall, in writing and prior to the meeting, provide to the applicant a description of any deficiencies in the application that, at that point, have been identified by the Secretary based on an interim review of the entire application and identify the information that is required to correct those deficiencies.

(iii) The Secretary shall notify the applicant promptly of—

(I) any additional deficiency identified in the application, or

(II) any additional information required to achieve completion of the review and final action on the application,

that was not described as a deficiency in the written description provided by the Secretary under clause (ii).

(B) The Secretary and the applicant may, by mutual consent, establish a different schedule for a meeting required under this paragraph.

(4) An applicant whose application has been denied approval may, by petition filed on or before the thirtieth day after the date upon which he receives notice of such denial, obtain review thereof in accordance with either paragraph (1) or (2) of subsection (g), and any interested person may obtain review, in accordance with paragraph (1) or (2) of subsection (g), of an order of the Secretary approving an application.

(5)(A)(i) A supplemental application shall be required for any change to a device subject to an approved application under this subsection that affects safety or effectiveness, unless such change is a modification in a manufacturing procedure or method of manufacturing and the holder of the approved application submits a written notice to the Secretary that describes in detail the change, summarizes the data or information supporting the change, and informs the Secretary that the change has been made under the requirements of section 360j(f) of this title.

(ii) The holder of an approved application who submits a notice under clause (i) with respect to a manufacturing change of a device may distribute the device 30 days after the date on which the Secretary receives the notice, unless the Secretary within such 30-day period notifies the holder that the notice is not adequate and describes such further information or action that is required for acceptance of such change. If the Secretary notifies the holder that a supplemental application is required, the Secretary shall review the supplement within 135 days after the receipt of the supplement. The time used by the Secretary to review the notice of the manufacturing change shall be deducted from the 135-day review period if the notice meets appropriate content requirements for premarket approval supplements.

(B)(i) Subject to clause (ii), in reviewing a supplement to an approved application, for an incremental change to the design of a device that affects safety or effectiveness, the Secretary shall approve such supplement if—

(I) nonclinical data demonstrate that the design modification creates the intended additional capacity, function, or performance of the device; and

(II) clinical data from the approved application and any supplement to the approved application provide a reasonable assurance of safety and effectiveness for the changed device.

(ii) The Secretary may require, when necessary, additional clinical data to evaluate the design modification of the device to provide a reasonable assurance of safety and effectiveness.

(e) Withdrawal and temporary suspension of approval of application

(1) The Secretary shall, upon obtaining, where appropriate, advice on scientific matters from a panel or panels under section 360c of this title, and after due notice and opportunity for informal hearing to the holder of an approved application for a device, issue an order withdrawing approval of the application if the Secretary finds—

(A) that such device is unsafe or ineffective under the conditions of use prescribed, recommended, or suggested in the labeling thereof;

(B) on the basis of new information before him with respect to such device, evaluated together with the evidence available to him when the application was approved, that there is a lack of a showing of reasonable assurance that the device is safe or effective under the conditions of use prescribed, recommended, or suggested in the labeling thereof;

(C) that the application contained or was accompanied by an untrue statement of a material fact;

(D) that the applicant (i) has failed to establish a system for maintaining records, or has repeatedly or deliberately failed to maintain records or to make reports, required by an applicable regulation under section 360i(a) of this title, (ii) has refused to permit access to, or copying or verification of, such records as required by section 374 of this title, or (iii) has not complied with the requirements of section 360 of this title;

(E) on the basis of new information before him with respect to such device, evaluated together with the evidence before him when the application was approved, that the methods used in, or the facilities and controls used for, the manufacture, processing, packing, or installation of such device do not conform with the requirements of section 360j(f) of this title and were not brought into conformity with such requirements within a reasonable time after receipt of written notice from the Secretary of nonconformity;

(F) on the basis of new information before him, evaluated together with the evidence before him when the application was approved, that the labeling of such device, based on a fair evaluation of all material facts, is false or misleading in any particular and was not corrected within a reasonable time after receipt of written notice from the Secretary of such fact; or

(G) on the basis of new information before him, evaluated together with the evidence before him when the application was approved, that such device is not shown to conform in all respects to a performance standard which is in effect under section 360d of this title compliance with which was a condition to approval of the application and that there is a lack of adequate information to justify the deviation from such standard.

(2) The holder of an application subject to an order issued under paragraph (1) withdrawing approval of the application may, by petition filed on or before the thirtieth day after the date upon which he receives notice of such withdrawal, obtain review thereof in accordance with either paragraph (1) or (2) of subsection (g).

(3) If, after providing an opportunity for an informal hearing, the Secretary determines there is reasonable probability that the continuation of distribution of a device under an approved application would cause serious, adverse health consequences or death, the Secretary shall by order temporarily suspend the approval of the application approved under this section. If the Secretary issues such an order, the Secretary shall proceed expeditiously under paragraph (1) to withdraw such application.

(f) Product development protocol

(1) In the case of a class III device which is required to have an approval of an application submitted under subsection (c), such device shall be considered as having such an approval if a notice of completion of testing conducted in accordance with a product development protocol approved under paragraph (4) has been declared completed under paragraph (6).

(2) Any person may submit to the Secretary a proposed product development protocol with respect to a device. Such a protocol shall be accompanied by data supporting it. If, within thirty days of the receipt of such a protocol, the Secretary determines that it appears to be appropriate to apply the requirements of this subsection to the device with respect to which the protocol is submitted, the Secretary—

(A) may, at the initiative of the Secretary, refer the proposed protocol to the appropriate panel under section 360c of this title for its recommendation respecting approval of the protocol; or

(B) shall so refer such protocol upon the request of the submitter, unless the Secretary finds that the proposed protocol and accompanying data which would be reviewed by such panel substantially duplicate a product development protocol and accompanying data which have previously been reviewed by such a panel.

(3) A proposed product development protocol for a device may be approved only if—

(A) the Secretary determines that it is appropriate to apply the requirements of this subsection to the device in lieu of the requirement of approval of an application submitted under subsection (c); and

(B) the Secretary determines that the proposed protocol provides—

(i) a description of the device and the changes which may be made in the device,

(ii) a description of the preclinical trials (if any) of the device and a specification of (I) the results from such trials to be required before the commencement of clinical trials of the device, and (II) any permissible variations in preclinical trials and the results therefrom,

(iii) a description of the clinical trials (if any) of the device and a specification of (I) the results from such trials to be required before the filing of a notice of completion of the requirements of the protocol, and (II) any permissible variations in such trials and the results therefrom,

(iv) a description of the methods to be used in, and the facilities and controls to be used for, the manufacture, processing, and, when relevant, packing and installation of the device,

(v) an identifying reference to any performance standard under section 360d of this title to be applicable to any aspect of such device,

(vi) if appropriate, specimens of the labeling proposed to be used for such device,

(vii) such other information relevant to the subject matter of the protocol as the Secretary, with the concurrence of the appropriate panel or panels under section 360c of this title, may require, and

(viii) a requirement for submission of progress reports and, when completed, records of the trials conducted under the protocol which records are adequate to show compliance with the protocol.

(4) The Secretary shall approve or disapprove a proposed product development protocol submitted under paragraph (2) within one hundred and twenty days of its receipt unless an additional period is agreed upon by the Secretary and the person who submitted the protocol. Approval of a protocol or denial of approval of a protocol is final agency action subject to judicial review under chapter 7 of title 5.

(5) At any time after a product development protocol for a device has been approved pursuant to paragraph (4), the person for whom the protocol was approved may submit a notice of completion—

(A) stating (i) his determination that the requirements of the protocol have been fulfilled and that, to the best of his knowledge, there is no reason bearing on safety or effectiveness why the notice of completion should not become effective, and (ii) the data and other information upon which such determination was made, and

(B) setting forth the results of the trials required by the protocol and all the information required by subsection (c)(1).

(6)(A) The Secretary may, after providing the person who has an approved protocol an opportunity for an informal hearing and at any time prior to receipt of notice of completion of such protocol, issue a final order to revoke such protocol if he finds that—

(i) such person has failed substantially to comply with the requirements of the protocol,

(ii) the results of the trials obtained under the protocol differ so substantially from the results required by the protocol that further trials cannot be justified, or

(iii) the results of the trials conducted under the protocol or available new information do not demonstrate that the device tested under the protocol does not present an unreasonable risk to health and safety.

(B) After the receipt of a notice of completion of an approved protocol the Secretary shall, within the ninety-day period beginning on the date such notice is received, by order either declare the protocol completed or declare it not completed. An order declaring a protocol not completed may take effect only after the Secretary has provided the person who has the protocol opportunity for an informal hearing on the order. Such an order may be issued only if the Secretary finds—

(i) such person has failed substantially to comply with the requirements of the protocol,

(ii) the results of the trials obtained under the protocol differ substantially from the results required by the protocol, or

(iii) there is a lack of a showing of reasonable assurance of the safety and effectiveness of the device under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof.

(C) A final order issued under subparagraph (A) or (B) shall be in writing and shall contain the reasons to support the conclusions thereof.

(7) At any time after a notice of completion has become effective, the Secretary may issue an order (after due notice and opportunity for an informal hearing to the person for whom the notice is effective) revoking the approval of a device provided by a notice of completion which has become effective as provided in subparagraph (B) if he finds that any of the grounds listed in subparagraphs (A) through (G) of subsection (e)(1) of this section apply. Each reference in such subparagraphs to an application shall be considered for purposes of this paragraph as a reference to a protocol and the notice of completion of such protocol, and each reference to the time when an application was approved shall be considered for purposes of this paragraph as a reference to the time when a notice of completion took effect.

(8) A person who has an approved protocol subject to an order issued under paragraph (6)(A) revoking such protocol, a person who has an approved protocol with respect to which an order under paragraph (6)(B) was issued declaring that the protocol had not been completed, or a person subject to an order issued under paragraph (7) revoking the approval of a device may, by petition filed on or before the thirtieth day after the date upon which he receives notice of such order, obtain review thereof in accordance with either paragraph (1) or (2) of subsection (g).

(g) Review

(1) Upon petition for review of—

(A) an order under subsection (d) approving or denying approval of an application or an order under subsection (e) withdrawing approval of an application, or

(B) an order under subsection (f)(6)(A) revoking an approved protocol, under subsection (f)(6)(B) declaring that an approved protocol has not been completed, or under subsection (f)(7) revoking the approval of a device,

the Secretary shall, unless he finds the petition to be without good cause or unless a petition for review of such order has been submitted under paragraph (2), hold a hearing, in accordance with section 554 of title 5, on the order. The panel or panels which considered the application, protocol, or device subject to such order shall designate a member to appear and testify at any such hearing upon request of the Secretary, the petitioner, or the officer conducting the hearing, but this requirement does not preclude any other member of the panel or panels from appearing and testifying at any such hearing. Upon completion of such hearing and after considering the record established in such hearing, the Secretary shall issue an order either affirming the order subject to the hearing or reversing such order and, as appropriate, approving or denying approval of the application, reinstating the application's approval, approving the protocol, or placing in effect a notice of completion.

(2)(A) Upon petition for review of—

(i) an order under subsection (d) approving or denying approval of an application or an order under subsection (e) withdrawing approval of an application, or

(ii) an order under subsection (f)(6)(A) revoking an approved protocol, under subsection (f)(6)(B) declaring that an approved protocol has not been completed, or under subsection (f)(7) revoking the approval of a device,

the Secretary shall refer the application or protocol subject to the order and the basis for the order to an advisory committee of experts established pursuant to subparagraph (B) for a report and recommendation with respect to the order. The advisory committee shall, after independent study of the data and information furnished to it by the Secretary and other data and information before it, submit to the Secretary a report and recommendation, together with all underlying data and information and a statement of the reasons or basis for the recommendation. A copy of such report shall be promptly supplied by the Secretary to any person who petitioned for such referral to the advisory committee.

(B) The Secretary shall establish advisory committees (which may not be panels under section 360c of this title) to receive referrals under subparagraph (A). The Secretary shall appoint as members of any such advisory committee persons qualified in the subject matter to be referred to the committee and of appropriately diversified professional backgrounds, except that the Secretary may not appoint to such a committee any individual who is in the regular full-time employ of the United States and engaged in the administration of this chapter. Members of an advisory committee (other than officers or employees of the United States), while attending conferences or meetings of their committee or otherwise serving at the request of the Secretary, shall be entitled to receive compensation at rates to be fixed by the Secretary, which rates may not exceed the daily equivalent for grade GS–18 of the General Schedule for each day (including traveltime) they are so engaged; and while so serving away from their homes or regular places of business each member may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5 for persons in the Government service employed intermittently. The Secretary shall designate the chairman of an advisory committee from its members. The Secretary shall furnish each advisory committee with clerical and other assistance, and shall by regulation prescribe the procedures to be followed by each such committee in acting on referrals made under subparagraph (A).

(C) The Secretary shall make public the report and recommendation made by an advisory committee with respect to an application and shall by order, stating the reasons therefor, either affirm the order referred to the advisory committee or reverse such order and, if appropriate, approve or deny approval of the application, reinstate the application's approval, approve the protocol, or place in effect a notice of completion.

(h) Service of orders

Orders of the Secretary under this section shall be served (1) in person by any officer or employee of the department designated by the Secretary, or (2) by mailing the order by registered mail or certified mail addressed to the applicant at his last known address in the records of the Secretary.

(i) Revision

(1) Before December 1, 1995, the Secretary shall by order require manufacturers of devices, which were introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, and which are subject to revision of classification under paragraph (2), to submit to the Secretary a summary of and citation to any information known or otherwise available to the manufacturer respecting such devices, including adverse safety or effectiveness information which has not been submitted under section 360i of this title. The Secretary may require the manufacturer to submit the adverse safety or effectiveness data for which a summary and citation were submitted, if such data are available to the manufacturer.

(2) After the issuance of an order under paragraph (1) but before the date that is 2 years after July 9, 2012, the Secretary shall issue an administrative order following publication of a proposed order in the Federal Register, a meeting of a device classification panel described in section 360c(b) of this title, and consideration of comments from all affected stakeholders, including patients, payors, and providers, notwithstanding subchapter II of chapter 5 of title 5, for each device—

(A) which the Secretary has classified as a class III device, and

(B) for which no administrative order has been issued under subsection (b) (or no regulation has been promulgated under such subsection prior to July 9, 2012),

revising the classification of the device so that the device is classified into class I or class II, unless the administrative order issued under this paragraph requires the device to remain in class III. In determining whether to revise the classification of a device or to require a device to remain in class III, the Secretary shall apply the criteria set forth in section 360c(a) of this title.

(3) The Secretary shall, as promptly as is reasonably achievable, but not later than 12 months after the effective date of the order requiring a device to remain in class III, establish a schedule for the issuance of an administrative order under subsection (b) for each device which is subject to the order requiring the device to remain in class III.

(June 25, 1938, ch. 675, §515, as added Pub. L. 94–295, §2, May 28, 1976, 90 Stat. 552; amended Pub. L. 101–629, §§4(b)(1), 9(a), 18(c), Nov. 28, 1990, 104 Stat. 4515, 4521, 4528; Pub. L. 103–80, §3(t), Aug. 13, 1993, 107 Stat. 778; Pub. L. 105–115, title II, §§201(b), 202, 205(c), 209(b), 216(b), Nov. 21, 1997, 111 Stat. 2334, 2338, 2341, 2349; Pub. L. 107–250, title II, §§209, 210, title III, §302(c), Oct. 26, 2002, 116 Stat. 1613, 1614, 1618; Pub. L. 108–214, §2(d)(1), Apr. 1, 2004, 118 Stat. 576; Pub. L. 110–85, title VIII, §801(b)(3)(D), Sept. 27, 2007, 121 Stat. 921; Pub. L. 112–144, title II, §203(g), title VI, §608(b)(1), July 9, 2012, 126 Stat. 1006, 1056; Pub. L. 114–255, div. A, title III, §§3051(c)(1), 3058(b), 3101(a)(2)(J), Dec. 13, 2016, 130 Stat. 1124, 1129, 1154; Pub. L. 115–5