

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 Section as originally enacted contained no par.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).

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.

§ 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(h) 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 de-

termining 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 pre-market 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 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 and 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 attend-

ing 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 regula-

tion 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.)

AMENDMENTS

2016—Subsec. (a)(1). Pub. L. 114-255, § 3101(a)(2)(J), substituted “subject to an order” for “subject to a an order”.

Subsec. (c)(5). Pub. L. 114-255, § 3058(b), added par. (5).

Subsec. (d)(5), (6). Pub. L. 114-255, § 3051(c)(1), redesignated par. (6) as (5) and struck out former par. (5) which read as follows: “In order to provide for more effective treatment or diagnosis of life-threatening or irreversibly debilitating human diseases or conditions, the Secretary shall provide review priority for devices—

“(A) representing breakthrough technologies,

“(B) for which no approved alternatives exist,

“(C) which offer significant advantages over existing approved alternatives, or

“(D) the availability of which is in the best interest of the patients.”

2012—Subsec. (a)(1). Pub. L. 112-144, § 608(b)(1)(A), substituted “an order issued under subsection (b) (or a regulation promulgated under such subsection prior to July 9, 2012)” for “regulation promulgated under subsection (b)”.

Subsec. (b). Pub. L. 112-144, § 608(b)(1)(B)(i)(I), which directed substitution of “Order” for “Regulation” in the heading of par. (1) of subsec. (b), was executed by making the substitution in the heading of subsec. (b), to reflect the probable intent of Congress.

Subsec. (b)(1). Pub. L. 112-144, § 608(b)(1)(B)(i)(II), in concluding provisions, substituted “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” for “by regulation, promulgated in accordance with this subsection” and inserted at end “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.”

Subsec. (b)(2). Pub. L. 112-144, § 608(b)(1)(B)(ii), struck out subpar. (A) designation after “(2)” and substituted “A proposed order required under paragraph (1) shall contain—” for “A proceeding for the promulgation of a regulation under paragraph (1) respecting a device shall be initiated by the publication in the Federal Register of a notice of proposed rulemaking. Such notice shall contain—” in introductory provisions, redesignated cls. (i) to (iv) as subpars. (A) to (D), respectively, substituted “order” for “regulation” in subpars. (A) and (C), and struck out former subpar. (B) which read as follows: “If, within fifteen days after publication of a notice under subparagraph (A), the Secretary receives a request for a change in the classification of a device, 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)(3). Pub. L. 112-144, § 608(b)(1)(B)(iii)(I), (II), (IV), (V), substituted “proposed order” for “proposed regulation” in two places, “paragraph (2),” for “paragraph (2) and after”, “(A) issue an administrative order under paragraph (1)” for “(A) promulgate such regulation”, “paragraph (2)(B)” for “paragraph (2)(A)(ii)”, and “issuance of the administrative order” for “promulgation of the regulation”.

Pub. L. 112-144, § 608(b)(1)(B)(iii)(III), which directed insertion of “and a meeting of a device classification panel described in section 360c(b) of this title,” after “such proposed regulation and findings,” was inserted after “such proposed order and findings,” to reflect the probable intent of Congress and amendment by Pub. L. 112-144, § 608(b)(1)(B)(iii)(D). See above.

Subsec. (b)(4). Pub. L. 112-144, § 608(b)(1)(B)(iv), struck out par. (4) which read as follows: “The Secretary, upon his own initiative or upon petition of an interested person, may by regulation amend or revoke any regulation promulgated under this subsection. A regulation to amend or revoke a regulation under this subsection shall be promulgated in accordance with the requirements prescribed by this subsection for the promulgation of the regulation to be amended or revoked.”

Subsec. (c)(4)(A). Pub. L. 112-144, § 203(g), substituted “379j(h)” for “379j(g)”.

Subsec. (i)(2). Pub. L. 112-144, § 608(b)(1)(C)(i)(III), (IV), in concluding provisions, substituted “administrative order issued under this paragraph requires” for “regulation requires” and struck out at end “Before the publication of a regulation requiring a device to remain in class III or revising its classification, the Secretary shall publish a proposed regulation respecting the classification of a device under this paragraph and provide reasonable opportunity for the submission of comments on any such regulation. No regulation requiring a device to remain in class III or revising its classification may take effect before the expiration of 90 days from the date of its publication in the Federal Register as a proposed regulation.”

Pub. L. 112-144, § 608(b)(1)(C)(i)(I), in introductory provisions, substituted “the date that is 2 years after July 9, 2012” for “December 1, 1995” and “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 “publish a regulation in the Federal Register”.

Subsec. (i)(2)(B). Pub. L. 112-144, § 608(b)(1)(C)(i)(II), substituted “administrative order has been issued under subsection (b) (or no regulation has been promulgated under such subsection prior to July 9, 2012)” for “final regulation has been promulgated under subsection (b) of this section”.

Subsec. (i)(3). Pub. L. 112-144, § 608(b)(1)(C)(ii), substituted “order requiring” for “regulation requiring” in two places and “issuance of an administrative order under subsection (b)” for “promulgation of a subsection (b) of this section regulation”.

2007—Subsec. (c)(1)(G), (H). Pub. L. 110-85 added subpar. (G) and redesignated former subpar. (G) as (H).

2004—Subsec. (c)(3). Pub. L. 108-214, § 2(d)(1)(B), amended directory language of Pub. L. 107-250, § 210. See 2002 Amendment note below.

Pub. L. 108-214, § 2(d)(1)(A)(i), redesignated par. (3) relating to acceptance and review of any portion of the application prior to submission as (4).

Subsec. (c)(4). Pub. L. 108-214, § 2(d)(1)(A), redesignated par. (3) relating to acceptance and review of any portion of the application prior to submission as (4) and substituted “unless a significant issue of safety” for “unless an issue of safety” in subpar. (B).

2002—Subsec. (a). Pub. L. 107-250, § 302(c)(1), inserted “or, as applicable, an approval under subsection (c)(2) of a report seeking premarket approval” before period in concluding provisions.

Subsec. (c)(2). Pub. L. 107-250, § 302(c)(2)(B), added par. (2). Former par. (2) redesignated (3).

Subsec. (c)(3). Pub. L. 107-250, § 302(c)(2)(A), redesignated par. (2) relating to Secretary’s referral of application to appropriate panel as (3).

Pub. L. 107-250, § 210, as amended by Pub. L. 108-214, § 2(d)(1)(B), inserted “Where appropriate, the Secretary shall ensure that such panel includes, or consults with, one or more pediatric experts.” at the end of the concluding provisions of par. (3) as redesignated by Pub. L. 107-250, § 302(c)(2)(A).

Pub. L. 107-250, § 209, added par. (3) relating to acceptance and review of any portion of the application prior to submission.

1997—Subsec. (d)(1)(A). Pub. L. 105-115, § 205(c)(1), inserted at end “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.”

Subsec. (d)(1)(B)(iii). Pub. L. 105-115, § 201(b), added cl. (iii).

Subsec. (d)(3), (4). Pub. L. 105-115, § 202(1), 209(b), added par. (3) and redesignated former par. (3) as (4).

Subsec. (d)(5). Pub. L. 105-115, § 202(2), added par. (5).

Subsec. (d)(6). Pub. L. 105-115, § 205(c)(2), added par. (6).

Subsec. (f)(2). Pub. L. 105-115, § 216(b), substituted “the Secretary—” and subpars. (A) and (B) for “he shall refer the proposed protocol to the appropriate panel under section 360c of this title for its recommendation respecting approval of the protocol.”

1993—Subsec. (c)(2)(A). Pub. L. 103-80 struck out “refer such application” after “own initiative”.

1990—Subsec. (c)(2). Pub. L. 101-629, § 18(c), substituted “the Secretary—” for “the Secretary shall” and added subpars. (A) and (B).

Subsec. (e). Pub. L. 101-629, § 9(a)(2), inserted “and temporary suspension” after “Withdrawal” in heading.

Subsec. (e)(3). Pub. L. 101-629, § 9(a)(1), added par. (3).

Subsec. (i). Pub. L. 101-629, § 4(b)(1), added subsec. (i).

EFFECTIVE DATE OF 2012 AMENDMENT

Amendment by section 203(g) of Pub. L. 112-144 effective Oct. 1, 2012, with additional provision for assessment of certain fees, see section 206 of Pub. L. 112-144, 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.

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.

REPORT ON CERTAIN DEVICES

Pub. L. 107-250, title II, §205, Oct. 26, 2002, 116 Stat. 1612, directed the Secretary of Health and Human Services, not later than one year after Oct. 26, 2002, to report to the appropriate committees of Congress on the timeliness and effectiveness of device premarket reviews by centers other than the Center for Devices and Radiological Health, including information on the times required to log in and review original submissions and supplements, times required to review manufacturers' replies to submissions, times to approve or clear such devices, and recommendations on improvement of performance and reassignment of responsibility for regulating such 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.

§ 360e-1. Pediatric uses of devices

(a) New devices

(1) In general

A person that submits to the Secretary an application under section 360j(m) of this title, or an application (or supplement to an application) or a product development protocol under section 360e of this title, shall include in the application or protocol the information described in paragraph (2).

(2) Required information

The application or protocol described in paragraph (1) shall include, with respect to the device for which approval is sought and if readily available—

(A) a description of any pediatric subpopulations that suffer from the disease or condition that the device is intended to treat, diagnose, or cure; and

(B) the number of affected pediatric patients.

(3) Annual report

Not later than 18 months after September 27, 2007, and annually thereafter, 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 report that includes—

(A) the number of devices approved in the year preceding the year in which the report

is submitted, for which there is a pediatric subpopulation that suffers from the disease or condition that the device is intended to treat, diagnose, or cure;

(B) the number of devices approved in the year preceding the year in which the report is submitted, labeled for use in pediatric patients;

(C) the number of pediatric devices approved in the year preceding the year in which the report is submitted, exempted from a fee pursuant to section 379j(a)(2)(B)(v) of this title; and

(D) the review time for each device described in subparagraphs (A), (B), and (C).

(b) Determination of pediatric effectiveness based on similar course of disease or condition or similar effect of device on adults

(1) In general

If the course of the disease or condition and the effects of the device are sufficiently similar in adults and pediatric patients, the Secretary may conclude that adult data may be used to support a determination of a reasonable assurance of effectiveness in pediatric populations, as appropriate.

(2) Extrapolation between subpopulations

A study may not be needed in each pediatric subpopulation if data from one subpopulation can be extrapolated to another subpopulation.

(c) Pediatric subpopulation

For purposes of this section, the term “pediatric subpopulation” has the meaning given the term in section 360j(m)(6)(E)(ii) of this title.

(June 25, 1938, ch. 675, §515A, as added Pub. L. 110-85, title III, §302, Sept. 27, 2007, 121 Stat. 859.)

FINAL RULE RELATING TO TRACKING OF PEDIATRIC USES OF DEVICES

Pub. L. 112-144, title VI, §620(b), July 9, 2012, 126 Stat. 1064, provided that: “The Secretary of Health and Human Services shall issue—

“(1) a proposed rule implementing section 515A(a)(2) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360e-1(a)(2)) not later than December 31, 2012; and

“(2) a final rule implementing such section not later than December 31, 2013.”

§ 360e-3. Breakthrough devices

(a) Purpose

The purpose of this section is to encourage the Secretary, and provide the Secretary with sufficient authority, to apply efficient and flexible approaches to expedite the development of, and prioritize the Food and Drug Administration's review of, devices that represent breakthrough technologies.

(b) Establishment of program

The Secretary shall establish a program to expedite the development of, and provide for the priority review for, devices, as determined by the Secretary—

(1) that provide for more effective treatment or diagnosis of life-threatening or irreversibly debilitating human disease or conditions; and

(2)(A) that represent breakthrough technologies;