

act, FDA must promulgate a regulation under section 515(b) of the act requiring such approval, except as provided in paragraphs (b) and (c) of this section. Such a regulation under section 515(b) of the act shall not be effective during the grace period ending on the 90th day after its promulgation or on the last day of the 30th full calendar month after the regulation that classifies the device into class III is effective, whichever is later. See section 501(f)(2)(B) of the act. Accordingly, unless an effective date of the requirement for premarket approval is shown in the regulation for a device classified into class III in this part, the device may be commercially distributed without FDA's issuance of an order approving a PMA or declaring completed a PDP for the device. If FDA promulgates a regulation under section 515(b) of the act requiring premarket approval for a device, section 501(f)(1)(A) of the act applies to the device.

(b) Any new, not substantially equivalent, device introduced into commercial distribution on or after May 28, 1976, including a device formerly marketed that has been substantially altered, is classified by statute (section 513(f) of the act) into class III without any grace period and FDA must have issued an order approving a PMA or declaring completed a PDP for the device before the device is commercially distributed unless it is reclassified. If FDA knows that a device being commercially distributed may be a "new" device as defined in this section because of any new intended use or other reasons, FDA may codify the statutory classification of the device into class III for such new use. Accordingly, the regulation for such a class III device states that as of the enactment date of the amendments, May 28, 1976, the device must have an approval under section 515 of the act before commercial distribution.

(c) A device identified in a regulation in this part that is classified into class III and that is subject to the transitional provisions of section 520(1) of the act is automatically classified by statute into class III and must have an approval under section 515 of the act before being commercially distributed. Accordingly, the regulation for such a

class III transitional device states that as of the enactment date of the amendments, May 28, 1976, the device must have an approval under section 515 of the act before commercial distribution.

**§ 878.9 Limitations of exemptions from section 510(k) of the Federal Food, Drug, and Cosmetic Act (the act).**

The exemption from the requirement of premarket notification (section 510(k) of the act) for a generic type of class I or II device is only to the extent that the device has existing or reasonably foreseeable characteristics of commercially distributed devices within that generic type or, in the case of in vitro diagnostic devices, only to the extent that misdiagnosis as a result of using the device would not be associated with high morbidity or mortality. Accordingly, manufacturers of any commercially distributed class I or II device for which FDA has granted an exemption from the requirement of premarket notification must still submit a premarket notification to FDA before introducing or delivering for introduction into interstate commerce for commercial distribution the device when:

(a) The device is intended for a use different from the intended use of a legally marketed device in that generic type of device; e.g., the device is intended for a different medical purpose, or the device is intended for lay use where the former intended use was by health care professionals only;

(b) The modified device operates using a different fundamental scientific technology than a legally marketed device in that generic type of device; e.g., a surgical instrument cuts tissue with a laser beam rather than with a sharpened metal blade, or an in vitro diagnostic device detects or identifies infectious agents by using deoxyribonucleic acid (DNA) probe or nucleic acid hybridization technology rather than culture or immunoassay technology; or

(c) The device is an in vitro device that is intended:

(1) For use in the diagnosis, monitoring, or screening of neoplastic diseases with the exception of immunohistochemical devices;

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(2) For use in screening or diagnosis of familial or acquired genetic disorders, including inborn errors of metabolism;

(3) For measuring an analyte that serves as a surrogate marker for screening, diagnosis, or monitoring life-threatening diseases such as acquired immune deficiency syndrome (AIDS), chronic or active hepatitis, tuberculosis, or myocardial infarction or to monitor therapy;

(4) For assessing the risk of cardiovascular diseases;

(5) For use in diabetes management;

(6) For identifying or inferring the identity of a microorganism directly from clinical material;

(7) For detection of antibodies to microorganisms other than immunoglobulin G (IgG) or IgG assays when the results are not qualitative, or are used to determine immunity, or the assay is intended for use in matrices other than serum or plasma;

(8) For noninvasive testing as defined in § 812.3(k) of this chapter; and

(9) For near patient testing (point of care).

[65 FR 2317, Jan. 14, 2000]

### Subpart B—Diagnostic Devices

#### § 878.1800 Speculum and accessories.

(a) *Identification.* A speculum is a device intended to be inserted into a body cavity to aid observation. It is either nonilluminated or illuminated and may have various accessories.

(b) *Classification.* Class I (general controls). The device is exempt from the premarket notification procedures in subpart E of part 807 of this chapter, subject to the limitations in § 878.9.

[53 FR 23872, June 24, 1988, as amended at 54 FR 13827, Apr. 5, 1989; 59 FR 63010, Dec. 7, 1994; 66 FR 38802, July 25, 2001]

### Subpart C [Reserved]

### Subpart D—Prosthetic Devices

#### § 878.3250 External facial fracture fixation appliance.

(a) *Identification.* An external facial fracture fixation appliance is a metal apparatus intended to be used during surgical reconstruction and repair to

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immobilize maxillofacial bone fragments in their proper facial relationship.

(b) *Classification.* Class I (general controls). The device is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to § 878.9.

[53 FR 23872, June 24, 1988, as amended at 54 FR 13827, Apr. 5, 1989; 65 FR 2317, Jan. 14, 2000]

#### § 878.3300 Surgical mesh.

(a) *Identification.* Surgical mesh is a metallic or polymeric screen intended to be implanted to reinforce soft tissue or bone where weakness exists. Examples of surgical mesh are metallic and polymeric mesh for hernia repair, and acetabular and cement restrictor mesh used during orthopedic surgery.

(b) *Classification.* Class II.

#### § 878.3500 Polytetrafluoroethylene with carbon fibers composite implant material.

(a) *Identification.* A polytetrafluoroethylene with carbon fibers composite implant material is a porous device material intended to be implanted during surgery of the chin, jaw, nose, or bones or tissue near the eye or ear. The device material serves as a space-occupying substance and is shaped and formed by the surgeon to conform to the patient's need.

(b) *Classification.* Class II.

#### § 878.3530 Silicone inflatable breast prosthesis.

(a) *Identification.* A silicone inflatable breast prosthesis is a silicone rubber shell made of polysiloxane(s), such as polydimethylsiloxane and polydiphenylsiloxane, that is inflated to the desired size with sterile isotonic saline before or after implantation. The device is intended to be implanted to augment or reconstruct the female breast.

(b) *Classification.* Class III.

(c) *Date PMA or notice of completion of a PDP is required.* A PMA or a notice of completion of a PDP is required to be filed with the Food and Drug Administration on or before November 17, 1999, for any silicone inflatable breast prosthesis that was in commercial distribution before May 28, 1976, or that has, on