

## § 314.106

all drugs, the many kinds of drugs that are subject to the statutory standards and the wide range of uses for those drugs demand flexibility in applying the standards. Thus FDA is required to exercise its scientific judgment to determine the kind and quantity of data and information an applicant is required to provide for a particular drug to meet the statutory standards. FDA makes its views on drug products and classes of drugs available through guidance documents, recommendations, and other statements of policy.

(d) FDA will approve an abbreviated new drug application and send the applicant an approval letter if none of the reasons in § 314.127 for refusing to approve the abbreviated new drug application applies. The approval becomes effective on the date of the issuance of the agency's approval letter unless the approval letter provides for a delayed effective date. An approval with a delayed effective date is tentative and does not become final until the effective date. A new drug product approved under this paragraph may not be introduced or delivered for introduction into interstate commerce until approval of the abbreviated new drug application is effective. Ordinarily, the effective date of approval will be stated in the approval letter.

[57 FR 17989, Apr. 28, 1992, as amended at 64 FR 402, Jan. 5, 1999; 65 FR 56479, Sept. 19, 2000; 73 FR 39609, July 10, 2008]

### § 314.106 Foreign data.

(a) *General.* The acceptance of foreign data in an application generally is governed by § 312.120 of this chapter.

(b) *As sole basis for marketing approval.* An application based solely on foreign clinical data meeting U.S. criteria for marketing approval may be approved if: (1) The foreign data are applicable to the U.S. population and U.S. medical practice; (2) the studies have been performed by clinical investigators of recognized competence; and (3) the data may be considered valid without the need for an on-site inspection by FDA or, if FDA considers such an inspection to be necessary, FDA is able to validate the data through an on-site inspection or other appropriate means. Failure of an application to meet any of these criteria will result in the ap-

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plication not being approvable based on the foreign data alone. FDA will apply this policy in a flexible manner according to the nature of the drug and the data being considered.

(c) *Consultation between FDA and applicants.* Applicants are encouraged to meet with agency officials in a “pre-submission” meeting when approval based solely on foreign data will be sought.

[50 FR 7493, Feb. 22, 1985, as amended at 55 FR 11580, Mar. 29, 1990]

### § 314.107 Effective date of approval of a 505(b)(2) application or abbreviated new drug application under section 505(j) of the act.

(a) *General.* A drug product may be introduced or delivered for introduction into interstate commerce when approval of the application or abbreviated application for the drug product becomes effective. Except as provided in this section, approval of an application or abbreviated application for a drug product becomes effective on the date FDA issues an approval letter under § 314.105 for the application or abbreviated application.

(b) *Effect of patent on the listed drug.* If approval of an abbreviated new drug application submitted under section 505(j) of the act or of a 505(b)(2) application is granted, that approval will become effective in accordance with the following:

(1) *Date of approval letter.* Except as provided in paragraphs (b)(3), (b)(4), and (c) of this section, approval will become effective on the date FDA issues an approval letter under § 314.105 if the applicant certifies under § 314.50(i) or § 314.94(a)(12) that:

- (i) There are no relevant patents; or
- (ii) The applicant is aware of a relevant patent but the patent information required under section 505 (b) or (c) of the act has not been submitted to FDA; or
- (iii) The relevant patent has expired; or
- (iv) The relevant patent is invalid, unenforceable, or will not be infringed.

(2) *Patent expiration.* If the applicant certifies under § 314.50(i) or § 314.94(a)(12) that the relevant patent will expire on a specified date, approval

will become effective on the specified date.

(3) *Disposition of patent litigation.*

(i)(A) Except as provided in paragraphs (b)(3)(ii), (b)(3)(iii), and (b)(3)(iv) of this section, if the applicant certifies under § 314.50(i) or § 314.94(a)(12) that the relevant patent is invalid, unenforceable, or will not be infringed, and the patent owner or its representative or the exclusive patent licensee brings suit for patent infringement within 45 days of receipt by the patent owner of the notice of certification from the applicant under § 314.52 or § 314.95, approval may be made effective 30 months after the date of the receipt of the notice of certification by the patent owner or by the exclusive licensee (or their representatives) unless the court has extended or reduced the period because of a failure of either the plaintiff or defendant to cooperate reasonably in expediting the action; or

(B) If the patented drug product qualifies for 5 years of exclusive marketing under § 314.108(b)(2) and the patent owner or its representative or the exclusive patent licensee brings suit for patent infringement during the 1-year period beginning 4 years after the date the patented drug was approved and within 45 days of receipt by the patent owner of the notice of certification, the approval may be made effective at the expiration of the 7½ years from the date of approval of the application for the patented drug product.

(ii) If before the expiration of the 30-month period, or 7½ years where applicable, the court issues a final order that the patent is invalid, unenforceable, or not infringed, approval may be made effective on the date the court enters judgment;

(iii) If before the expiration of the 30-month period, or 7½ years where applicable, the court issues a final order or judgment that the patent has been infringed, approval may be made effective on the date the court determines that the patent will expire or otherwise orders; or

(iv) If before the expiration of the 30-month period, or 7½ years where applicable, the court grants a preliminary injunction prohibiting the applicant from engaging in the commercial man-

ufacture or sale of the drug product until the court decides the issues of patent validity and infringement, and if the court later decides that the patent is invalid, unenforceable, or not infringed, approval may be made effective on the date the court enters a final order or judgment that the patent is invalid, unenforceable, or not infringed.

(v) FDA will issue a tentative approval letter when tentative approval is appropriate in accordance with paragraph (b)(3) of this section. In order for an approval to be made effective under paragraph (b)(3) of this section, the applicant must receive an approval letter from the agency indicating that the application has received final approval. Tentative approval of an application does not constitute “approval” of an application and cannot, absent a final approval letter from the agency, result in an effective approval under paragraph (b)(3) of this section.

(4) *Multiple certifications.* If the applicant has submitted certifications under § 314.50(i) or § 314.94(a)(12) for more than one patent, the date of approval will be calculated for each certification, and the approval will become effective on the last applicable date.

(c) *Subsequent abbreviated new drug application submission.* (1) If an abbreviated new drug application contains a certification that a relevant patent is invalid, unenforceable, or will not be infringed and the application is for a generic copy of the same listed drug for which one or more substantially complete abbreviated new drug applications were previously submitted containing a certification that the same patent was invalid, unenforceable, or would not be infringed, approval of the subsequent abbreviated new drug application will be made effective no sooner than 180 days from whichever of the following dates is earlier:

(i) The date the applicant submitting the first application first commences commercial marketing of its drug product; or

(ii) The date of a decision of the court holding the relevant patent invalid, unenforceable, or not infringed.

(2) For purposes of paragraph (c)(1) of this section, the “applicant submitting the first application” is the applicant

that submits an application that is both substantially complete and contains a certification that the patent was invalid, unenforceable, or not infringed prior to the submission of any other application for the same listed drug that is both substantially complete and contains the same certification. A “substantially complete” application must contain the results of any required bioequivalence studies, or, if applicable, a request for a waiver of such studies.

(3) For purposes of paragraph (c)(1) of this section, if FDA concludes that the applicant submitting the first application is not actively pursuing approval of its abbreviated application, FDA will make the approval of subsequent abbreviated applications immediately effective if they are otherwise eligible for an immediately effective approval.

(4) For purposes of paragraph (c)(1)(i) of this section, the applicant submitting the first application shall notify FDA of the date that it commences commercial marketing of its drug product. Commercial marketing commences with the first date of introduction or delivery for introduction into interstate commerce outside the control of the manufacturer of a drug product, except for investigational use under part 312 of this chapter, but does not include transfer of the drug product for reasons other than sale within the control of the manufacturer or application holder. If an applicant does not promptly notify FDA of such date, the effective date of approval shall be deemed to be the date of the commencement of first commercial marketing.

(d) *Delay due to exclusivity.* The agency will also delay the effective date of the approval of an abbreviated new drug application under section 505(j) of the act or a 505(b)(2) application if delay is required by the exclusivity provisions in § 314.108. When the effective date of an application is delayed under both this section and § 314.108, the effective date will be the later of the 2 days specified under this section and § 314.108.

(e) *Notification of court actions.* The applicant shall submit a copy of the entry of the order or judgment to the Office of Generic Drugs (HFD-600), or

to the appropriate division in the Office of New Drugs within 10 working days of a final judgment.

(f) *Computation of 45-day time clock.* (1) The 45-day clock described in paragraph (b)(3) of this section begins on the day after the date of receipt of the applicant’s notice of certification by the patent owner or its representative, and by the approved application holder. When the 45th day falls on Saturday, Sunday, or a Federal holiday, the 45th day will be the next day that is not a Saturday, Sunday, or a Federal holiday.

(2) The abbreviated new drug applicant or the 505(b)(2) applicant shall notify FDA immediately of the filing of any legal action filed within 45 days of receipt of the notice of certification. If the applicant submitting the abbreviated new drug application or the 505(b)(2) application or patent owner or its representative does not notify FDA in writing before the expiration of the 45-day time period or the completion of the agency’s review of the application, whichever occurs later, that a legal action for patent infringement was filed within 45 days of receipt of the notice of certification, approval of the abbreviated new drug application or the 505(b)(2) application will be made effective immediately upon expiration of the 45 days or upon completion of the agency’s review and approval of the application, whichever is later. The notification to FDA of the legal action shall include:

(i) The abbreviated new drug application or 505(b)(2) application number.

(ii) The name of the abbreviated new drug or 505(b)(2) application applicant.

(iii) The established name of the drug product or, if no established name exists, the name(s) of the active ingredient(s), the drug product’s strength, and dosage form.

(iv) A certification that an action for patent infringement identified by number, has been filed in an appropriate court on a specified date.

The applicant of an abbreviated new drug application shall send the notification to FDA’s Office of Generic Drugs (HFD-600). A 505(b)(2) applicant shall send the notification to the appropriate division in the Office of New

Drugs reviewing the application. A patent owner or its representative may also notify FDA of the filing of any legal action for patent infringement. The notice should contain the information and be sent to the offices or divisions described in this paragraph.

(3) If the patent owner or approved application holder who is an exclusive patent licensee waives its opportunity to file a legal action for patent infringement within 45 days of a receipt of the notice of certification and the patent owner or approved application holder who is an exclusive patent licensee submits to FDA a valid waiver before the 45 days elapse, approval of the abbreviated new drug application or the 505(b)(2) application will be made effective upon completion of the agency's review and approval of the application. FDA will only accept a waiver in the following form:

*(Name of patent owner or exclusive patent licensee) has received notice from (name of applicant) under (section 505(b)(3) or 505(j)(2)(B) of the act) and does not intend to file an action for patent infringement against (name of applicant) concerning the drug (name of drug) before (date on which 45 days elapses. (Name of patent owner or exclusive patent licensee) waives the opportunity provided by (section 505(c)(3)(C) or 505(j)(B)(iii) of the act) and does not object to FDA's approval of (name of applicant)'s (505(b)(2) or abbreviated new drug application) for (name of drug) with an immediate effective date on or after the date of this letter.*

[59 FR 50367, Oct. 3, 1994, as amended at 63 FR 59712, Nov. 5, 1998; 65 FR 43235, July 13, 2000; 73 FR 39609, July 10, 2008; 74 FR 9766, Mar. 6, 2009]

#### § 314.108 New drug product exclusivity.

(a) *Definitions.* The following definitions of terms apply to this section:

*Active moiety* means the molecule or ion, excluding those appended portions of the molecule that cause the drug to be an ester, salt (including a salt with hydrogen or coordination bonds), or other noncovalent derivative (such as a complex, chelate, or clathrate) of the molecule, responsible for the physiological or pharmacological action of the drug substance.

*Approved under section 505(b)* means an application submitted under section 505(b) and approved on or after October

10, 1962, or an application that was "deemed approved" under section 107(c)(2) of Pub. L. 87-781.

*Clinical investigation* means any experiment other than a bioavailability study in which a drug is administered or dispensed to, or used on, human subjects.

*Conducted or sponsored by the applicant* with regard to an investigation means that before or during the investigation, the applicant was named in Form FDA-1571 filed with FDA as the sponsor of the investigational new drug application under which the investigation was conducted, or the applicant or the applicant's predecessor in interest, provided substantial support for the investigation. To demonstrate "substantial support," an applicant must either provide a certified statement from a certified public accountant that the applicant provided 50 percent or more of the cost of conducting the study or provide an explanation why FDA should consider the applicant to have conducted or sponsored the study if the applicant's financial contribution to the study is less than 50 percent or the applicant did not sponsor the investigational new drug. A predecessor in interest is an entity, e.g., a corporation, that the applicant has taken over, merged with, or purchased, or from which the applicant has purchased all rights to the drug. Purchase of non-exclusive rights to a clinical investigation after it is completed is not sufficient to satisfy this definition.

*Date of approval* means the date on the letter from FDA stating that the new drug application is approved, whether or not final printed labeling or other materials must yet be submitted as long as approval of such labeling or materials is not expressly required. "Date of approval" refers only to a final approval and not to a tentative approval that may become effective at a later date.

*Essential to approval* means, with regard to an investigation, that there are no other data available that could support approval of the application.

*FDA* means the Food and Drug Administration.

*New chemical entity* means a drug that contains no active moiety that has