system listings. Without an extension of the expiration dates for these listings, we will lack the medical evaluation criteria needed for assessing impairments in these body systems at the third step of the sequential evaluation process. In order to ensure that we continue to have these listings in our rules, we find that it is in the public interest to make this final rule effective on the date of publication.

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that this final rule does not meet the criteria for a significant regulatory action under Executive Order 12866, as amended. Thus, OMB did not review it. We have also determined that this final rule meets the plain language requirement of Executive Order 12866, as amended.

Regulatory Flexibility Act

We certify that this final rule does not have a significant economic impact on a substantial number of small entities because it affects only individuals. Therefore, a regulatory flexibility analysis, as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

This final rule imposes no reporting/recordkeeping requirements necessitating clearance by OMB.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; 96.006, Supplemental Security Income)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

Dated: May 27, 2008.

Michael J. Astrue,

Commissioner of Social Security.

■ For the reasons set forth in the preamble, part 404, subpart P, chapter III of title 20 of the Code of Federal Regulations is amended as set forth below.

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart P—[Amended]

■ 1. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a), (b), and (d)–(h), 216(i), 221(a) and (i), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a), (b), and (d)–(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189; sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 2. Appendix 1 to subpart P of part 404 is amended by revising items 1, 4, 8, 10, 12, and 13 of the introductory text before Part A to read as follows:

Appendix 1 to Subpart P of Part 404—Listing of Impairments

* * * * *

1. Growth Impairment (100.00): July 1, 2010.

* * * * *

4. Respiratory System (3.00 and 103.00): July 1, 2010.

* * * * *

8. Hematological Disorders (7.00 and 107.00): July 1, 2010.

* * * * *

10. Endocrine System (9.00 and 109.00): July 1, 2010.

* * * * *

12. Neurological (11.00 and 111.00): July 1, 2010.

13. Mental Disorders (12.00 and 112.00): July 1, 2010.

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[FR Doc. E8–12124 Filed 5–29–08; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 878

[Docket No. FDA–2006–P–0140] (formerly Docket No. 2006P–0071)

General and Plastic Surgery Devices; Reclassification of the Tissue Adhesive for Topical Approximation of Skin Device

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is reclassifying the device type, tissue adhesive for the topical approximation of skin, from class III (premarket approval) into class II (special controls). Tissue adhesives for non-topical uses remain in class III and continue to require premarket approval applications (PMAs). FDA is proposing this reclassification in accordance with the Federal Food, Drug, and Cosmetic Act (the act). Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a guidance document entitled ''Class II Special Controls Guidance Document: Tissue Adhesive for the Topical Approximation of Skin'' that will serve as the special control for the reclassified device type.

DATES: This final rule is effective June 30, 2008.

FOR FURTHER INFORMATION CONTACT: George J. Mattamal, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3619.

SUPPLEMENTARY INFORMATION:

I. Regulatory Authorities

The act, as amended by the Medical Device Amendments of 1976 (the 1976 amendments) (Public Law 94–295), the Safe Medical Devices Act of 1990 (SMDA) (Public Law 101–629), and the Food and Drug Administration Modernization Act of 1997 (FDAMA) (Public Law 105–115), among other amendments, established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

The 1976 amendments broadened the definition of ''device'' in section 201(h) of the act (21 U.S.C. 321(h)) to include certain articles that were once regulated as drugs. Under the 1976 amendments, Congress classified all transitional devices, i.e., those devices previously regulated as new drugs, into class III. SMDA amended section 520(l) of the act (21 U.S.C. 360j(l)) to direct FDA to collect certain safety and effectiveness information from the manufacturers of transitional devices still remaining in class III to determine whether the devices should be reclassified into class II (special controls) or class I (general controls). The legislative history of the SMDA reflects congressional concern that many transitional devices were not appropriately regulated in class III (H. Rept. 808, 101st Cong., 2d sess. 26–27 (1990); S. Rept. 513, 101st Cong., 2d sess. 27 (1990)).

Accordingly, in the **Federal Register** of November 14, 1991 (56 FR 57960), FDA issued an order under section 520(l)(5)(A) of the act, requiring manufacturers of transitional devices to submit to FDA a summary of and a citation to any information known or otherwise available to them respecting the devices, including adverse safety or effectiveness information, that had not

been submitted under section 519 of the act (21 U.S.C. 360i). Manufacturers were to submit the summaries and citations to FDA by January 13, 1992. By notice published in the **Federal Register** of March 10, 1992 (57 FR 8462), FDA extended the reporting period to March 31, 1992.

Section 520(l)(5)(B) of the act provides that, after the issuance of an order requiring manufacturers to submit any information known or otherwise available respecting the devices, but before December 1, 1992, FDA was to publish regulations either leaving transitional class III devices in class III or reclassifying them into class I or II. Subsequently, as permitted by section 520(l)(5)(C) of the act, in the **Federal Register** of November 30, 1992 (57 FR 56586), the agency published a notice extending the period for issuing such regulations until December 1, 1993, but did not publish the regulations before December 1, 1993.

II. Regulatory Background of the Device

Transitional devices, those devices formerly regulated as drugs, were classified into class III by the statute and premarket approval was immediately required (section 520(l) of the act). The **Federal Register** of December 16, 1977 (42 FR 63472), identified certain transitional devices and stated the following: ''The lists contained in this notice may not be an exhaustive inventory of products subject to section 520(l) of the act.'' This notice did not specifically list ''Tissue Adhesives.'' The investigational new drug (IND) and new drug applications (NDAs) for transitional devices were shortly thereafter transferred to FDA's Center for Devices and Radiological Health (formerly the Bureau of Medical Devices). Applications for tissue adhesives were included in this transfer. In a January 19, 1982, preamble to a proposed rule classifying other devices (47 FR 2810), ''tissue adhesive for use in general surgery,'' was identified as a transitional device, but listed under injectable silicone. Since enactment of the 1976 amendments, FDA has approved several PMAs and PMA supplements authorizing the commercial distribution of tissue adhesives in the United States.

III. Description of the Device

FDA has referred to this device type, under review for reclassification, in previous notices as ''tissue adhesive for use in general surgery''; however, FDA is now revising the name and identification to more accurately identify the device type. The device, reclassified into class II, would be:

Tissue adhesive for the topical approximation of skin. A tissue adhesive for the topical approximation of skin is a device intended for topical closure of surgical incisions, including laparoscopic incisions, and simple traumatic lacerations that have easily approximated skin edges. Tissue adhesives for the topical approximation of skin may be used in conjunction with, but not in place of, deep dermal stitches.

FDA is also issuing the following identification for the devices that will remain in class III:

A tissue adhesive for non-topical use, including adhesives intended for use in the embolization of brain arteriovenous malformation or ophthalmic surgery, is a device used for adhesion of internal tissues and vessels.

IV. Recommendation of the Panel

On February 9, 2006, Regulatory & Clinical Research Institute, Inc. (RCRI), Minneapolis, MN, submitted a petition (Docket No. 2006P–0071) to FDA to reclassify tissue adhesive for soft tissue approximation from ''Class III to Class II (special controls)'' (Ref. 1). On May 15, 2006, the petitioner amended its petition to include several references from the scientific literature cited in the original petition (Ref. 2). On July 18, 2006, the petitioner again amended its petition to clarify that the use it was proposing for reclassification was only the topical approximation of skin (Ref. 3).

In response to the petition, FDA consulted with the FDA's General and Plastic Surgery Devices Panel (the Panel), regarding reclassification of this device type. The Panel discussed the device type at an August 25, 2006, public meeting and unanimously recommended that the tissue adhesive for the topical approximation of skin be reclassified from class III into class II. The Panel also recommended that a class II guidance document, which the Panel thought should include several voluntary consensus standards, be the special control for the device. The Panel based the recommendations on the information provided by FDA; the presentations to the panel by the petitioner, other manufacturers, and FDA; the Panel's deliberations at the meeting; and the Panel's personal experience with the use of devices for the topical approximation of skin. The Panel did not consider the reclassification of any other use of tissue adhesives.

Accordingly, in the **Federal Register** of July 3, 2007 (72 FR 36398), FDA issued a proposed rule to reclassify the device, tissue adhesive for the topical approximation of skin, from class III (premarket approval) into class II (special controls). Tissue adhesive for non-topical uses would remain in class III and continue to require PMAs.

V. Comments

FDA invited interested persons to comment on the proposed rule by September 4, 2007. FDA received two comments on the proposed rule. The following is a summary of the comments and FDA's responses. Elsewhere in this issue of the **Federal Register**, portions of the comments which address only the draft guidance document are addressed in the notice of availability announcing the special controls guidance document.

(Comment 1) One comment supported the reclassification of tissue adhesives. The comment noted that the tissue adhesives approved by FDA have had a long history of safety. The comment suggested that tissue adhesives made of other cyanoacrylates with different alkyl groups may have additional benefits for patients. The comment also said that bench testing is more useful than clinical testing to evaluate substantial equivalence due to the many uncontrolled variables. The comment said that manufacturers of new tissue adhesives should be permitted to market their devices through a premarket notification if they are able to demonstrate that their devices are substantially equivalent to the marketed predicate devices.

(Response) FDA agrees that these type devices should be reclassified and intends that manufacturers who are able to demonstrate substantial equivalence to marketed devices within the reclassified generic type will be permitted to market their devices.

(Comment 2) One comment objected that FDA improperly designated the tissue adhesive for the topical approximation of skin as a transitional device. The comment said that the tissue adhesive for the topical approximation of skin does not meet the definition of a transitional device in section 520(l) of the act. The comment noted that an NDA for a tissue adhesive was submitted before the enactment of the 1976 amendments but was subsequently withdrawn before the enactment date. The comment said that, in order for the device to be a transitional device, it is necessary for an IND to have been in effect or for an NDA to have been pending or approved on the enactment date. The comment said that tissue adhesives are devices automatically classified into class III under section 513(f)(1) of the act.

(Response) Section 520(l)(1)(B) provides that a device is a transitional

device if ''an application [under section 505(b) of the act was filed on or before the enactment date [of the Medical Device Amendments of 1976] and with respect to which no order of approval or refusing to approve had been issued on such date* * *.'' The comment agrees that an application was filed before the enactment date. It is also clear that no order of approval or refusing to approve had been issued before the enactment date. The plain words of the statute do not require that an application be pending on the date of enactment. As noted previously, FDA published a document on January 19, 1982 identifying, among other devices, tissue adhesives as transitional devices. FDA did not receive any objections to this designation until the comment on this proposed rule. Furthermore, even if the device would be considered a postamendments device under section 513(f) of the act, the procedures that FDA followed would be sufficient to reclassify the device. FDA did not follow ''truncated procedures'' to reclassify the device under the transitional device provisions. FDA referred the petition to an advisory panel that made a recommendation after holding an open public meeting. FDA published the panel recommendation along with the proposed rule and provided interested persons 60 days to comment on the proposal. The criteria for reclassifying a device into class II are identical for transitional devices under section 520(l) of the act and postamendments devices under section 513(f) of the act.

(Comment 3) One comment said that FDA failed to instruct the panel on the appropriate legal standard for reclassification. The comment said that the panel transcript and briefing memorandum show that FDA did not instruct the panel that a reclassification recommendation must be based on valid scientific evidence.

(Response) FDA disagrees. The panel was instructed properly. FDA conducts training sessions prior to the panel meeting for panel members before they undertake their duties. Training for panels considering the reclassification of a transitional device type consists of procedures for the reclassification of a device type, including a transitional device type, and the appropriate regulatory controls for each class of device. Moreover, it is FDA's responsibility to make reclassification decisions after receiving a panel recommendation. In accordance with § 860.7(c)(1) (21 CFR 860.7(c)(1)) the agency relied on valid scientific evidence in determining that special controls, in addition to general controls, would provide reasonable assurance of the safety and effectiveness of the device.

(Comment 4) One comment said that FDA did not identify an appropriate generic type of device that could be reclassified. The comment said that existing tissue adhesives are significantly different in composition and could not be combined into a single generic type of device. The comment also said there is insufficient publicly available formulation and manufacturing information to establish a generic type of device. Finally, the comments said that even minor differences in product composition can affect the performance of the device.

(Response) FDA disagrees with this comment. The FDA classification regulations (21 CFR 860.3(i)) define generic type of device as ''a grouping of devices that do not differ significantly in purpose, design, materials, energy source, function, or any other feature related to safety and effectiveness, and for which similar regulatory controls are sufficient to provide reasonable assurance of safety and effectiveness.'' It is not necessary that devices be identical in order to fit within the same generic type. FDA believes that there is sufficient publicly available information from currently marketed tissue adhesives to show that they do not differ significantly in design, materials, and function and that similar regulatory controls are sufficient to provide reasonable assurance of their safety and effectiveness. A manufacturer who wishes to market a new device will need to show in a premarket notification that its device is substantially equivalent in safety and effectiveness to a marketed predicate device.

(Comment 5) Two comments said that there was insufficient valid scientific evidence to support the reclassification. One comment noted that three of the articles submitted are not reports of prospective clinical trials. The comment described one of the articles as a general discussion of tissue adhesives, the second article as a brief description of one facility's 6-month experience with tissue adhesives, and the third article as a retrospective review of eight different clinical studies. The comment further said the 6 FDA-designated representative articles that discuss prospective clinical studies involve limited numbers of subjects with a total of 60 to 100 subjects in each study.

(Response) FDA disagrees with this comment. FDA regulations (§ 860.7(b)(2)) define valid scientific evidence as:

''* * *evidence from well-controlled investigations, partially controlled studies, studies and objective trials without matched controls, well-documented case histories conducted by qualified experts, and reports of significant human experience with a marketed device, from which it can fairly and responsibly be concluded by qualified experts that there is reasonable assurance of the safety and effectiveness of a device under its conditions of use. The evidence required may vary according to the characteristics of the device, its conditions of use, the existence and adequacy of warnings and other restrictions, and the extent of experience with its use. Isolated case reports, random experience, reports lacking sufficient details to permit scientific evaluation, and unsubstantiated opinions are not regarded as valid scientific evidence to show safety or effectiveness* * *.''

FDA believes that the evidence on the record falls within this definition of valid scientific evidence. The shortcomings of the information alleged by the comment do not take this information out of the category of valid scientific evidence. Literature available to FDA and the Panel included over 1,500 published articles that reported on the use of multiple adhesives in over 5,900 procedures (over 5,500 patients), with more than half evaluated in prospective randomized trials. The study protocols included primary endpoints such as cosmesis, dehiscence, and healing time for the topical skin approximations. As defined in § 860.7(c)(2), randomized prospective trials and peer-reviewed literature constitute valid scientific evidence.

(Comment 6) One comment said that the performance parameters for the device described in the proposal are incomplete. The comment said that missing performance parameters include adherence and endurance (how long the product will remain intact once applied); the ability to potentiate infection; the ability to maintain a microbial barrier; and how the skin reacts to the stabilizing agents. The comment also said that publicly available scientific literature does not yield ranges of values that would constitute acceptable performance on required tests to demonstrate that performance parameters are met.

(Response) FDA disagrees with this comment. FDA believes that the FDA recommendations for premarket notifications in the special controls guidance as well as general controls will adequately address all appropriate performance parameters. Manufacturers who are proposing the introduction of a new tissue adhesive will need to demonstrate substantial equivalence to a

legally marketed predicate device in all safety and effectiveness aspects before FDA will issue a substantial equivalence order. All manufacturers submitting 510(k)s will need to demonstrate the performance characteristics of the device related to adhesive strength, (i.e., tensile strength, shear strength, peel adhesion strength, and impact strength); hydrolytic degradation (i.e., the amount of formulation additives, monomer impurities, and degradation products); heat of polymerization; shelf life; and biocompatibility. FDA believes that these performance characteristics will directly or indirectly address the performance parameters identified in the comment. Where these performance characteristics are shown sufficiently different from currently legally marketed devices, the special controls guidance document indicates that FDA may conclude additional animal testing or clinical assessment is necessary, see sections 10, ''Animal Testing,'' and 11, ''Clinical Studies.''

(Comment 7) A comment said that FDA has failed to fully identify the risks to health presented by these devices. A comment said that FDA unduly relied upon Medical Device Reports (MDRs) to identify the risks to health and that the MDR system is inadequate to fully identify the risks. A comment said that risks not identified include pain, stinging, or burning upon application, delayed wound healing or tissue toxicity, patients picking off the adhesive, and necrosis.

All of these effects are intrinsic to the risk of adverse tissue reaction and chemical burns except for patient ''picking off adhesive.'' Although foreseeable, it is not intended for patients to ''pick off'' the adhesive and therefore is not considered a risk to health associated with the intended or otherwise correct use of the device. A comment further said that the risks identified by FDA are not supported by valid scientific evidence because they are developed from the MDR system.

(Repsonse) FDA disagrees with this comment. FDA believes that it has fully identified the significant risks to health presented by these devices. As noted in the proposal, FDA did not rely solely upon the MDR reports to identify the risks to health presented by these devices. FDA also considered the information presented in the petition, presentations at the panel meeting, and the panel recommendation.

(Comment 8) A comment also said that the proposed special controls are inadequate to eliminate or mitigate the risks associated with tissue adhesives. A comment also said that FDA did not present sufficient valid scientific evidence to support the proposed special controls because almost half of the articles relate to a single device and, therefore, cannot support reclassification of a generic type of device.

(Response) FDA disagrees with the comment. FDA believes that a premarket notification that adequately addresses the recommendations of the special control guidance and adherence to the general controls of the act will mitigate the risks to health associated with these devices and provide reasonable assurance of the safety and effectiveness of the device. In the premarket notification review process, FDA will assure that the device intended for marketing is at least as safe and effective as the legally marketed predicate device. FDA believes that there is adequate valid scientific evidence on the record about all legally marketed tissue adhesives to establish and reclassify a generic type of device. Although many of the articles relate to a single device, there is substantial evidence concerning other marketed devices and that evidence, as well as the remainder of the evidence on the record, provides adequate valid scientific evidence to reclassify a generic type of device.

(Comment 9) One comment stated that bench testing as described in the special controls guidance document is more informative and introduces fewer variables than do animal or clinical studies in evaluating these devices.

(Response) FDA agrees, in general, that animal studies and clinical trials for these devices may not be the most appropriate means to evaluate these devices. FDA intends to request animal or clinical data only when appropriate.

(Comment 10) One comment asked whether the device is subject to current good manufacturing practices (CGMPs).

(Response) When the device is reclassified into class II, it remains subject to the requirements of good manufacturing practices (GMPs) under the Quality System Regulation in part 820 (21 CFR part 820). For more information on the scope of applicability of the Quality System Regulation, please see § 820.1, *Scope*.

(Comment 11) One comment said the bench testing using American Society for Testing and Materials (ASTM) methods described in the guidance does not correlate to device performance in the clinical setting because the ASTM methods do not include acceptance criteria.

(Response) Although FDA agrees these methods do not include acceptance criteria, FDA disagrees with the premise that these methods are inadequate. The methods described in these standards allow direct comparison of performance characteristics between devices. For those devices where the data demonstrate equivalent performance characteristics, no additional clinical testing would be necessary. Where the performance characteristics are shown by bench testing to be sufficiently different from those of currently legally marketed devices, the special controls guidance document indicates that FDA may conclude additional animal testing or clinical assessment is necessary. See sections 10. Animal Testing and 11. Clinical Studies.

(Comment 12) One comment suggested that heat of polymerization studies recommended in the guidance are not appropriate for materials that cure by non-exothermic mechanisms. The second part of the comment said that FDA should set an upper limit on the amount of heat generated by exothermic mechanisms because of the possibility of burns.

(Response) FDA agrees, in part, with this comment. Heat of polymerization studies are not appropriate methods for evaluating the performance characteristics of materials that cure by non-exothermic mechanisms. As stated in section 5 of the special controls guidance document, a manufacturer proposing to use materials that cure by non-exothermic mechanisms will need to identify the risks specific to those devices by conducting a risk analysis and will need to address the risks identified. FDA disagrees with the second part of the comment. FDA has set no upper threshold for the heat of polymerization because FDA believes the unique properties of each material approved to date require a case-by-case evaluation of the heat generated by polymerization. Addressing this property is intrinsic to addressing the risk of chemical burns, which is one of the risks to health identified in the special controls guidance document.

(Comment 13) One comment said that testing the applicator based on the force to express and that moisture vapor transmission testing are not relevant. The comment also suggested that, depending on the design of the applicator and its components, applicator functionality may be a more relevant test.

(Response) FDA agrees and has revised the guidance accordingly.

(Comment 14) A comment said that clinical trials are necessary to effectively evaluate critical performance parameters. One comment said that the record fails to reveal any new valid

scientific evidence that demonstrates a diminished need for clinical testing.

(Response) FDA generally disagrees with the comment. In accordance with the ''least burdensome'' provision of section 513(i)(1)(D) of the act, FDA believes that the special controls guidance document recommends the submission of the minimum information that is necessary to making substantial equivalence determinations. In some cases, submission of reports from bench and animal testing and conformance to designated standards may be sufficient to demonstrate substantial equivalence. FDA also states in the special controls guidance that it may recommend the submission of clinical evidence in a premarket notification if the proposed device is dissimilar to the legally marketed predicate device in material formulation, technology, or intended use.

FDA believes that new information includes information developed as a result of a re-evaluation of the data before the agency when the device was originally classified, as well as information not presented, not available, or not developed at that time. (See e.g., *Holland Rantos* v. *United States Department of Health, Education, and Welfare*, 587 F.2d 1173, 1174 n.1 (D.C. Cir. 1978); *Upjohn* v. *Finch*, 422 F.2d 944 (6th Cir. 1970); *Bell* v. *Goddard*, 366 F.2d 177 (7th Cir. 1966).) Re-evaluation of the data previously before the agency is an appropriate basis for subsequent regulatory action where the re-evaluation is made in light of newly available regulatory authority (see *Bell* v. *Goddard*, supra, 366 F.2d at 181; *Ethicon, Inc.* v. *FDA*, 762 F.Supp. 382, 389–91 (D.D.C. 1991)), or in light of changes in ''medical science.'' (See *Upjohn* v. *Finch*, supra, 422 F.2d at 951.) FDA believes that the information in the reclassification petition together with information presented at the panel meeting and the history of use of the device as known to the panel and FDA is sufficient new information to justify the reclassification.

(Comment 15) One comment said that the premarket notification and GMP requirements will not provide reasonable assurance of the safety and effectiveness of these devices. The comment said that there is no coherent generic type of device that would permit meaningful substantial equivalence comparisons and determinations. The comment also said the premarket notification review process does not afford the same level of manufacturing review as the premarket approval process.

(Response) FDA disagrees with this comment. FDA believes that the premarket notification process, in conjunction with the special controls guidance document and the general controls of the act, including the GMP requirements, will provide reasonable assurance of the safety and effectiveness of the device. A manufacturer will need to show in a premarket notification that the device it intends to market is at least as safe and effective as a legally marketed predicate device. This provides a device to which meaningful comparisons can be made. While the premarket notification review process does not include a pre-clearance GMP inspection, manufacturers of new tissue adhesive devices will still be required to be in compliance with the GMP requirements at all times.

(Comment 16) One comment noted that tissue adhesives have been considered significant risk devices under the investigational device exemption rule (21 CFR 812.3(m)). The comment expressed concern that reclassification into class II would result in these devices being considered non-significant risk devices and expose patients in studies involving newly developed tissue adhesives to risks without adequate protection.

(Response) Reclassification of these devices into class II is not inconsistent with the designation of these devices as significant risk devices under the investigational device exemption regulations. In the special controls guidance document, FDA states: ''If a clinical study is needed to demonstrate substantial equivalence (i.e., conducted prior to obtaining 510(k) clearance of the device), the study must be conducted under the Investigational Device Exemptions (IDE) regulation, 21 CFR Part 812. FDA generally believes that this device is a significant risk device as defined in 21 CFR 812.3(m). In addition to the requirement of having an FDA-approved IDE, sponsors of such trials must comply with the regulations governing institutional review boards (21 CFR Part 56) and informed consent (21 CFR Part 50).''

VI. Risks to Health

After considering the information in the petition, the information presented at the Panel meeting, the Panel's recommendation, and MDRs, FDA has evaluated the risks to health associated with use of the tissue adhesive for the topical approximation of skin and determined that the following risks to health are associated with its use.

A. Unintentional Bonding or Product Leaks into Eyes

Without adequate protection of the patient's eye, the adhesive may inadvertently leak onto the eyelids when tissue adhesive is used on the skin near the patient's eye, for example on the brow or forehead. If this occurs, this can lead to sealing the eyelids shut and can require surgical intervention to remove the adhesive and any bound skin.

B. Wound Dehiscence

Wound dehiscence, the subsequent separation of the edges of the wound, i.e., incision or laceration, during recovery is a risk of all surgical procedures and treatments of traumatic wounds. Complications, which include re-sealing the wound and surgical revision of the wound with adhesive or sutures, can arise as a result of wound dehiscence. These complications have the potential to delay the patient's recovery.

C. Adverse Tissue Reaction and Chemical Burns

Tissue adhesive may be associated with adverse tissue reactions, including allergy, inflammation, foreign body reactions, erythema (redness), granuloma, and the exacerbation of asthma. In addition, fumes given off by the adhesive before or during polymerization can cause chemical burns.

D. Infection

Infection of the skin or soft tissue is a risk to health associated with all surgical procedures and wound treatment. If the tissue adhesive is not properly sterilized, it may contribute to an increased risk of infection.

E. Applicator Malfunction

Inadequate packaging of the device or user error when opening the packaging can result in damage to the applicator and subsequent malfunction. If an applicator malfunctions, surgery may be extended, resulting in additional time under anesthesia, or treatment may be delayed. In addition, if the adhesive is packaged in a glass container, lacerations to the user or the patient may result if the glass breaks.

F. Delayed Polymerization

Polymerization of the adhesive may be delayed, resulting in compromise of the wound, additional time under anesthesia, or delayed treatment.

VII. Summary of the Reasons for the Reclassification

FDA believes that a tissue adhesive for the topical approximation of skin should be reclassified into class II because special controls, in addition to general controls, would provide reasonable assurance of the safety and effectiveness of the device. FDA believes there is sufficient information to establish special controls to provide such assurance. In addition to the potential risks to health associated with use of a tissue adhesive for the topical skin approximation described in section V of this document, there is reasonable knowledge of the benefits of the device. Specifically, the tissue adhesive for the topical approximation of skin may prevent extended bleeding in the repair of surgical incisions and traumatic lacerations, promote healing of approximated wound edges, and reduce pain and recovery time.

VIII. Special Controls

In addition to general controls, FDA believes that the guidance document entitled ''Class II Special Controls Guidance Document: Tissue Adhesive for the Topical Approximation of Skin'' (the class II special controls guidance document) is a special control adequate to address the risks to health associated with the use of the device described in section V of this document. FDA believes that the class II special controls guidance document, which incorporates voluntary consensus standards and describes labeling recommendations, in addition to general controls, provides reasonable assurance of the safety and effectiveness of the device. Elsewhere in this issue of the **Federal Register**, FDA is publishing a notice of availability of the class II special controls guidance document that is the special control for this device.

The class II special controls guidance document sets forth the information FDA believes should be included in premarket notification submissions (510(k)s) for the tissue adhesive for the topical approximation of skin. FDA has identified the risks to health associated with the use of the device in the first column of table 1 of this document and the recommended mitigation measures identified in the class II special controls guidance document in the second column of table 1. FDA believes that addressing these risks to health in a 510(k) in the manner identified in the class II special controls guidance document, or in an acceptable alternative manner, is necessary to provide reasonable assurance of the safety and effectiveness of the device.

TABLE 1.—RISKS TO HEALTH AND MITIGATION MEASURES

Identified Risk	Recommended Mitigation Measures
Unintentional bonding or product leaks into eyes	Bench testing Labeling
Wound dehiscence	Bench testing Shelf-life testing Animal testing Labeling
Adverse tissue reaction and chemical burns	Biocompatibility Animal testing
Infection	Bench testing Sterility
Applicator malfunction	Bench testing
Delayed polymerization	Bench testing Animal testing

IX. FDA's Findings

As discussed previously in this document, FDA believes the tissue adhesive for the topical approximation of skin can be reclassified into class II because special controls, in addition to general controls, provide reasonable assurance of the safety and effectiveness of the device and because there is sufficient information to establish special controls to provide such assurance. FDA, therefore, is reclassifying the device into class II and establishing the draft class II special controls guidance document as a special control for the device. Tissue adhesives for non-topical use will remain in class III and continue to require PMAs.

Section 510(m) of the act (21 U.S.C. 360) provides that a class II device may be exempted from the premarket notification requirements under section 510(k) of the act, if the agency determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this device, for the reasons discussed previously, FDA believes that premarket notification is necessary to provide reasonable assurance of safety and effectiveness and, therefore, does not intend to exempt the device from the premarket notification requirements.

X. Environmental Impact

The agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

XI. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4)). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is not a significant regulatory action under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small

entities. Reclassification of this device when it is used for the topical approximation of skin, from class III to class II, will relieve manufacturers of the device of the cost of complying with the premarket approval requirements in section 515 of the act (21 U.S.C. 360e). Because reclassification will reduce regulatory costs with respect to this device, the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $127 million, using the most current (2006) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this rule to result in any 1-year expenditure that would meet or exceed this amount.

XII. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

XIII. Paperwork Reduction Act of 1995

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 is not required. Elsewhere in this issue of the **Federal Register**, FDA is issuing a notice announcing the guidance for the final rule. This guidance, ''Class II Special Controls Guidance Document: Tissue Adhesive for the Topical Approximation of Skin,'' references previously approved collections of information found in FDA regulations.

XIV. References

The following references have been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852 and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Regulatory & Clinical Research Institute, Inc. (RCRI), reclassification petition, Docket No. 2006P–0071, Minneapolis, MN, February 9, 2006.

2. Regulatory & Clinical Research Institute, Inc., reclassification petition, Docket No. 2006P–0071, Minneapolis, MN, May 15, 2006.

3. Regulatory & Clinical Research Institute, Inc., reclassification petition, Docket No. 2006P–0071, Minneapolis, MN, July 18, 2006.

4. General and Plastic Surgery Devices Panel, transcript, pp. 199 to 207, August 25, 2006.

List of Subjects in 21 CFR Part 878

Medical devices.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 878 is amended as follows:

PART 878—GENERAL AND PLASTIC SURGERY DEVICES

■ 1. The authority citation for 21 CFR part 878 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Section 878.4010 is added to subpart E to read as follows:

§ 878.4010 Tissue adhesive.

(a) *Tissue adhesive for the topical approximation of skin*—(1) *Identification.* A tissue adhesive for the topical approximation of skin is a device intended for topical closure of surgical incisions, including laparoscopic incisions, and simple traumatic lacerations that have easily approximated skin edges. Tissue adhesives for the topical approximation of skin may be used in conjunction with, but not in place of, deep dermal stitches.

(2) *Classification.* Class II (special controls). The special control for this device is FDA's ''Class II Special Controls Guidance Document: ''Tissue Adhesive for the Topical Approximation of Skin.'' See § 878.1(e) of this chapter for the availability of this guidance document.

(b) *Tissue adhesive for non-topical use*—(1) *Identification.* A tissue adhesive for non-topical use, including adhesives intended for use in the embolization of brain arteriovenous malformation or for use in ophthalmic surgery, is a device used foradhesion of internal tissues and vessels.

(2) *Classification.* Class III (premarket approval). As of May 28, 1976, an approval under section 515 of the act is required before this device may be commercially distributed. See § 878.3 of this chapter.

Dated: May 21, 2008.

Daniel G. Schultz,

Center for Devices and Radiological Health.

[FR Doc. E8–12078 Filed 5–29–08; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Parts 1114, 1121, 1150, and 1180

[STB Ex Parte No. 575 (Sub-No. 1)]

Disclosure of Rail Interchange Commitments

AGENCY: Surface Transportation Board, Department of Transportation.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board is amending its regulations to require that parties seeking to obtain an individual exemption for, or to invoke a class exemption covering, a transaction involving the sale or lease of a railroad line identify any provision in their agreements that would restrict the ability of the purchaser or tenant railroad to interchange traffic with a rail carrier other than the seller or landlord railroad (interchange commitment). The rules also provide a procedure whereby a shipper or other affected party may obtain access to such provisions. The Board is adopting these regulations to facilitate the case-specific review of challenges involving interchange commitments and to facilitate the Board's monitoring of their usage. The final rule appears below.

DATES: *Effective Date:* This rule is effective on June 29, 2008.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar (202) 245–0395. [Federal Information Relay Service (FIRS) for the hearing impaired: 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: Additional information and background on the regulations appear in our written decision in *Disclosure of Rail Interchange Commitments,* STB Ex Parte No. 575 (Sub-No. 1), which is being served along with this notice.

Except as noted in this agency's decision adopting the final rules, the