

order. The necessary special controls appear in the regulation codified by this order. This device is subject to premarket notification requirements under section 510(k) of the FD&C Act.

### III. Analysis of 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.

### IV. Paperwork Reduction Act of 1995

This final order establishes special controls that refer to previously approved collections of information found in other FDA regulations and guidance. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in the guidance document “De Novo Classification Process (Evaluation of Automatic Class III Designation)” have been approved under OMB control number 0910–0844; the collections of information in 21 CFR part 814, subparts A through E, regarding premarket approval, have been approved under OMB control number 0910–0231; the collections of information in part 807, subpart E, regarding premarket notification submissions, have been approved under OMB control number 0910–0120; and the collections of information in 21 CFR part 801, regarding labeling, have been approved under OMB control number 0910–0485.

#### 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 part 878 continues to read as follows:

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

■ 2. Add § 878.4430 to subpart E to read as follows:

#### § 878.4430 Microneedling device for aesthetic use.

(a) *Identification.* A microneedling device for aesthetic use is a device using one or more needles to mechanically

puncture and injure skin tissue for aesthetic use. This classification does not include devices intended for transdermal delivery of topical products such as cosmetics, drugs, or biologics.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) The technical specifications and needle characteristics must be identified, including needle length, geometry, maximum penetration depth, and puncture rate.

(2) Non-clinical performance data must demonstrate that the device performs as intended under anticipated conditions of use. The following performance characteristics must be tested:

(i) Accuracy of needle penetration depth and puncture rate;

(ii) Safety features built into the device to protect against cross-contamination, including fluid ingress protection; and

(iii) Identification of the maximum safe needle penetration depth for the device for the labeled indications for use.

(3) Performance data must demonstrate the sterility of the patient-contacting components of the device.

(4) Performance data must support the shelf life of the device by demonstrating continued sterility, package integrity, and device functionality over the intended shelf life.

(5) Performance data must demonstrate the electrical safety and electromagnetic compatibility (EMC) of all electrical components of the device.

(6) Software verification, validation, and hazard analysis must be performed for all software components of the device.

(7) The patient-contacting components of the device must be demonstrated to be biocompatible.

(8) Performance data must validate the cleaning and disinfection instructions for reusable components of the device.

(9) Labeling must include the following:

(i) Information on how to operate the device and its components and the typical course of treatment;

(ii) A summary of the device technical parameters, including needle length, needle geometry, maximum penetration depth, and puncture rate;

(iii) Validated methods and instructions for reprocessing of any reusable components;

(iv) Disposal instructions; and

(v) A shelf life.

(10) Patient labeling must be provided and must include:

(i) Information on how the device operates and the typical course of treatment;

(ii) The probable risks and benefits associated with use of the device; and

(iii) Postoperative care instructions.

Dated: June 4, 2018.

**Leslie Kux,**

*Associate Commissioner for Policy.*

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**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 888

[Docket No. FDA–2018–N–1863]

#### Medical Devices; Orthopedic Devices; Classification of the In Vivo Cured Intramedullary Fixation Rod

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final order.

**SUMMARY:** The Food and Drug Administration (FDA or we) is classifying the in vivo cured intramedullary fixation rod into class II (special controls). The special controls that apply to the device type are identified in this order and will be part of the codified language for the in vivo cured intramedullary fixation rod’s classification. We are taking this action because we have determined that classifying the device into class II (special controls) will provide a reasonable assurance of safety and effectiveness of the device. We believe this action will also enhance patients’ access to beneficial innovative devices, in part by reducing regulatory burdens.

**DATES:** This order is effective June 8, 2018. The classification was applicable on December 19, 2017.

**FOR FURTHER INFORMATION CONTACT:** Peter Allen, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1512, Silver Spring, MD 20993–0002, 301–796–6402, [Peter.Allen@fda.hhs.gov](mailto:Peter.Allen@fda.hhs.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Upon request, FDA has classified the in vivo cured intramedullary fixation rod as class II (special controls), which we have determined will provide a reasonable assurance of safety and effectiveness. In addition, we believe this action will enhance patients’ access to beneficial innovation, in part by

reducing regulatory burdens by placing the device into a lower device class than the automatic class III assignment.

The automatic assignment of class III occurs by operation of law and without any action by FDA, regardless of the level of risk posed by the new device. Any device that was not in commercial distribution before May 28, 1976, is automatically classified as, and remains within, class III and requires premarket approval unless and until FDA takes an action to classify or reclassify the device (see 21 U.S.C. 360c(f)(1)). We refer to these devices as “postamendments devices” because they were not in commercial distribution prior to the date of enactment of the Medical Device Amendments of 1976, which amended the Federal Food, Drug, and Cosmetic Act (FD&C Act).

FDA may take a variety of actions in appropriate circumstances to classify or reclassify a device into class I or II. We may issue an order finding a new device to be substantially equivalent under section 513(i) of the FD&C Act (21 U.S.C. 360c(i)) to a predicate device that does not require premarket approval. We determine whether a new device is substantially equivalent to a predicate by means of the procedures for premarket notification under section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807 (21 CFR part 807).

FDA may also classify a device through “De Novo” classification, a common name for the process authorized under section 513(f)(2) of the FD&C Act. Section 207 of the Food and Drug Administration Modernization Act of 1997 established the first procedure for De Novo classification (Pub. L. 105–115). Section 607 of the Food and Drug Administration Safety and Innovation Act modified the De Novo application process by adding a second procedure (Pub. L. 112–144). A device sponsor

may utilize either procedure for De Novo classification.

Under the first procedure, the person submits a 510(k) for a device that has not previously been classified. After receiving an order from FDA classifying the device into class III under section 513(f)(1) of the FD&C Act, the person then requests a classification under section 513(f)(2).

Under the second procedure, rather than first submitting a 510(k) and then a request for classification, if the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence, that person requests a classification under section 513(f)(2) of the FD&C Act.

Under either procedure for De Novo classification, FDA shall classify the device by written order within 120 days. The classification will be according to the criteria under section 513(a)(1) of the FD&C Act. Although the device was automatically placed within class III, the De Novo classification is considered to be the initial classification of the device.

We believe this De Novo classification will enhance patients’ access to beneficial innovation, in part by reducing regulatory burdens. When FDA classifies a device into class I or II via the De Novo process, the device can serve as a predicate for future devices of that type, including for 510(k)s (see 21 U.S.C. 360c(f)(2)(B)(i)). As a result, other device sponsors do not have to submit a De Novo request or premarket approval application in order to market a substantially equivalent device (see 21 U.S.C. 360c(i), defining “substantial equivalence”). Instead, sponsors can use the less burdensome 510(k) process, when necessary, to market their device.

**II. De Novo Classification**

On December 28, 2016, IlluminOss Medical, Inc. submitted a request for De

Novo classification of the IlluminOss Photodynamic Bone Stabilization System. FDA reviewed the request in order to classify the device under the criteria for classification set forth in section 513(a)(1) of the FD&C Act.

We classify devices into class II if general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls that, in combination with the general controls, provide reasonable assurance of the safety and effectiveness of the device for its intended use (see 21 U.S.C. 360c(a)(1)(B)). After review of the information submitted in the request, we determined that the device can be classified into class II with the establishment of special controls. FDA has determined that these special controls, in addition to the general controls, will provide reasonable assurance of the safety and effectiveness of the device.

Therefore, on December 19, 2017, FDA issued an order to the requester classifying the device into class II. FDA is codifying the classification of the device by adding 21 CFR 888.3023. We have named the generic type of device in vivo cured intramedullary fixation rod, and it is identified as a prescription implanted device consisting of a balloon that is inserted into the medullary canal of long bones for the fixation of fractures. The balloon is infused with, and completely encapsulates, a liquid monomer that is exposed to a curing agent that polymerizes the monomer within the balloon creating a hardened rigid structure.

FDA has identified the following risks to health associated specifically with this type of device and the measures required to mitigate these risks in table 1.

TABLE 1—IN VIVO CURED INTRAMEDULLARY FIXATION ROD RISKS AND MITIGATION MEASURES

Identified risks	Mitigation measures
Adverse tissue reaction resulting from: ..... <ul style="list-style-type: none"> <li>• Balloon leakage.</li> <li>• Device materials.</li> </ul>	Biocompatibility evaluation and Labeling.
Infection, including wound complications .....	Sterilization validation, Reprocessing validation, Shelf life testing, Pyrogenicity testing, and Labeling. Non-clinical performance testing and Labeling.
Bone fracture resulting from: ..... <ul style="list-style-type: none"> <li>• Device bending, cracking, or fracture.</li> <li>• Device migration or instability, including initial inadequate fixation.</li> <li>• Inability to properly deploy or remove device.</li> </ul>	Non-clinical performance testing and Labeling.
Soft tissue damage including transection or laceration of neural, vascular, or muscular structures.	Non-clinical performance testing and Labeling.
Pain and/or loss of function resulting from: ..... <ul style="list-style-type: none"> <li>• Balloon leakage.</li> <li>• Device bending, cracking, or fracture.</li> </ul>	Non-clinical performance testing and Labeling.

TABLE 1—IN VIVO CURED INTRAMEDULLARY FIXATION ROD RISKS AND MITIGATION MEASURES—Continued

Identified risks	Mitigation measures
<ul style="list-style-type: none"> <li>• Device migration or instability, including initial inadequate fixation.</li> <li>• Inability to properly deploy or remove device.</li> </ul>	
Revision .....	Non-clinical performance testing and Labeling.
Electric shock or interference with other electrical devices .....	Electrical safety testing, Electromagnetic compatibility testing, and Labeling.
Exothermic reaction leading to tissue injury .....	Non-clinical performance testing.

FDA has determined that special controls, in combination with the general controls, address these risks to health and provide reasonable assurance of safety and effectiveness. For a device to fall within this classification, and thus avoid automatic classification in class III, it would have to comply with the special controls named in this final order. The necessary special controls appear in the regulation codified by this order. This device is subject to premarket notification requirements under section 510(k) of the FD&C Act.

At the time of classification, in vivo cured intramedullary fixation rods are for prescription use only. Prescription devices are exempt from the requirement for adequate directions for use for the layperson under section 502(f)(1) of the FD&C Act (21 U.S.C. 352(f)(1)) and 21 CFR 801.5, as long as the conditions of 21 CFR 801.109 are met (referring to 21 U.S.C. 352(f)(1)).

**III. Analysis of 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.

**IV. Paperwork Reduction Act of 1995**

This final order establishes special controls that refer to previously approved collections of information found in other FDA regulations and guidance. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in the guidance document “De Novo Classification Process (Evaluation of Automatic Class III Designation)” have been approved under OMB control number 0910–0844; the collections of information in 21 CFR part 814, subparts A through E, regarding premarket approval, have been approved under OMB control number 0910–0231; the collections of

information in part 807, subpart E, regarding premarket notification submissions, have been approved under OMB control number 0910–0120; and the collections of information in 21 CFR part 801, regarding labeling, have been approved under OMB control number 0910–0485.

**List of Subjects in 21 CFR Part 888**

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 888 is amended as follows:

**PART 888—ORTHOPEDIC DEVICES**

- 1. The authority citation for part 888 is revised to read as follows:

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

- 2. Add § 888.3023 to subpart D to read as follows:

**§ 888.3023 In vivo cured intramedullary fixation rod.**

(a) *Identification.* An in vivo cured intramedullary fixation rod is a prescription implanted device consisting of a balloon that is inserted into the medullary canal of long bones for the fixation of fractures. The balloon is infused with, and completely encapsulates, a liquid monomer that is exposed to a curing agent which polymerizes the monomer within the balloon creating a hardened rigid structure.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) Non-clinical performance testing must demonstrate that the device performs as intended under anticipated conditions of use. The following performance characteristics must be tested:

(i) Mechanical testing must be conducted on the final device to assess burst, abrasion, bending, and torsion in static and dynamic conditions.

(ii) Mechanical testing must demonstrate the integrity of the balloon including testing for leaks, ruptures, and release of cured/uncured material.

(iii) Performance testing must demonstrate that the device can be inserted and removed.

(iv) Performance testing must demonstrate the ability, in the event of a leak, to remove the uncured material from its in vivo location.

(v) Performance testing must demonstrate the reliability and accuracy of the curing method used.

(vi) Thermal safety testing must be conducted to evaluate the temperature rise during curing.

(2) Electrical safety, electromagnetic compatibility (EMC) testing, and electromagnetic interference (EMI) testing must be conducted for all electrical components.

(3) All patient-contacting components must be demonstrated to be biocompatible.

(4) Performance data must demonstrate the sterility and pyrogenicity of patient contacting components of the device that are provided sterile.

(5) Performance data must validate the reprocessing instructions for any reusable components or instruments.

(6) Performance data must support the shelf life of the system by demonstrating continued sterility, package integrity, and system functionality over the established shelf life.

(7) Technological characterization of the device must include materials, curing agents, and a description of the operating principles of the device, including the delivery system and devices which initiate the curing process.

(8) Labeling must include the following:

(i) A detailed summary of the device technical parameters.

(ii) Information describing all materials of the device.

(iii) Information describing how to perform the procedure and use the device, including the delivery system and devices which initiate the curing process, as well as how to remove the device and any uncured materials.

(iv) A shelf life.

(v) Validated methods and instructions for reprocessing any reusable components or instruments.

Dated: June 4, 2018.

Leslie Kux,

Associate Commissioner for Policy.

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[TD 9833]

RIN 1545-BO43

#### Partnership Transactions Involving Equity Interests of a Partner

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final rule.

**SUMMARY:** This document contains final regulations that prevent a corporate partner from avoiding corporate-level gain through transactions with a partnership involving equity interests of the partner or certain related entities.

This document also contains final regulations that allow consolidated group members that are partners in the same partnership to aggregate their bases in stock distributed by the partnership for the purpose of limiting the application of rules that might otherwise cause basis reduction or gain recognition. This document also contains final regulations that may also require certain corporations that engage in gain elimination transactions to reduce the basis of corporate assets or to recognize gain. These final regulations affect partnerships and their partners.

**DATES:**

*Effective Date:* These final regulations are effective on June 8, 2018.

*Applicability Date:* These final regulations are applicable on or after June 12, 2015.

**FOR FURTHER INFORMATION CONTACT:**

Concerning the final regulations, Kevin I. Babitz, (202) 317-6852.

**SUPPLEMENTARY INFORMATION:**

#### Background

##### 1. Overview

On June 12, 2015, the Department of the Treasury (and the IRS published final and temporary regulations (TD 9722) under section 337(d) of the Internal Revenue Code (Code) in the **Federal Register** (80 FR 33402). On July 8, 2015, corrections to TD 9722 were published in the **Federal Register** (80 FR 38940-38941) (together with TD 9722, the temporary regulations). The temporary regulations expire on June 11, 2018.

A notice of proposed rulemaking (REG-149518-03) withdrawing proposed regulations under section 337(d) published in 1992, and proposing new proposed regulations by cross-reference to the temporary regulations, was published in the **Federal Register** (80 FR 33451) on the same date as TD 9722. Additionally, on June 12, 2015, the Treasury Department and the IRS published proposed regulations (REG-138759-14) under section 732(f) in the **Federal Register** (80 FR 33452) (together with the 2015 proposed regulations under section 337(d), the 2015 regulations).

The Treasury Department and the IRS received one comment letter in response to the 2015 regulations. Except as described below, the commenter largely supported the 2015 regulations while recommending some minor modifications and clarifications to the 2015 regulations under both section 337(d) and section 732(f). The comment letter is discussed in detail in the Explanation of Provisions section of this preamble.

After considering this comment letter, this Treasury decision adopts as final regulations the rules set forth in the 2015 regulations under section 337(d) (with only minor, nonsubstantive clarifications in response to the commenter's request for additional certainty regarding certain collateral effects) and section 732(f) (without any change). However, the Treasury Department and the IRS are considering publishing a new notice of proposed rulemaking to propose more substantive amendments to the final regulations under section 337(d) and to allow for additional public comment with respect to these more substantive proposals in response to the comment letter, further reflection by the Treasury Department and the IRS, and concerns raised by practitioners.

#### 2. Regulations Under Section 337(d)

##### A. Background

In *General Utilities & Operating Co. v. Helvering*, 296 U.S. 200 (1935), the Supreme Court held that corporations generally could distribute appreciated property to their shareholders without the recognition of any corporate level gain (the *General Utilities* doctrine). Beginning with legislation in 1969 and culminating in the Tax Reform Act of 1986, Public Law 99-514 (100 Stat. 2085) (the Act), Congress repealed the *General Utilities* doctrine by enacting section 336(a) to apply gain and loss recognition to liquidating distributions.

Under current law, sections 311(b) and 336(a) require a corporation that

distributes appreciated property to its shareholders to recognize gain determined as if the property were sold to the shareholders for its fair market value. Additionally, section 631 of the Act added section 337(d) to permit the Secretary to prescribe regulations that are necessary or appropriate to carry out the purposes of the *General Utilities* repeal, "including regulations to ensure that [the repeal of the *General Utilities* doctrine] may not be circumvented through the use of any provision of law or regulations."

After the enactment of sections 311(b) and 337(d), the Treasury Department and the IRS became aware of transactions in which taxpayers used a partnership to postpone or avoid completely gain generally required to be recognized under section 311(b). In one example of this transaction, a corporation entered into a partnership and contributed appreciated property. The partnership then acquired stock of that corporate partner, and later made a liquidating distribution of this stock to the corporate partner. Under section 731(a), the corporate partner did not recognize gain on the partnership's distribution of its stock. By means of this transaction, the corporation had disposed of the appreciated property it formerly held and had acquired its own stock, permanently avoiding its gain in the appreciated property. If the corporation had directly exchanged the appreciated property for its own stock, section 311(b) would have required the corporation to recognize gain upon the exchange.

In response to these types of abusive transactions, the Treasury Department and the IRS issued Notice 89-37, 1989-1 CB 679, on March 9, 1989. Notice 89-37 announced that future regulations under section 337(d) would address the use of partnerships to avoid the repeal of the *General Utilities* doctrine.

On December 15, 1992, the Treasury Department and the IRS published a notice of proposed rulemaking under section 337(d) (PS-91-90, REG-208989-90, 1993-1 CB 919) in the **Federal Register** (57 FR 59324) addressing abusive partnership transactions involving stock of a corporate partner (the 1992 proposed regulations). The 1992 proposed regulations set forth a deemed redemption rule and a separate distribution rule to prevent a corporate partner from avoiding corporate-level gain through transactions with a partnership involving stock of the corporate partner, stock of the partner's affiliate, and other equity interests in the corporate partner or affiliate. The 1992 proposed regulations treated a corporation as an affiliate of a partner at